

**REPORT TO
THE COUNCIL OF THE TOWNSHIP OF SOUTH FRONTENAC
REGARDING THE INVESTIGATION OF THE CLOSED MEETING OF THE
COUNCIL OF THE TOWNSHIP OF SOUTH FRONTENAC
HELD ON AUGUST 7, 2018**

Complaint

The Township of South Frontenac (“Township”) received a complaint about an in-camera portion (“closed session”) of a meeting of Township Council held on August 7, 2018.

The essence of the complaint is the subject matter of one of the items under consideration at the closed session was not, in its entirety, a proper one for deliberation in a closed session. The complainant alleges that the public should have been better informed, in a general way, about the nature of the closed session item. More specifically, the complainant alleges that Council discussed several issues during its deliberation of the in-camera item and that some of those issues ought to have been disclosed in public session.

The complainant alleges that Township Council has discussed the item in closed sessions in previous meetings and that the public ought to have been better informed about the nature and, to a certain extent, the content of Council’s deliberations or information about the matter. A review of prior meetings was requested by the complainant.

The complaint was sent to the offices of Amberley Gavel Ltd. for investigation.

Jurisdiction

The Township appointed Local Authority Services (LAS) as its closed meeting Investigator pursuant to section 239.2 of the *Municipal Act, 2001*¹, as amended (“Municipal Act”). LAS has delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council of the Township of South Frontenac.

¹ Municipal Act, 2001, SO 2001, c 25, <<http://canlii.ca/t/534v1>> retrieved on 2018-08-23.

Background

(1) The Municipal Act

Section 239 of the Municipal Act provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government. The section sets forth exceptions to this open meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public. Two of those reasons in Section 239(2) are:

...

- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

...

Section 239 also requires that before a council, local board or committee moves into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution must include the general nature of the matter(s) to be deliberated at the closed meeting.

Subsections 239 (5) & (6) limit the actions that may be taken by the council, local board or committee at the closed session. Votes may only be taken at a closed meeting for procedural matters, or giving direction or instructions to staff or persons retained by the municipality such as a lawyer or planner. It provides as follows:

Open meeting

- (5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote. 2001, c. 25, s. 239 (5).

Exception

- (6) Despite section 244, a meeting may be closed to the public during a vote if,
 - (a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
 - (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board. 2001, c. 25, s. 239 (6).

Section 239.1 provides that any person can ask for an investigation into whether a council, local board or committee of either of them has breached the open meeting requirements of the Municipal Act or its own procedural by-law.

Investigation

The complainant, CAO, and Deputy Clerk were interviewed during the investigation. Documents provided by the Township and reviewed included agendas, reports, minutes, the Township's Procedure and Notice By-laws, and applicable legislation.

An investigation under Section 239.1 of the Municipal Act is confined to assessing whether the council, local board or committee of either complied with the open meetings provision of the Municipal Act or its own procedural by-law. It is not open to the investigator to determine if the responsible body made the right decision with respect to the substantive matter at issue in the complaint.

In addition, an investigator is bound by the rules of confidentiality as stipulated in Section 239.2(5).

Once the investigation is completed, if the investigator "is of the opinion that the meeting or part of the meeting that was the subject-matter of the investigation appears to have been closed to the public contrary to Section 239 or to a procedure by-law under Section 238(2), the investigator shall report his or her opinion and the reasons for it to the municipality or local board, as the case may be, and may make such recommendations as he or she thinks fit" (section 239.2(10)).

Facts and Evidence

(1) The Township's Procedure By-law

Section 238 of the Municipal Act requires that every municipality and local board pass a procedure by-law. Section 238 reads in part as follows:

- (2) Every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings.
- (2.1) The procedure by-law shall provide for public notice of meetings.

The Township has a Procedure By-law that governs the calling, place, and proceedings of meetings, as well as public notice of meetings.²

The Procedure By-law provides for closed meetings of Council and its Committees, and requires that, prior to moving in-camera, Council or Committees of Council pass a motion in public session stating:

- i. the fact of the holding of the closed meeting;
- ii. the general nature of the matter to be considered at the closed meeting.³

² *The Corporation of the Township of South Frontenac, By-law 2017-76, Being a By-law to Provide for the Governing of the Council, the Conduct of Members and the Calling of Meetings* ("Procedure By-law").

³ *ibid*, s.2 h). The Procedure By-law also stipulates other policies relating to closed meetings. Those policies are not relevant or at issue in this complaint.

