



ONTARIO'S WATCHDOG
CHIEN DE GARDE DE L'ONTARIO

February 4, 2014

Mayor Gord McKay
Acting Clerk Laura Lee
Town of Midland
575 Dominion Avenue
Midland, ON L4R 1R2

Dear Mayor McKay and Ms. Lee,

Re: Closed Meeting Complaint – July 22, 2013 Council Meeting

I am writing further to our discussion on January 29, 2014 regarding the outcome of our review of a complaint that Council violated the open meeting requirements when it discussed a staffing/hiring issue and reimbursement of a Council member's legal fees behind closed doors. The complainant expressed the view that these matters did not qualify for closed meeting consideration under the *Municipal Act, 2001* (the Act).

As you are aware, the Act requires that all meetings of Council, local boards, and their committees be open to the public, with limited exceptions and subject to certain procedural requirements.

In reviewing this complaint, our Office spoke with the Mayor and Clerk Andrea Fay, and obtained and reviewed the meeting documents, including the July 22, 2013 Council meeting agenda, and the public and closed session minutes. In addition, our Office considered the relevant sections of the Town's Procedure By-Law and the *Municipal Act, 2001*. After nearing completion of the review, our Office received information that an audio recording was made of the July 22, 2013 closed session, which we received and reviewed on January 15, 2014.

The Town's Procedure By-Law provides for public notice of meetings, as required under the Act. The Town's practice is to post Council meeting agendas on the City's website, the Friday prior to the meeting. Regular meetings of Council are held on the fourth Monday of each month at 7:00 p.m. Closed meetings are generally held at 6:00 p.m. prior to the regular Council meeting.

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July 22, 2013 Council meeting

The Agenda for the July 22, 2013 Council meeting that was posted on the Town's website stated that three matters would be discussed in a closed session under the "personal matters about an identifiable individual" exception to the open meeting requirements:

- i) verbal report from the CAO re: legal fees
- ii) verbal report from the CAO re: position
- iii) verbal report from the Director of Finance/Treasurer re: Request for Reimbursement

According to the public meeting minutes, Council passed a resolution in open session to close the meeting under s. 239 (2) to discuss "personal matters about an identifiable individual."

The closed meeting minutes state that all of Council attended the meeting, except for Councillors Attwood and Ross. The Chief Administrative Officer (CAO), Director of Finance/Treasurer, and the Clerk were also present.

According to the closed meeting record and audio recording, the first matter discussed included a verbal report from the CAO regarding the status of a legal invoice submitted by Deputy Mayor Stephan Kramp, who was seeking reimbursement of legal fees under the Town's Indemnification By-Law. The legal fees were incurred for advice obtained about a Code of Conduct complaint filed with the Ontario Civilian Police Commission, which related to Deputy Mayor Kramp's activities as a member of the local Police Services Board.

A July 3, 2013 article in the *Orillia Packet and Times* newspaper reported that the Ontario Civilian Police Commission was asked to investigate remarks made by Deputy Mayor Kramp at a June 10, 2013 Council meeting. The comments were about the Police Services Board's budget expenditures and allegedly breached the Board's confidentiality provisions.

Staff were seeking instruction from Council on whether to pay the invoice. During the closed session Council considered whether the reimbursement request met the criteria under the Indemnification By-Law. The CAO disclosed the amount of the legal bill

during the meeting, but the invoice itself was not presented, although it was available for Council member review. Council did not discuss the substance of legal advice provided.

At the end of this discussion, Council voted to direct staff to contact the Police Services Board to inquire about the Board's indemnification policy.

We noted that in the course of closed meeting discussions, two Council members expressed views that discussion of a Council member's request for reimbursement of legal fees should have been discussed in open session, as it related to a Council member in his official capacity and not something of a "personal" nature.

The second agenda item – "verbal report from the CAO re: position" – related to an anticipated staff resignation and the resulting restructure of another staff member's position and role. The audio recording confirmed that Council considered the overall performance and qualifications of a particular employee as well as the impact of proposed restructuring on that employee. Council discussed individual workload and reporting and working relationships in the context of changes in municipal department structures. The Clerk advised that the restructure might also impact unionized staff, although that was not the focus of discussions.

The third matter discussed in the closed session related to a resident's request for a tax rebate. This matter was not the subject of a complaint.

Analysis

Midland Council's July 22, 2013 meeting was closed under the "personal matters" exception to the open meeting requirements. While the *Municipal Act* does not specifically define "personal matters," the Information and Privacy Commission (the Commission) has issued a number of orders that assess and define what types of information can be considered personal.

The Commission has held¹ that "to qualify as personal information under the Act, the information must be about the individual in a personal capacity." Information about an individual acting in a professional, official or business capacity will not be considered to

¹ IPC Order MO-2368/November 26, 2008

be personal information unless it reveals something of a personal nature about the individual.

Closed meeting investigator Douglas R. Wallace also relies on the Commission's interpretation of personal matters in assessing whether a matter qualifies for closed meeting consideration under this exception. In a 2009 investigation of meetings held by Ottawa City Council, Investigator Wallace found that Council's deliberation about whether a Council member's comments to the media breached the City's Code of Conduct because the statements under review were made by the Council member in the course of his professional duties as a member of Council, and the subject matter did not fall within the "personal matters" exception to the open meeting requirements.

Indemnification request

We found that Council violated the *Municipal Act's* open meeting requirements in discussing this matter behind closed doors for the following reasons:

Council's consideration of a Council member's request for indemnification for legal fees incurred in his role on the Police Services Board does not fall within the "personal matters" exception, as the matter relates to a Council member seeking reimbursement from the Town for legal fees incurred in his official role. In addition, much of the information discussed was already publicly known, because the media reported on the complaint about Deputy Mayor Kramp's alleged breach of the Police Services Board's Code of Conduct on July 3, 2013.

We also considered whether the discussion about this request for indemnification of legal fees would qualify for closed meeting consideration under the "advice that is subject to solicitor-client privilege" exception.

Legal bills are protected under the solicitor-client privilege exception only where they reveal communications between a solicitor and client². In this case, however, the substance of the legal advice provided to the Council member was not discussed. Rather, the focus of Council's closed meeting discussion was on whether the legal bill submitted qualified for reimbursement under the Town's indemnification policy. There is no indication that these discussions revealed any communication between solicitor and

² *Maranda v. Richer*, 2003 SCC 67

client protected by the privilege. For this reason, the discussion did not qualify for closed meeting consideration under the “solicitor-client privilege” exception.

Resignation/restructure

Council’s discussion of an anticipated resignation, the resignation’s impact on another employee, and an assessment of the employee’s performance, falls within the “personal matters” exception under the *Municipal Act*. An individual's employment record, including details of a resignation and performance assessment, is considered personal information.

On January 29, 2014, we explained our review and findings with you and provided you with an opportunity to provide feedback. You did not express any concerns about our findings.

You agreed to include this letter on the agenda for the next public Council meeting, to be held on February 18, 2014. A copy of the letter will also be posted on the Town’s website as part of the Agenda package.

Thank you for your cooperation with our review.

Sincerely,

Yvonne Heggie
Early Resolution Officer, Open Meeting Law Enforcement Team