



J. Paul Dubé, Ombudsman

BY EMAIL

May 21, 2024

Council for the Township of Lanark Highlands
c/o Reeve Peter McLaren
75 George Street, PO Box 340
Lanark, ON K0G 1K0

Dear Members of Council for the Township of Lanark Highlands:

Re: Closed meeting complaint

My Office received a complaint about meetings held by council for the Township of Lanark Highlands (the “Township”). The complaint raised concerns that council for the Township may have discussed the Glenayr Kitten Mill in closed session, and that these discussions did not fit within the closed meeting exceptions in the *Municipal Act, 2001*. In addition, the complaint raised concerns that the Township did not provide sufficient information about the general topic of discussion in its resolutions to proceed into closed session to discuss this matter.

I am writing to share the outcome of my review of this complaint. For the reasons set out below, I have concluded that council for the Township of Lanark Highlands did not contravene the open meeting rules in the *Municipal Act, 2001*¹ (the “Act”) when it discussed the Glenayr Kitten Mill in closed session. In addition, council’s resolutions to proceed into closed session to discuss this topic provided general information about the matters to be discussed and cited the exceptions from the Act being relied upon.

Ombudsman’s role and authority

As of January 1, 2008, the *Municipal Act, 2001* gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator. The Act designates the Ombudsman

¹ SO 2001, c 25, s 1.

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as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the Township of Lanark Highlands.

My Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

The Ontario Ombudsman also has the authority to conduct impartial reviews and investigations of hundreds of public sector bodies. This includes municipalities, local boards, and municipally-controlled corporations, as well as provincial government organizations, publicly funded universities, and school boards. In addition, the Ombudsman's mandate includes reviewing complaints about the services provided by children's aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Read more about the bodies within our jurisdiction here: www.ombudsman.on.ca/have-a-complaint/who-we-oversee.

Review

My Office spoke with the Reeve and the Clerk/Acting Chief Administrative Officer ("CAO"). The Reeve and the Clerk/Acting CAO both told my Office that council discussed the Glenayr Kitten Mill (the "Kitten Mill"), a private property containing historic structures in the Municipality, in closed session on January 10, 2023 and September 26, 2023. We reviewed the open and closed meeting materials for the January 10, 2023 and September 26, 2023 meetings, including the agendas, minutes, correspondence received, and reports.

January 10, 2023 council meeting

Council held a regular meeting in council chambers at the Municipal Office on January 10, 2023, beginning at 6:00 p.m. After council approved the open meeting agenda and discussed a variety of topics in open session, including matters related to the Kitten Mill, it proceeded *in camera* at 8:07 p.m. The resolution to proceed into closed session was titled, "Closed Session - Property Matter", and stated:

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THAT, Council move into Closed Session at 8:07 p.m. to discuss a matter subject to:
239 (2)

(b) personal matters about an identifiable individual, including municipal or local board employees;

(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;

AND THAT, Darlene Plumley, CAO/Deputy Clerk, Amanda Noël, Clerk, and Chad Kean, Manager of Public Works remain in the room.

According to the closed meeting minutes, council approved the closed meeting agenda and previous closed meeting minutes. Council then received and discussed a letter from the Township's legal counsel that provided legal advice with respect to the Kitten Mill. The Clerk/Acting CAO told my Office that council discussed an individual's conduct, as well as potential litigation related to the property. Council then directed staff based on information contained in the lawyer's letter and gave copies of the letter to the Clerk/Acting CAO for shredding.

Council returned to open session at 8:45 p.m. and reported that no pecuniary interests were declared during the closed meeting, and that staff should proceed as directed. Council then passed a by-law to confirm the proceedings of council, and adjourned the meeting at 8:46 p.m.

Analysis

Council cited the Act's exceptions for personal matters about an identifiable individual, litigation or potential litigation, and advice that is subject to solicitor-client privilege, including communications necessary for that purpose, when it proceeded *in camera* on January 10, 2023.

Applicability of the exception for personal matters about an identifiable individual

The "personal matters" exception in section 239(2)(b) of the Act applies to discussions that reveal personal information about an identifiable individual. As I noted in a recent letter to the

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Town of Grimsby, discussions in which an individual's conduct are scrutinized will generally be considered personal in nature.²

In the present case, while *in camera*, council discussed an individual's conduct in relation to the Kitten Mill. Accordingly, council's *in camera* discussions on January 10, 2023 fit within the exception for personal matters about an identifiable individual.