(2) Agendas for the Meeting of Council on August 7, 2018

The Agenda for the Council Meeting of August 7, 2018 indicated that Council was expected to move into closed session to consider several matters, none of which is the subject of this complaint.

(3) Minutes for the Open and Closed Sessions of the Council Meeting of August 7, 2018

The Minutes record that Council went into Closed Session to “approve minutes of the July 3, 2018 Closed Session and to discuss matters about an identifiable individual and property acquisition”. It did not report out on any of these matters.

The Minutes for the Closed Session indicate that Council discussed a previous item, involving the subject matter at issue in the complaint, although it was not separately listed on the agenda for discussion. It was referenced in the July 3, 2018 Minutes which were under consideration for approval at this meeting.

Council noted that it had previously provided direction to its solicitor and was waiting for a reply.

(4) Agenda for the Meeting of Council on July 3, 2018

The Agenda for the Council Meeting of July 3, 2018 indicated that Council would move into closed session to consider “Litigation – Solicitor to be present”.

(5) Minutes for the Open and Closed Sessions of the Council Meeting of July 3, 2018

The Minutes record that Council resolved into Closed Session to “discuss litigation”, among other matters. That litigation is related to the subject matter in the complaint. The public minutes posted on the Township’s website indicate that the Litigation was with respect to the Sydenham Water Treatment Plant. There was no reporting out from the Closed Session about the matter.

The Minutes for the Closed Session indicate that Council discussed various aspects of the subject matter and provided the solicitor with direction with respect to the litigation process and strategy.

(6) Agendas for the Meeting of Council on June 19, 2018

The Agenda for the Council Meeting of June 19, 2018 indicated that Council would move into closed session to consider Litigation – Solicitor to be present”.

(7) Minutes for the Open and Closed Sessions of the Council Meeting of June 19,

2018

The Minutes record that Council went into Closed Session to “discuss litigation”, among other matters. That litigation related to the subject matter of the complaint under investigation.

The Minutes for the Closed Session indicated that, since the solicitor was unable to be present, the CAO provided Council with information with respect to the ongoing litigation. Council deferred further discussion until the solicitor was present.

(8) Other Proceedings

Council was updated in Closed Session at other meetings that occurred in 2012, 2014, 2015, and 2016.

(9) Testimony

The CAO indicated that the matter was listed simply as “litigation” in order not to create any public concern over the issues engaged in the litigation.

The CAO also indicated that a Member of Council had questioned the fact that the public was not made more aware of some of the aspects of the matter. As directed by Council, the CAO was in the midst of soliciting an opinion from the Township’s solicitor.

Findings

Essentially, the complaint deals with two issues:

- (1) Was the item a matter for which a meeting of Council could be closed to the public in accordance with the Municipal Act?
- (2) Did the Agendas and resolutions for the Council Meetings give sufficient information such that the public would know the general nature of the matter to be discussed at the closed session(s) as required by the Municipal Act?

(1) A Matter for Which the Meeting Could Be Closed

During the course of the investigation, Amberley was advised about the substance of the discussion at the closed meetings and reviewed the in-camera notes from the closed meeting.

It would be improper, however, for Amberley to discuss in this report the substance of the closed meeting discussions, since disclosure would offend the principle of confidentiality that closed meetings protect.

In addition, disclosure would allow complainants and other third parties to receive information through a closed meeting investigation that they would otherwise not be

privity to; that is not the function of a closed meeting investigation. That is not to say that the complainant in this instance was attempting to do that, but rather that the possibility could be contemplated in other instances.

Having reviewed the content of the discussions and the minutes of the closed meetings, we are satisfied that the matter was covered either by litigation privilege or by solicitor/client privilege.

Litigation privilege is engaged in s.239(2)(e) when a closed meeting matter deals with litigation or potential litigation, including matters before an administrative tribunal. Solicitor/client privilege is engaged in s.239(2)(f) when a closed meeting matter deals with advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Since the matter under discussion at the time of the closed meetings likely straddled both privileges, it might be useful to explain the nature of the two privileges.

The Supreme Court of Canada recently considered the nature of the litigation privilege and solicitor/client privilege in *Blank v. Canada (Minister of Justice)*⁴:

“The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients’ cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client.

It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.”⁵

Both litigation privilege and solicitor/client privilege are invoked whether or not the communication is in written or oral form.

