



Ombudsman Report

**Investigation into whether
Council for the Township of Russell
held an illegal closed meeting on
December 12, 2016**

**Paul Dubé
Ombudsman of Ontario
May 2017**

Complaint

- 1 On December 16, 2016, my Office received a complaint about a closed meeting held by council for the Township of Russell.
- 2 Under the *Municipal Act, 2001* (the “Act”), all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 The complaint alleged that a closed session discussion on December 12, 2016 to discuss naming rights for a new sports facility, citing the “personal matters” and “litigation or potential litigation” exceptions to the open meeting requirements of the *Municipal Act*, did not fit within these exceptions, or any exception under the Act.

Ombudsman jurisdiction

- 4 As of January 1, 2008, the *Municipal Act* gives citizens the right to request an investigation into whether a municipality or local board has complied with the Act and its own procedure by-law in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities and local boards that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for the Township of Russell.
- 6 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the applicable municipal procedure by-law have been observed.

Investigative process

- 7 On January 16, 2017 my Office issued notice in accordance with section 18(1) of the *Ombudsman Act* that we would be investigating this complaint. We reviewed the open and closed session materials for the December 12 meeting, and spoke with staff and council.

The December 12, 2016 meeting

- 8 The December 12 meeting was a regular council meeting, scheduled to begin at 6:00 p.m. On the agenda was a closed session to discuss “Sports Dome Sponsorship and Fee Proposal by Russell Kin Club” under the personal matters and litigation/potential litigation exceptions (ss. 239(2)(b) and (e) of the Act).
- 9 According to the open session minutes, council passed a resolution to proceed in camera for the reasons noted on the agenda.
- 10 While in camera, council reviewed a staff report prepared by the Chief Administrative Officer entitled "Kin Club Corporate Naming Rights and Advertising". Attached to the staff report was a recent proposal from the club.
- 11 By way of background, the staff report noted that in February 2016, the township entered into a memorandum of understanding with the Kin Club of Russell. The Kin Club is a corporation with registered charitable status, and is part of Kin Canada, a service organization made up of volunteers who host and sponsor community service projects.
- 12 According to the memorandum of understanding, the Kin Club is responsible for coordinating the fundraising campaign for the Sports Dome, a 600,000 square foot facility scheduled to open in the fall of 2017. The agreement states that the terms of the memorandum of understanding shall remain confidential.
- 13 The staff report noted that the Kin Club had sent a proposal to the township regarding corporate donations and advertising opportunities. The proposal included a suggested minimum bid for corporate naming rights for the Sports Dome and recommended costs for banner advertisements within the dome. The staff report provided an opinion on the proposal and a recommendation for next steps.
- 14 The staff report also outlined some fundraising challenges. These challenges resulted in part from members of the community being hesitant to process donations through the Kin Club for several reasons, including personality conflicts with Kin Club members, concerns that the club does not follow the township’s purchasing policy, and the impression that the club deducted too many expenses from revenues.

- 15 As there was very little information in the closed session minutes, we interviewed members of staff and all members of council to determine what was discussed in camera.
- 16 All those we interviewed, except one council member, recalled some discussion of personal information about one or more members of the Kin Club. Specifically, they advised that council discussed how personality conflicts between individuals could impede the ability of the Kin Club to effectively fundraise for the Sports Dome project.
- 17 The Chief Administrative Officer advised my Office that he shared information and opinions staff received from members of the community about this issue, which he believed were communicated in confidence. Accordingly, he did not want to share the information during an open session.
- 18 We were also advised that there was some discussion of whether the Kin Club should be credited with certain fundraising initiatives that the township undertook, and how active a role the township should play in fundraising for the Sports Dome.
- 19 With respect to discussions of “litigation or potential litigation”, no one we interviewed recalled any specific mention of ongoing or potential litigation during the in camera session. The closed session minutes also do not reflect any such discussion.
- 20 We were advised that this exception was cited because of concerns about how council’s response to the Kin Club’s proposal could impact the ongoing working relationship with the club.
- 21 One person we interviewed recalled that council considered whether a legal action for breach of contract could result if council did not agree with the club’s proposal. Several other interviewees, however, stated that there was no concern that the Kin Club, or anyone else, would be taking legal action against the township.
- 22 As is written in the closed session minutes, council reviewed the staff report and “was in agreement” with the following:
 - 1) Naming rights opportunities: no minimum bid, add an out clause, seek tenders for a period of 5 or 10 years, and that items be priced individually and not lumped together as the proposed agreement by the Kin Club.

