

## BY EMAIL

Council for the Town of Grimsby  
c/o Mayor Jeff Jordan  
160 Livingston Avenue  
Grimsby, ON  
L3M 0J5

November 29, 2023

Dear Council for the Town of Grimsby:

### **Re: Closed meeting complaint**

My Office received a complaint alleging that the Town of Grimsby's *in camera* meeting on February 21, 2023 violated the open meeting rules. Based on the nature of the resolution that council passed in open session afterwards, which was about supporting women in politics, the complaint alleged that the discussion did not appear to fit within the cited exceptions for personal matters about an identifiable individual and litigation or potential litigation. The complaint also alleged that the decision to add the closed session item to the February 21, 2023 agenda should have been made by council in open session.

I am writing to share the outcome of my review. For the reasons set out below, I have concluded that council's discussion on February 21, 2023 fit within the exception for personal matters about an identifiable individual, as well as the exception for advice subject to solicitor-client privilege. However, council for the Town of Grimsby contravened section 239(4)(a) of the *Municipal Act, 2001* (the "Act")<sup>1</sup> by failing to provide sufficient information about the general topic of discussion in its resolution to proceed into closed session.

### **Ombudsman's role and authority**

As of January 1, 2008, the *Municipal Act, 2001* (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.<sup>2</sup> Municipalities may appoint their own investigator. The Act designates the

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<sup>1</sup> SO 2001, c 25.

<sup>2</sup> *Ibid*, s 239.1.

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.

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](http://www.ombudsman.on.ca/digest).

## Review

We notified the Town of our intent to investigate on October 26, 2023. My Office reviewed the meeting materials for the February 21, 2023 meeting, including the agenda, the open and closed meeting minutes, and the video of the *in camera* discussion. In addition, we spoke with the Town's Clerk and Chief Administrative Officer (CAO).

## Background

The Town's February 21, 2023 council meeting was called to order at 9:54 p.m.

According to the video of the meeting, approximately 30 minutes later, council resolved to move into closed session, citing the exceptions for personal matters about an identifiable individual and litigation or potential litigation.

The closed session was called to order at 10:23 p.m. The discussion, which lasted approximately an hour, was about the conduct of a particular individual. Council discussed various options for how they should respond to the conduct. Council passed a resolution providing direction to staff, and the closed session was adjourned at 11:24 p.m.

Once back in open session, council passed a resolution expressing its support for women in politics and their right to participate in a political environment free from misogyny and harassment. Council committed to taking steps to ensure that the Town's political environment was inclusive and welcoming, and encouraging other municipalities to support women in politics and promote gender equality. Council also resolved to send a copy of the resolution to all Ontario municipalities, the Premier, and Grimsby's Member of Parliament and Member of Provincial Parliament, among others.

The meeting was adjourned shortly thereafter.

## Analysis

### *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. The Information and Privacy Commissioner has found that information pertaining to an individual solely in their professional capacity will not normally qualify as personal information; however, it may if it reveals something personal about them.<sup>3</sup> Discussions in which an individual’s conduct is scrutinised will generally be considered personal in nature.<sup>4</sup> Although not binding on my Office, these decisions are informative.

In a 2018 report to the Town of Amherstburg, I found that council’s discussion fit within the exception because it was about identified individuals’ conduct and allegations that they acted improperly, and council members expressed their opinions about the alleged conduct.<sup>5</sup>

Similarly, in the present case, while *in camera*, council discussed and scrutinized an individual’s conduct. Accordingly, the discussion fit within the exception for personal matters about an identifiable individual.

### *Applicability of the exception for litigation or potential litigation*

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.<sup>6</sup> 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.<sup>7</sup> Council must believe there is a reasonable prospect of litigation and must use the closed meeting to explore that prospect in some way.<sup>8</sup> Discussions about whether or not to litigate are also captured by the exception.<sup>9</sup>

<sup>3</sup> *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), online: <<https://canlii.ca/t/1scqh>>.

<sup>4</sup> *Madawaska Valley (Township) (Re)*, 2010 CanLII 24619 (ON IPC), online: <<https://canlii.ca/t/29p2h>>.

<sup>5</sup> *Amherstburg (Town of) (Re)*, 2018 ONOMBUD 8 at paras 32-33, 67, online: <<https://canlii.ca/t/hvmv1>>.

<sup>6</sup> Letter from the Ontario Ombudsman to the City of Timmins (May 9, 2017) at 2, 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, online: <<https://canlii.ca/t/jw7tk>>.

<sup>7</sup> Letter from the Ontario Ombudsman to the City of Timmins (May 9, 2017) at 2, 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, online: <<https://canlii.ca/t/jw7tk>>.

<sup>8</sup> *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 at para 26, online: <<https://canlii.ca/t/hqsph>>; and *West Lincoln (Township of) (Re)*, 2015 ONOMBUD 34 at para 36, online: <<https://canlii.ca/t/gtp7g>>.

<sup>9</sup> See e.g. *Head, Clara and Maria (United Townships of) (Re)*, 2012 ONOMBUD 8, online: <<https://canlii.ca/t/gtth4>>.