Applicability of the exception for litigation or potential litigation

My Office has previously found that the "litigation or potential litigation" exception under section 239(2)(e) is reserved for circumstances where the subject matter is either related to ongoing litigation or involves a reasonable prospect of litigation.³ With respect to potential litigation, in order for the exception to apply, there must be more than a remote possibility or a suspicion that litigation could arise, although it need not be a certainty.⁴ Council must believe there is a reasonable prospect of litigation and must use the closed meeting to explore that prospect in some way.⁵

In this case, council discussed potential litigation related to the Kitten Mill that was more than a mere possibility. Accordingly, council's *in camera* discussions on January 10, 2023 fit within the exception for litigation or potential litigation.

Applicability of the exception for solicitor-client privilege

The "solicitor-client privilege" exception under section 239(2)(f) of the Act applies to discussions between a municipality and its solicitor in seeking or receiving legal advice that is intended to be confidential, and includes communications for that purpose. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.⁶ My Office has previously found that discussion of a letter from a municipality's

² Letter from the Ontario Ombudsman to the Town of Grimsby (29 November 2023) [*Letter to the Town of Grimsby*], online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2023/town-of-grimsby>>.

³ See e.g. Letter from the Ontario Ombudsman to the City of Timmins (May 9, 2017) at 2 [*Letter to the City of Timmins*], online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2017/city-of-timmins-2>>; and *Grey Bruce Health Unit (Re)*, 2023 ONOMBUD 6 at paras 38-39 [*Grey Bruce Health Unit*], online: <<https://canlii.ca/t/jw7tk>>.

⁴ *Ibid.*

⁵ *West Lincoln (Township of) (Re)*, 2015 ONOMBUD 34 at para 36, <<https://canlii.ca/t/gtp7g>>; and *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 at para 26, online: <<https://canlii.ca/t/hqsph>>.

⁶ *Amherstburg (Town of) (Re)*, 2022 ONOMBUD 11 at para 26 [*Amherstburg*], online: <<https://canlii.ca/t/jr5rc>>.



lawyer that contains legal advice fits within the exception for advice subject to solicitor-client privilege⁷.

In the present case, council went into closed session on January 10, 2023 to receive and discuss a letter from the Township's lawyer that provided legal advice with respect to the Kitten Mill. As a result, council's closed session discussions fit within the exception for advice that is subject to solicitor-client privilege.

September 26, 2023 council meeting

Council held a regular meeting in council chambers at the Municipal Office on September 26, 2023, beginning at 7:04 p.m. After council approved the meeting agenda and discussed a variety of topics in open session, it proceeded *in camera* at 7:17 p.m. The resolution to proceed into closed session was titled "Closed Session: Property Matter Regarding a Property Located in Concession 2, Part Lot 1, Lanark", and stated:

THAT, Council move into Closed Session at 7:17 p.m. to discuss a matter subject to:

239 (2)

(b) personal matters about an identifiable individual, including municipal or local board employees;

(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

AND THAT, Amanda Noël, Clerk / Acting CAO and Kyle McRae, CBO, and Chad Kean, Manager of Public Works remain in the room.

According to the closed meeting minutes, council approved the closed meeting agenda and previous closed meeting minutes before discussing the Kitten Mill. Council received and discussed a written report prepared by the Clerk/Acting CAO regarding the building (the "Clerk's report"). The Clerk's report was prepared in consultation with legal counsel and outlined legal advice that a lawyer had provided to the Township regarding the Kitten Mill. The Clerk/Acting CAO told my Office that council discussed an individual's conduct, as well as potential litigation related to the property. In addition, the Clerk/Acting CAO told my Office that

⁷ *Ibid* at paras 27-28 and *McMurrich/Monteith (Township of) (Re)*, 2015 ONOMBUD 21 at para 42, online: <<https://canlii.ca/t/gtp6k>>.



she presented council with the lawyer's advice, and sought direction from council based on this legal advice. Council then directed staff in relation to the Kitten Mill. Council returned to open session at 8:02 p.m. and reported that no pecuniary interests were declared during the closed meeting, and that staff should proceed as directed. Council subsequently held additional closed sessions to discuss other matters that were unrelated to the Kitten Mill.⁸

Council then returned to open session and passed a by-law to confirm the proceedings of council, and adjourned the meeting at 8:40 p.m.

Analysis

Council cited the Act's exceptions for personal matters about an identifiable individual, litigation or potential litigation, and advice that is subject to solicitor-client privilege when it proceeded *in camera* on September 26, 2023.