- 2) RFP documentation for the naming rights to be prepared by the Township.
 - 3) Banner ads within the dome: price reduction on a 4x8 sign for \$500 for one (1) year option and that a discount program be put in place for paid upfront advertisement for more than one year options.
 - 4) Legal contracts be prepared by legal counsel and township staff with respect to the banner ads as recommended.
 - 5) Administration to proceed to prepare a list of companies and/or individuals it intends to contact directly and forward such list to the Kin Club as recommended.
- 23** We were advised that there was no vote or show of hands with respect to this agreement. Rather, there was an understanding that council was “on the same page”.
- 24** The closed session lasted approximately an hour and 15 minutes. When the open meeting resumed, council reported that during the closed meeting, council was briefed on the subject and as a result of the closed session the following motion was presented for council's consideration:
- “That council gives direction to the administration regarding the naming rights opportunities of the proposal and more specifically about the minimum bid amount, the associated extra benefits and privileges and time of issuance; and that the administration prepares the RFP documentation for the naming rights; and that council gives direction to the administration regarding the banner ads within the dome and more specifically about the length of the contract, banner size and fee schedule; and that the administration prepares legal contracts and provide them to the Kin Club prior to them accepting any sponsorships in regards to the banner ads; and that the administration proceed to prepare a list of companies it intends to contact for ads outside the dome, and/or for sponsorships and that such list be submitted to the Kin Club.”
- 25** The motion was approved. The open session vote contained less detail than the closed session “agreement”, and we were advised that the additional details were not made public.

Analysis

- 26 Council cited two grounds for discussing this matter in closed session at the December 12, 2016 meeting: 1) personal matters about an identifiable individual and 2) litigation or potential litigation.

The personal matters exception

- 27 Discussions under this exception must be about an individual in their personal capacity, rather than their official or professional capacity. However, information about an individual in their official capacity can take on a more personal nature if it relates to scrutiny of that individual's conduct¹.
- 28 During interviews, my staff were advised that the in camera discussion was personal in nature, as it related to personality conflicts involving members of the community. However, the evidence provided to my Office, including the information contained in the staff report and provided during interviews, indicates that much of the discussion clearly did not fall within the personal matters exception. As noted by another closed meeting investigator in a 2013 report, "A municipal council cannot automatically shield itself from open discussion on a full report merely because the report contains relatively minor references...to bona fide 'personal matters.'"²
- 29 The purpose of the December 12 in camera session was to review a staff report about the Kin Club's proposal, which pertained to naming rights and advertising for the Sports Dome. According to the closed session minutes, the result of the closed session discussion was a council "agreement" pertaining to naming rights and banner advertisements.
- 30 The staff report did note that some members of the public did not want to deal with the Kin Club for various reasons, but the fact that some personal observations and comments were added to the discussion does not change the original purpose. General concerns about the Kin Club's proposal and fundraising activities are not personal in nature, and do not fit within this exception or any exceptions to the open meeting requirements.

¹ IPC Order MO-2519, Township of Madawaska Valley, April 29, 2010.

² Local Authority Services, *A Report to the Corporation of the City of Windsor* (May 2013) at 10, Online: http://www.agavel.com/?page_id=28

The potential litigation exception

- 31** The exception in s. 239(2)(e) of the Act for litigation or potential litigation is reserved for circumstances where the subject matter discussed is ongoing litigation or a reasonable prospect of litigation.
- 32** In *RSJ Holdings v. London (City)*, the Ontario Court of Appeal considered the litigation or potential litigation exception. The Court observed that, “The fact that there might be, or even inevitably would be, litigation arising from the [matter discussed] does not make the ‘subject matter under consideration’ potential litigation”³.
- 33** In order for the “litigation or potential litigation” exception to apply, litigation must be more than a remote possibility, but it does not need to be a certainty. Council or a committee must believe that litigation is a reasonable prospect, and must use the closed meeting to explore that prospect in some way.⁴
- 34** Amberley Gavel, acting as closed meeting investigator on behalf of Local Authority Services (LAS), recently explained that, “Council should not go into closed session merely because another party has the right to bring a lawsuit or other claim against Council or that one speculates that litigation might be brought as a result of a Council decision”.⁵
- 35** There is nothing in the minutes for the December 12 meeting to indicate that council was considering ongoing litigation or realistically contemplated a litigation proceeding. Only one individual we interviewed could recall some discussion taking place about a possible breach of contract action, and even that discussion - if it took place - would have been speculative, and would not have fallen within the s. 239(2)(e) exception.
- 36** The evidence provided to my office indicates that “litigation or potential litigation” was not the subject of the in camera discussion on December 12, 2016.

