

April 14, 2021

Council for the Town of Grimsby
Grimsby Town Hall
160 Livingston Avenue
Grimsby, ON L3M 4X1

Sent by email to skim@grimsby.ca

Dear Members of Council for the Town of Grimsby:

Re: Complaints about the February 16, 2021 council meeting

My Office received complaints about a closed meeting held by council for the Town of Grimsby (the “Town”) on February 16, 2021. The meeting was conducted electronically. The complainants told my Office that council discussed the an identifiable individual while *in camera* and that the subject matter did not fit within the closed meeting exceptions in the *Municipal Act, 2001* (the “Act”).

I am writing to share the outcome of my Office’s review. Based on the evidence, I do not find that the meeting contravened the Act’s open meeting rules.

Ombudsman jurisdiction

As of January 1, 2008, the *Municipal Act* gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public.¹ 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 Grimsby.

¹ *Municipal Act*, SO 2001, c 25, s 239.1.

In reviewing closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

Our 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 procedure. Summaries of previous Ombudsman decisions can be found in the digest at: www.ombudsman.on.ca/digest.

Review

My Office reviewed the meeting agenda and the open and closed session minutes for the February 16 meeting. We also reviewed a video recording of the open and closed sessions of the meeting. Members of my Office spoke with the Town's Clerk.

Council's resolution to proceed *in camera* cited the "personal matters" exception to the open meeting rules and included the following description of the matters to be discussed *in camera*:

Discuss personal matters regarding an identifiable individual with respect to provision of services to the Town.

Prior to moving into closed session, council debated whether the subject matter fit within the open meeting rules. Some council members expressed reservation about meeting *in camera* to hold the discussion. Ultimately, council voted to move into closed session.

After moving back into open session, council passed the following motion identifying the individual as the Town's current integrity commissioner:

Resolved that the Clerk be directed to discuss with ADR Chambers in regards to the matter of the Integrity Commissioner.

While in closed session, council reviewed the services provided to the Town by the integrity commissioner. Individual council members offered their opinions on the integrity commissioner, his fitness for the job, and their satisfaction with his performance.

The Town's solicitor participated in the closed session and provided legal advice to council on the open meeting rules and the Town's contract for services with the integrity commissioner.

Application of the "personal matters" exception

My Office was advised that the "personal matters" exception was cited to protect the privacy of the integrity commissioner while council discussed his provision of services to the Town.

When reviewing the parameters of the open meeting exceptions, my Office has often considered the case law of the Information and Privacy Commissioner (the IPC). These decisions are not binding on my Office; however, they are often informative with respect to the applicability of the open meeting exceptions in the Act. The IPC has found that, generally, information that pertains to an individual in their professional capacity will not fit within the "personal matters" exception.² However, if the information relates to scrutiny of an individual's conduct, it may still fit within the exception.³

In a letter to the Township of Wollaston, my Office found that a closed session discussion relating to an employee's job performance fit within the exception for personal matters.⁴ My Office made similar findings in a report to the Town of Pelham where council discussed the conduct and performance of an individual in the context of their employment with that municipality.⁵

In this case, council discussed the integrity commissioner in the context of his professional relationship with the Town. During the discussion, council scrutinized the integrity commissioner's performance and suitability for his role. Council members offered their opinions on the integrity commissioner in a way that went beyond information related to his professional role. If that information were disclosed in public, it would reveal something of a personal nature about the integrity commissioner.

² Order M0-2204 (22 June 2007), online: <<http://canlii.ca/t/1scqh>>

³ *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6 at paras 31 to 32, online: <<http://canlii.ca/t/gtp80>>.

⁴ Letter from the Ombudsman to the Township of Wollaston (24 May 2019), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2019/township-of-wollaston>>.

⁵ Letter from the Ombudsman to the Town of Pelham (19 April 2019), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2018/town-of-pelham>>.

Accordingly, these discussions revealed information that went beyond professional information and fit within the “personal matters” exception in the Act.

Application of the St. Catharines’ Principle

Council also discussed the contract for services between the integrity commissioner and the Town. Normally, this topic would not fit within the “personal matters” exception.

In 2011, with respect to an appeal of a decision of the Information and Privacy Commission, Ontario's Divisional Court commented on the practicality of conducting a meeting where only parts of discussion are allowed in closed session. In *St. Catharines (City) v. IPCO*, Justice Lederer observed that:

[I]t is not realistic to expect the members of a municipal council to parse their meetings ... this way. At a minimum, it would detract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not continuous, debate about when to close the meeting and when to invite the interested public to return.⁶

During the February 16 closed session, the integrity commissioner’s contract with the Town was discussed as part of council’s broader discussion about the integrity commissioner’s provision of services. Consequently, I am satisfied that the discussion could not have been parsed from the *in camera* discussion.

Application of the “advice subject to solicitor-client privilege” exception

Based on my Office’s review of the closed meeting minutes and video recording, we also reviewed whether council’s discussion fit within the exception for advice subject to solicitor-client privilege found in section 239(2)(f) of the Act. This exception was not cited by council to go into closed session on February 16.

This exception covers discussions that include communications between a municipality and its solicitor in seeking or receiving legal advice intended to be confidential.⁷ The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure. The Supreme Court of Canada has found that solicitor-client privilege extends when three pre-conditions are met:

⁶ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 at para 42.

⁷ *Timmins (City of) (Re)*, 2017 ONOMBUD 4 at para 28, online: <<http://canlii.ca/t/h4rwt>>.

1. there is a communication between a lawyer and a client;
2. which entails the seeking or giving of legal advice; and
3. which is considered to be confidential by the parties.⁸

The Town's solicitor attended the *in camera* session on February 16 and provided council with legal advice relating to both the application of the open meeting rules to the closed session discussion and the Town's contract with the integrity commissioner.

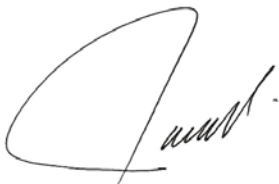
My review indicates that council's discussion fit within the open meeting exception for solicitor-client privilege outlined in s.239(2)(f) of the Act.

Conclusion

My review indicates that the *in camera* discussion on February 16, 2021 did not violate the open meeting rules set out in the Act.

I would like to thank the Township for its co-operation during my review. The Mayor confirmed that this letter would be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc: Sarah Kim, Township Clerk

⁸ *Solosky v. The Queen*, [1980] 1 S.C.R. 821