It is also worth noting that litigation privilege begins when litigation is contemplated and continues throughout the litigation process, including any appeal processes. The privilege expires at the end of the litigation. Solicitor/client privilege, on the other hand, survives even after the termination of the solicitor and client relationship.

⁴ [2006] 2 S.C.R. 319, 2006 SCC 39 (“Blank”).

⁵ *ibid.* at paras. 28-29.

The matter at issue in this particular complaint involves ongoing litigation between the Township and several defendants. The Township has contracted with external legal counsel to represent the Township in the litigation (“Township Solicitor”), and the CAO works closely with the Township Solicitor to provide regular updates to Township Council. These updates include recommending legal strategies and approaches in the actual litigation process (e.g. such as potential settlement, mediation, or proceeding to trial).

Thus, any communication that the Township’s Solicitor would have with Township Council respecting the matter would be covered by litigation privilege.

Communication would include both written communication and oral communication.

Given the fact that the litigation does not end until decisions are rendered by the court and all appeals, if any, are exhausted, Council’s processes must be set up to allow Council, as a party in the litigation, to discuss their positions and strategies in private and “without fear of premature disclosure”. For those reasons, Council conducts its deliberations in closed session. Meetings are not closed just to exclude the public from the process. Meetings are closed to ensure that the opposing party is not privy to Council’s deliberations on its positions and strategies.

It is also normal when Council is discussing legal strategies and positions (whether the Township is involved in litigation or if litigation is pending), the Township Solicitor would be called upon to provide recommendations or advice to Council. Those communications would be subject to solicitor/client privilege.

Council must be able to confide in the Township Solicitor on all legal matters and to have “full, free, and frank discussions” without being concerned about whether the communication between the Township Solicitor and the Council, as client, is going to be revealed in a public forum.

That is the purpose of solicitor/client privilege and is the reason why Council is permitted to go into closed session to deal with a matter involving solicitor/client privilege.

While it is true that the court process is open and public (unless ordered by the court otherwise), it is not a place where the client and his/her solicitor discuss in open forum their strategies, positions, and tactics. It is the stage where those strategies and positions are played out. It is the place where the opposing party tries to figure out the other side’s strategies and positions to counteract them. The opposing party is not given a backstage pass to the strategy session (a closed meeting) as that would defeat the purpose of the adversarial system of litigation.

Without divulging the substance of the deliberations and discussions at the closed meetings, for reasons outlined above, we are satisfied that the content of the closed meetings involved matters covered by both litigation privilege and solicitor/client

privilege. Hence, the matter was one for which the meetings could properly be closed under s. 239(e) or s.239(f) of the Municipal Act.

(2) The General Nature of the Matter to be Discussed

As stated earlier, the Municipal Act requires that before a council, local board or committee move into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution also must include the general nature of the matter(s) to be deliberated at the closed meeting.

The Municipal Act cites the exceptions for which a meeting may be closed to the public. However, it does not provide guidance as to what language to use to convey “the general nature of the matter(s) to be deliberated at the closed meeting”, other than by necessary reference to one of the exception criteria found in s. 239(2) of the Act.

Thus, the Clerk of a municipality, who is usually the individual charged with preparing the agenda, often must use some discretion when preparing the subsection 239(4) draft resolution that is required to be passed before holding a closed meeting. That discretion involves a tension between inadvertently disclosing too much and disclosing too little.⁶

The Municipal Act contemplates that the public resolution provides the transparency to the public of the fact of the intent to hold the closed meeting and the general nature of the matter to be considered. In the interest of disclosing enough information in the resolution, staff might prepare it such that the public knows *the essence* of the item under consideration without disclosing *the potential substance* of the ensuing deliberations.

How does council (or a local board or committee) satisfy the requirement in subsection 239(4) to state the general nature of the matter to be considered at a closed meeting?

There are circumstances when it would not be appropriate for the municipality to divulge any greater information than a subject matter listed in subsection 239(2). For example, if the senior administrator needs to inform council about an employee’s misconduct, it would be inappropriate for council to pass a resolution identifying the particular individual at issue in the matter.

