



J. Paul Dubé, Ombudsman

BY EMAIL

September 13, 2022

Town of South Bruce Peninsula
c/o Mayor Janice Jackson
315 George Street
PO Box 310
Warton, ON N0H 2T0

Dear Council for the Town of South Bruce Peninsula,

Re: Closed meeting complaints

My Office received two complaints alleging that the Town of South Bruce Peninsula (the “Town”) voted in closed session on April 28, 2022, contrary to the requirements in the *Municipal Act, 2001*. Specifically, the complaints alleged that council voted in closed session not to appeal a specific decision of the Ontario Court of Appeal.

I am writing to advise on the outcome of my review of these complaints. For the reasons set out below, I have determined that council’s vote complied with the open meeting rules in the *Municipal Act, 2001*¹ (the “Act”).

Ombudsman’s role and authority

As of January 1, 2008, the Act 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 as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the Town of South Bruce Peninsula.

¹ SO 2001, c 25.

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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.

Review

My Office reviewed the open and closed meeting materials, including the agendas, minutes, and relevant reports. We also spoke with the Deputy Clerk.

Council met for a special meeting at 9:00 a.m. on April 28, 2022. Council resolved at 9:01 a.m. to proceed into closed session. The open meeting minutes state that council addressed a matter pertaining to:

Litigation or potential litigation including matters before administrative tribunals affecting the municipality or local board **and** Advice that is subject to solicitor-client privilege including communications necessary for that purpose (Natural Resources and Forestry v Town of South Bruce Peninsula 2022 ONCA 315).

Our review indicates that while *in camera*, council discussed legal advice related to the court decision and discussed how to proceed. Based on that discussion, council directed staff to advise the Town solicitor that the Town would not appeal.

The open meeting minutes state that council reconvened in open session at 9:21 a.m. Council then reported that a direction was given to staff in closed session. Mayor Janice Jackson read a message to the community advising that council had decided not to proceed with any further appeal of the court's decision. The meeting was adjourned at 9:27 a.m.

Analysis

Applicability of the exception for litigation or potential litigation

Under section 239(e) of the Act, a meeting or part of a meeting may be closed to the public to discuss litigation or potential litigation, including matters before administrative tribunals, affecting a municipality.

My Office has found that the exception applies in the context of anticipated litigation where there is more than a remote possibility that litigation may commence, although the litigation need not be a certainty. Discussions about whether or not to litigate are also included in the exception.²

During the meeting, council discussed whether to appeal a court decision. Accordingly, the April 28, 2022 discussion fit within this exception.

Applicability of the exception for solicitor-client privilege

Under section 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the discussion includes communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

My Office has found that it is not necessary that the municipality's lawyer be present for the exception to apply. For example, a written legal opinion may be considered in closed session under the exception, or staff may convey legal advice from a lawyer to council during a closed session.³

During the meeting, council discussed legal advice related to the court decision and discussed how to proceed. Accordingly, the April 28, 2022 discussion fit within this exception.

Vote in closed session

Section 239(6)(b) of the Act prohibits voting during a closed session unless the meeting is properly closed to the public and the vote is for a procedural matter or for giving directions to staff. In a 2015 report about the Town of South Bruce Peninsula, my Office considered a series of votes taken in closed session with respect to the purchase of land.⁴ Council directed staff to make an offer to buy the land, amend that offer in response to a counteroffer, and finally to accept the offer of the seller. The report explains that these votes were taken to direct staff, and that the land purchase was not complete until council voted on the matter in open session. Accordingly, the directions to staff were permitted *in camera*.

In this case, our Office has determined that the *in camera* discussion on April 28, 2022 fit within the open meeting exceptions for both litigation or potential litigation and solicitor-client privilege. While in closed session, council voted to direct staff not to proceed with any further appeal of a court decision. The vote was a direction to staff, and was therefore permissible under the Act.

² *Head, Clara and Maria (United Townships of) (Re)*, 2012 ONOMBUD 8, online: <<https://canlii.ca/t/gtth4>>.

³ *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2, online: <<https://canlii.ca/t/h4rwp>>.

⁴ *South Bruce Peninsula (Town of) (Re)*, 2015 ONOMBUD 25, online: <<https://canlii.ca/t/gtp6t>>.

Conclusion

My review has determined that the discussion that took place on April 28, 2022 fit within both the “litigation or potential litigation” and “solicitor-client privilege” exceptions to the open meeting requirements. In addition, my Office found that council for the Town did not contravene the Act when it voted in closed session on April 28, 2022, as the vote occurred during a properly closed session and was a direction to staff.

I would like to thank the Town of South Bruce Peninsula for its co-operation during my review. The Clerk confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul Dubé', written over a large, light-colored oval shape.

Paul Dubé
Ombudsman of Ontario

cc: Angie Cathrae, Director of Legislative Services/Clerk, Town of South Bruce Peninsula