

February 14, 2013

Ms. Caroline Hallsworth
Executive Director, Administrative Services/Clerk
The City of Greater Sudbury
PO Box 5000 Stn A
200 Brady St.
Sudbury, ON
P3A 5P3

Dear Ms. Hallsworth,

Re: Ombudsman Review of closed meetings held June 12 and June 26, 2012

I am writing to advise you of the results of the Ombudsman's review of two complaints made to our Office on December 28, 2012. The complaints resulted from an article in a local newspaper, which stated that the City's Auditor General's contract had been reduced from three years to one year.

The complainants alleged that the decision to cut back the Auditor General's term had never been debated or voted on in open session, and accordingly the decision must have been improperly made *in camera*. You advised our Office that the Auditor General's contract was discussed *in camera* on June 12 and June 26, 2012.

As you are aware, in assessing closed meeting complaints our Office is restricted to reviewing whether a meeting was closed to the public in accordance with the relevant provisions of the Act and the municipality's procedure by-law. Our mandate does not allow us to review the substance of council's decision making, including whether a particular decision was justified. Accordingly, our review of these complaints was focused on whether council was permitted under the Act to discuss this matter *in camera* and whether all procedural requirements were followed.

As part of our Office's review we spoke with you and reviewed relevant sections of the *Municipal Act, 2001* (the Act), and the municipality's procedure by-law. We also reviewed the open and closed meeting materials for the meetings in question.

June 12, 2012 Council Meeting:

The publicly available agenda for the June 12 meeting indicated that council would be proceeding *in camera* at 4:00 p.m. to deal with one personal matter regarding an identifiable individual and two solicitor-client privileged matters regarding legal

representation. Our review was focused on the “personal matter” item pertaining to the Auditor General’s contract and accordingly we did not review the items discussed under the solicitor-client privilege exception.

The open session minutes record that council passed a resolution to proceed *in camera* for the reasons outlined on the public agenda. No further information was provided. While *in camera* council discussed the Auditor General’s employment contract. Council voted during the closed session to direct the Mayor and three councillors, as well as the Director of Human Resources, to enter into contract discussions with the Auditor General based on council’s position, which was outlined in the *in camera* motion.

Council recessed at 5:40 p.m. and the open session began at 6:05 p.m. In open session, Cllr. Landry-Altman reported that council met in closed session to deal with one personal matter regarding an identifiable individual and two solicitor-client privileged matters regarding legal representation, and that direction was given.

Analysis:

As council was discussing the employment contract of an identified staff member (the Auditor General) it appears this was permissible for discussion under the “personal matters” exception.

The vote taken *in camera* was phrased as a direction. According to s. 239(6) of the Act, council may vote *in camera* if the vote is for a procedural matter, or for giving directions to officers, employees or agents of the municipality.

Although the mayor is considered an officer of the municipality, other councillors generally are not. As noted in the *Handbook for Municipal Councillors*¹, “Membership in a municipal council does not make the member an employee, officer or agent of the municipality, or create a contractual relationship with the municipal corporation...” (p. 33)

¹ George Rust-D’Eye, *Handbook for Municipal Councillors*, (Carswell, 2010)

A decision of the Office of the Information and Privacy Commissioner² also considered this issue and found, “In my view...except in unusual circumstances, a member of municipal council is generally not considered to be an ‘officer’ of a municipal corporation.” There do not appear to be any such “unusual” circumstances regarding the direction given to three council members during the June 12 meeting. Although the direction included the Director of Human Resources, who is an employee of the municipality, this was not sufficient to authorize the vote as a proper *in camera* direction under s. 239(6) of the Act, since the three councillors included in the direction were not officers or employees of the municipality. Furthermore, the vote was not merely procedural in nature. The vote was to enter into negotiations, which is a substantive matter.

Accordingly, the vote was not permissible under s. 239(6) and was taken in violation of the *Municipal Act*.

June 26, 2012 Council Meeting

The public agenda for the June 26 meeting stated that council would proceed *in camera* at 4:30 p.m. to deal with one personal matter regarding an identifiable individual.

The confidential agenda included the personal matter, as well as one added item, which was closed under the solicitor-client privilege exception (239(2)(f)). As with the June 12 meeting, our review was focused on the “personal matter” item pertaining to the Auditor General’s contract and accordingly we did not review the solicitor-client privileged matter.

The discussion of the “personal matter” involved the Director of Human Resources updating council on contract discussions with the Auditor General, and answering council’s questions.

Council recessed at 5:25 p.m. and the open meeting began at 6:00 p.m.

In open session, Cllr. Landry-Altmann reported that council met in closed session to deal with one personal matter about an identifiable individual and one solicitor-client privileged matter regarding legal representation, and that no resolutions emanated therefrom.

² Order M-813; (City of Toronto) (July 31, 1996)

Analysis:

During the June 26 closed session council was discussing contract negotiations that took place with an identified staff member. Accordingly, it appears that these discussions were permitted to be held *in camera* under the “personal matters” exception.

Although it was permissible for council to discuss this subject matter *in camera* on June 12 and June 16, we encourage council to consider dealing with such issues in a more transparent fashion in the future. Given the media discussion and complaints to our Office that resulted from these meetings, it is clear that there is significant public interest in this issue, which involved the renewal of the contract of a public figure charged with independently auditing the finances of the City.

All of the exceptions to the open meeting requirements - other than s. 239(3) (a matter relating to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act*) - are discretionary, and council should consider in such instances whether the public might be better served by a more open and public discussion of such issues wherever possible.

Given the public’s interest in the matter, Council could have sought the Auditor General’s input regarding whether more information could be provided in the agenda and resolution to proceed *in camera*. Since the purpose of the “personal matters” exception is to protect an identifiable individual’s right to privacy, Council may choose to exercise its discretion to proceed with an open meeting, or to provide more information about a closed meeting, if the individual in question wants to waive their right to privacy.

Some of the public speculation regarding this matter may have been avoided had council provided more information in its resolution to proceed *in camera*. As noted by the Ontario Court of Appeal in *Farber v. Kingston City*,³ “the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.”

This is consistent with s. 239(4) of the Act, which states that prior to proceeding *in camera* council must pass a resolution that states both the fact of holding a closed meeting and the general nature of the matter to be considered. Usually, this would require at least a brief description of the subject matter being discussed *in camera*, beyond simply mentioning the exception authorizing the discussion. Failing to pass a resolution

³ [2007] O.J. No. 919, at page 151

that discloses the general nature of the matter to be discussed is a procedural violation of the Act.

Council also could have avoided some public speculation about this session had it reported back in open session in a more comprehensive manner. As a best practice, the Ombudsman encourages municipalities to report publicly in open session on what transpired in closed session, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

Please share this letter with council and with the public as soon as possible, and in any event no later than the next council meeting.

Thank you for the cooperation our Office received during this review.

Sincerely,

Michelle Bird
Legal Counsel
Open Meeting Law Enforcement Team