However, if more information can be provided to the public in the resolution required by subsection 239(4) then it should be provided. This was the situation in the *Farber v. City of Kingston* case before the Ontario Court of Appeal. The Court ruled that additional disclosure may be appropriate in circumstances where it can do so in a way that **“maximizes the information available to the public while not undermining the**

⁶ Although the Clerk, or secretary to the meeting, usually sets the agenda and its contents, it is up to Council to approve or reject the agenda content. Council, the local board, or the committee of either of them ultimately has the authority to decide to proceed into closed session and it – and not the Clerk or the secretary – is ultimately accountable for the decision to proceed into closed session.

reason for excluding the public”.⁷ (The bolding is ours).

The agenda for several of the Council meetings indicated that Council would be moving into closed session. However, the agenda refers only to a generic reason (e.g. to “discuss litigation”), rather than a specific reference to the section and subsection of the Municipal Act.

In this instance, the agenda should have stated that the nature of the item was “litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board”, an allowable exception to the statutory provision that all meetings should be open to the public. The agenda should also cite the reason for moving into closed session, not just the applicable reference to the Municipal Act.

For greater openness and transparency, the in-camera matter could have been titled:

Closed Session dealing with litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board, under s.239(2)(e) of the Municipal Act, respecting the Sydenham Water Treatment Plant.

That title would have provided for greater clarity on what was being considered in closed session, without divulging the substance of the legal strategy or advice being discussed.

Although it would have been appropriate to provide more information about the nature of the matter in this case, the fact that the municipality did not does not render the meeting invalid.

Further, as outlined in the previous section of this report, the subject matter discussed at the closed meetings was of a nature that the meeting could be closed in accordance with the Municipal Act.

(3) Bifurcating Closed Meeting Discussions

However, it is our opinion that some of the discussion could have, and should have, been held in open session so that the public could fully understand why Council was a party to or about to be a party to litigation. There were several facts underlying the legal claims which could have been made public.

Just because a portion of a discussion might be about matters for which a meeting can and should be closed, a council or committee should not close the whole meeting to the public on the issue. The body should also question whether the discussion, or part of it, can be held in an open meeting format to foster the aims of openness, accountability, and transparency.

The matter should be bifurcated such that the issues that can be discussed in public are discussed in open session. This will depend on the nature of the matter.

⁷ See *Farber V. Kingston (City)* (2007), 279 D.L.R. (4th) 409 (Ont. C.A.), at para. 21.

Council, its local boards, and committees should be reminded that the exceptions to the open meetings rule in the Municipal Act are discretionary. A council, local board, or committee of either, should always err on the side of openness and transparency when determining whether to exercise its discretion to consider a matter in closed session. In this case, it would have fostered the twin goals of openness and transparency had some of the discussion about the matter taken place in a public forum⁸ and then reported out in the publicly available minutes of the meeting.

(4) Reporting Out at the Open Council Meeting

Council properly moved, seconded, and carried a motion to rise with report from the in-camera portion of the meetings under review. However, it appears that Council did not specifically report out about the closed meeting.

The Best Practice procedure would have been that the chair of the meeting report out in the public session that the body (i.e. municipality, local board, or committee of either of them) met in closed session, that it dealt with an in-camera matter (i.e. a matter dealing with litigation or potential litigation, including matters before administrative tribunals, affecting the municipality, under s.239(2)(e) of the Municipal Act, respecting the Sydenham Water Treatment Plant), and that Council directed staff (or, in this case, the solicitor) to take certain actions. Those actions do not have to be specified if they ought to remain confidential as part of the litigation strategy or advice.

The lack of reporting out is, however, a procedural irregularity that does not affect the validity of the meetings under review.

Conclusion

Based on the evidence and the interviews, it is our conclusion that the matter deliberated at the Closed Sessions of Township Council fell within at least one, and likely two, of the exceptions in Section 239 of the Municipal Act for which a closed meeting may be held.

Further, the fact that no words were added in the title of the item on the meeting agendas to augment the Municipal Act exception to the open meeting provision, or that Council did not report out in the minutes, does not render the meeting or the outcome of the meeting improper or illegal.

Although none of the meetings under review were improper or illegal, we have found that Council could have been more open and transparent in discussing some of the elements of the matter under consideration, without undermining the litigation and should consider amending its practice in future to do so wherever possible.

⁸ Subject to any restrictions that the solicitor has advocated with respect to public disclosure.

Public Report

We received full co-operation from the complainant, CAO, and Deputy Clerk and we thank them.

This report is forwarded to the Council of the Township of South Frontenac. The Municipal Act provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.

Closed Meeting Investigator

AMBERLEY GAVEL LTD.

Per: *Nigel Bellchamber*