³ *RSJ Holdings Inc. v. London (City)*, [2005] OJ No 5037 (QL).

⁴ *R(C) v CAS of Hamilton (2004)*, 50 RFL (5th) 394 (Ont SCJ) at para 21, citing *Carlucci v Laurentian Casualty Co of Canada (1991)*, 50 CPC (2d) 62 (Ont Ct (Gen Div)).

⁵ Local Authority Services, *A Report to the Corporation of the City of Peterborough* (July 2016) at 10, online: http://www.agavel.com/?page_id=28

The closed session agreement

- 37** Sections 239(5) and (6) of the Act prohibit municipal councils from voting in a closed session, except where the meeting discussions fall within one of the exceptions in the Act, and the vote is for a procedural matter or for giving directions to municipal employees or officers.
- 38** This rule does not only apply when council takes a formal vote. As our Office noted in a report regarding meetings held by council for the Town of South Bruce Peninsula, “A direction based on council consensus is for all intents and purposes a vote of council.⁶” A show of hands, straw poll, or consensus can be considered a vote for the purpose of the open meeting requirements.
- 39** The closed session minutes for the December 12 meeting indicate that council was “in agreement” on several matters. We were advised that council did not formally vote during the closed session, but rather there was an understanding that all of council was “on the same page”. A vote was taken in open session after the closed session, but that vote did not contain the same details as the closed session agreement.
- 40** Even if the same vote had been repeated in open session, it is clear from the wording for the closed session minutes that council’s decision was made in camera, and was not on a procedural matter. If it was council’s intention to vote to direct staff during the closed session, the “agreement” should have been worded as a direction to staff. As it stands, the in camera decision was a vote, taken in violation of the open meeting rules.

Procedural matters

- 41** The closed session minutes contained very little information about the substance of the in camera discussion. In a report regarding a closed meeting held by council for the Township of Russell on June 1, 2015⁷, my Office recommended that the township audio or video record its closed meetings. So far, the township has not implemented this recommendation.

⁶Investigation into whether Council for the Town of South Bruce Peninsula held illegal closed meetings in April, May and June, 2015 (September 2015), online:

[https://www.ombudsman.on.ca/Resources/Reports/Town-of-South-Bruce-Peninsula-\(4\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Town-of-South-Bruce-Peninsula-(4).aspx)

⁷ Investigation into whether Council for the Township of Russell

held an illegal closed meeting on June 1, 2015, Ontario Ombudsman (October 2015), Online: [https://www.ombudsman.on.ca/Resources/Reports/Township-of-Russell-\(2\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Township-of-Russell-(2).aspx)

In this case, such a recording would have greatly assisted my Office in completing a timely review of the closed meeting complaint.

- 42 More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These municipalities include: the Townships of Tiny, Adelaide Metcalfe, Brudenell, Lyndoch & Raglan, and McMurrich-Monteith; the Towns of Midland and Fort Erie; the Municipalities of Lambton Shores and Brighton; and the Cities of Oshawa, Sault Ste. Marie, Brampton, Niagara Falls, and Welland.

Opinion

- 43 My investigation found that council for the Township of Russell contravened the *Municipal Act, 2001* at its December 12, 2016 meeting when it discussed matters in camera that did not fall within the exceptions to the open meeting requirements of the Act.

Recommendations

- 44 I make the following recommendations to assist the township in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Township of Russell should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

Council for the Township of Russell should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 3

Council for the Township of Russell should ensure that its in camera votes comply with sections 239(5) and (6) of the *Municipal Act*.

Recommendation 4

Council for the Township of Russell should implement the practice of audio or video recording its closed sessions.

Report

- 45 The Township of Russell was given the opportunity to review a preliminary version of this report and provide comments. The township acknowledged that the discussion of corporate naming rights, advertising and banners should have been dealt with in an open session.
- 46 The township expressed disagreement with my findings regarding the application of the personal matters exception, noting that the staff report considered at the December 12 in camera session referenced individuals who were not members of the Kin Club.
- 47 I understand council's preference to discuss these sensitive matters in closed session. However, the township's comments do not change my finding that the general purpose of the December 12, 2016 closed meeting was not to discuss personal matters about identifiable individuals. The fact that some comments of a personal nature might have come up does not bring the entire discussion within the scope of the personal matters exception.
- 48 My report should be shared with council for the Township of Russell and should be made available to the public as soon as possible, and no later than the next council meeting.



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