Applicability of the exception for personal matters about an identifiable individual

As noted above, the "personal matters" exception in section 239(2)(b) of the Act applies to discussions that reveal personal information about an identifiable individual. Discussions in which an individual's conduct are scrutinized will generally be considered personal in nature.⁹

In the present case, while *in camera*, council discussed an individual's conduct in relation to the Kitten Mill. Accordingly, council's *in camera* discussions on September 26, 2023 fit within the exception for personal matters about an identifiable individual.

Applicability of the exception for litigation or potential litigation

As noted above, my Office has determined that the "litigation or potential litigation" exception under section 239(2)(e) is reserved for circumstances where the subject matter is either related to ongoing litigation or involves a reasonable prospect of litigation.¹⁰ With respect to potential litigation, in order for the exception to apply, there must be more than a remote possibility or a suspicion that litigation could arise, although it need not be a certainty.¹¹

⁸ Section 5.9.6 of the Township's procedural by-law states that if there is more than one matter to be discussed in closed session, each matter shall be addressed in a separate closed session.

⁹ Letter to the Town of Grimsby, *supra* note 2.

¹⁰ Letter to the City of Timmins, *supra* note 3 and *Grey Bruce Health Unit*, *supra* note 3.

¹¹ *Ibid.*



In this case, council discussed potential litigation related to the Kitten Mill that was more than a mere possibility. Accordingly, council's *in camera* discussions on September 26, 2023 fit within the exception for litigation or potential litigation.

Applicability of the exception for solicitor-client privilege

As noted above, the “solicitor-client privilege” exception under section 239(2)(f) of the Act applies to discussions between a municipality and its solicitor in seeking or receiving legal advice that is intended to be confidential, and includes communications for that purpose.¹² The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure. It is not necessary that the municipality’s lawyer be present in order for the exception to apply. I have previously found that the exception for solicitor-client privilege can apply to circumstances where another person, such as the Clerk or CAO, conveys communications or advice from a solicitor to a council.¹³

In the present case, council went into closed session on September 26, 2023 to receive and discuss the Clerk’s report, which summarized legal advice with respect to the Kitten Mill. The Clerk/Acting CAO presented council with the lawyer’s advice and sought direction from council based on this advice. Accordingly, council’s closed session discussions about the Kitten Mill on September 26, 2023 fit within the exception for advice subject to solicitor-client privilege.

Resolutions to proceed *in camera*

Under section 239(4) of the Act, before moving into a closed session, a municipality, local board, or committee of either must state by resolution in open session that a closed meeting will be held. It must also state the general nature of the matter to be considered at the closed meeting.

As the Court of Appeal noted in *Farber v. Kingston*, the resolution to go into a closed meeting 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.¹⁴

¹² *Amherstburg*, *supra* note 6 at para 26.

¹³ See, for example: *Owen Sound (City of) (Re)*, 2015 ONOMBUD 36 at paras 20-21, online: <<https://canlii.ca/t/gtp7l>>, *Collingwood (Town of) (Re)*, 2022 ONOMBUD 1 at para 42, online: <<https://canlii.ca/t/jlvk1>>, and Letter to the Town of Grimsby, *supra* note 2.

¹⁴ *Farber v. Kingston (City)*, 2007 ONCA 173, online: <<https://canlii.ca/t/1qtzl>>.



The January 10, 2023 resolution to move *in camera* included the general description of “Property Matter” and cited the exceptions from the Act being relied upon. The September 26, 2023 resolution to move *in camera* included the general description of “Property Matter Regarding a Property Located in Concession 2, Part Lot 1, Lanark” and cited the exceptions from the Act being relied upon. The Clerk/Acting CAO told my Office that the Township received legal advice in drafting these resolutions.

These resolutions provided general information about the matters to be discussed in closed session and cited the exceptions from the Act being relied upon. As I noted in a letter to Norfolk County, there is no general requirement that a resolution must include the address of a property to be discussed in closed session, and doing so may undermine the reason for having the discussion in closed session.¹⁵

Conclusion

My review has determined the Council for the Township of Lanark Highlands did not contravene the open meeting rules in the *Municipal Act, 2001* when it discussed the Glenayr Kitten Mill in closed session on January 10, 2023 and September 26, 2023. Council’s resolutions to proceed into closed session for these meetings provided general information about the matters to be discussed and cited the exceptions from the Act being relied upon.

I would like to thank the Township of Lanark Highlands for its co-operation. The Clerk/Acting Chief Administrative Officer has confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

cc: Amanda Noël Clerk/Acting CAO, Township of Lanark Highlands

¹⁵ Letter from the Ontario Ombudsman to Norfolk County (13 December 2022), online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2022/norfolk-county>>.

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