In a 2022 report to the City of Brockville, I found that council's discussion about one of the City's employees did not fit within the litigation or potential litigation exception.<sup>10</sup> Although council discussed the individual's conduct and some members expressed concerns about their performance, there was no ongoing litigation at the time and any concern about litigation was speculative.

In the present case, there was no ongoing litigation against the individual who was the subject of the *in camera* discussion and council only briefly discussed the possibility of seeking legal advice about commencing litigation. It cannot be said that there was a reasonable prospect of litigation at the time. Accordingly, council's discussion did not fit within the exception for litigation or potential litigation.

### *Applicability of the exception for advice subject to solicitor-client privilege*

Although council did not cite the exception for advice subject to solicitor-client privilege before going into closed session, we nevertheless considered during our review whether this exception applied to council's discussion.

The 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.<sup>11</sup> The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

I have previously found that it is not necessary that the municipality's lawyer be present in order for the exception to apply. For example, in a 2015 report to the City of Owen Sound, I found that council's discussion fit within the exception where the city solicitor communicated legal advice for the benefit of council to the Deputy Clerk, who then relayed it to council in a closed session, where council discussed it.<sup>12</sup>

In the present case, no lawyers were present *in camera*. However, at one point during the meeting, the CAO provided an update to council about advice she had sought from the Town's lawyers. The CAO conveyed the advice she had received from the lawyers to council. As a result, this part of the *in camera* discussion fit within the exception for advice subject to solicitor-client privilege.

<sup>10</sup> *Brockville (City of) (Re)*, 2022 ONOMBUD 12, online: <<https://canlii.ca/t/jrhjr>>.

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

<sup>12</sup> *Owen Sound (City of) (Re)*, 2015 ONOMBUD 36, online: <<https://canlii.ca/t/gtp7l>>.

### *The agenda*

The complaint alleged that the decision to put this item on the agenda for discussion in closed session should have been made in open session. However, there is no requirement under the *Municipal Act, 2001* that agendas for either open or closed sessions be created during open council meetings. We understand that the municipality's normal practice is for staff to prepare the agenda, including for closed session, ahead of the meeting, and council must then vote to approve the agenda at the beginning of each meeting. Council must also pass a resolution in open session before closing a meeting, which it did in this case.

### *The resolution to proceed in camera*

Section 239(4)(a) of the Act requires that before holding a closed meeting, council must state by resolution "the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting". The Ontario Court of Appeal noted in *Farber v. Kingston* that a 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."<sup>13</sup>

I have previously determined that merely citing the open meeting exception(s) that council is relying on to hold a closed meeting generally will not meet the requirement set out in section 239(4)(a) of the Act.<sup>14</sup> While it is a best practice to include the exception(s),<sup>15</sup> municipalities must also add an appropriate "level of informative detail" to the resolution.<sup>16</sup>

In this case, council cited the exceptions from the *Municipal Act, 2001* that it was relying upon to move *in camera*, but did not provide any further information about the topic of discussion. While I appreciate that this was a sensitive matter and council did not wish to give any identifying information about the individual in question, it should nevertheless have ensured that the resolution to enter into closed session included a brief description of the subject matter to be considered *in camera*. In this case, in addition to citing the closed meeting exceptions, council could have disclosed that it was going to discuss the conduct of a particular individual and possible responses to their conduct.

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<sup>13</sup> *Farber v. Kingston (City)*, 2007 ONCA 173 at para 21, online: <<https://canlii.ca/t/1qtzl>>.

<sup>14</sup> See e.g. *Brockville (City of)*, 2016 ONOMBUD 12, online: <<https://canlii.ca/t/h2ssr>>; *Brockville (City of) (Re)*, 2022 ONOMBUD 12, online: <<https://canlii.ca/t/jrhjr>>; and Letter from the Ontario Ombudsman to the Town of Huntsville (May 15, 2023), online: <<https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/municipal-meetings/2023/town-of-huntsville>>.

<sup>15</sup> *Brockville (City of) (Re)*, 2022 ONOMBUD 12 at para 25, online: <<https://canlii.ca/t/jrhjr>>.

<sup>16</sup> *Brockville (City of)*, 2016 ONOMBUD 12 at para 45, online: <<https://canlii.ca/t/h2ssr>>.

## Conclusion

Council for the Town of Grimsby's *in camera* discussion on February 21, 2023 did not contravene the *Municipal Act, 2001* because the subject matter fit within the exceptions for personal matters about an identifiable individual and advice subject to solicitor-client privilege.

However, council did contravene section 239(4)(a) of the Act by failing to provide sufficient information in its resolution to close the meeting about the matter to be discussed *in camera*. In future, council should ensure that it provides a general description of the subject matter to be discussed in closed session in a way that maximizes the information available to the public, while not undermining the reason for excluding them.

The Mayor and Clerk were given an opportunity to review the contents of this letter and provide comments to my Office. All comments received were considered before the finalization of this letter.

I would like to thank the Town for its co-operation during my review. This letter will be published on my Office's website, and should also be made public by the Town. In accordance with section 239.2(12) of the *Municipal Act, 2001*, council is required to pass a resolution stating how it intends to address this letter.

Sincerely,



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Paul Dubé  
Ombudsman of Ontario

Cc: Bonnie Nistico-Dunk, Director of Legislative Services/Town Clerk

*Cette lettre est aussi disponible en français*