

BY EMAIL

September 29, 2021

Council for the Township of South Frontenac
c/o Angela Maddocks, Clerk
4432 George Street, PO Box 100
Sydenham, ON K0H 2T0

Dear Council for the Township of South Frontenac:

Re: Closed Meeting Complaint

My Office received a complaint about a closed meeting held by council for the Township of South Frontenac (the “Township”) on July 13, 2021. The complaint alleged that the topic discussed by council did not fit within the closed meeting exception cited by the municipality under the *Municipal Act, 2001* (the “Act”).

I am writing to share the outcome of my review.

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.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 Township.

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.

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

Review

My Office reviewed documentation related to the July 13, 2021 closed meeting, including a PowerPoint presentation delivered during the meeting, the meeting agenda, and the draft minutes. We also reviewed relevant portions of the Township's procedural by-law and spoke with the Clerk and Mayor.

At 6:00 p.m. on July 13, 2021, council held a Special Committee of the Whole meeting.

Council passed a resolution to go into closed session to discuss the Johnston Point Development, citing the exception for solicitor-client privilege. The exception for personal matters was also cited with respect to a different subject, which was not the focus of our review.

According to information we reviewed, the Township's solicitor attended the meeting and delivered a presentation about the development project. Following the presentation, the solicitor responded to council members' questions in relation to confidential matters. Council did not pass any resolutions pertaining to the development or provide any direction to staff on the matter.

Council approved minutes from a previous closed session meeting and passed a resolution to rise from closed session at 7:02 p.m.

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

Per s. 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the subject matter being considered is advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

This exception covers discussions that include communications between the Township and its solicitor in seeking or receiving legal advice intended to be confidential.² The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

In this case, the Mayor told us that the objective of the meeting was to advise council of the Township's legal obligations around the Johnston Point Development. During the meeting, the Township's solicitor actively participated in the discussion, providing confidential legal advice and responding to questions posed by council. Accordingly, council's discussion fit within the exception for solicitor-client privilege.

The complaint to my Office suggested that the discussion did not fit within the exception, as the presentation included information about the project that was not confidential. However, the courts have found that it is unrealistic to expect council to parse its discussion where it would

² *Timmins (City of) (Re)*, 2017 ONOMBUD 4 at para 28, online: <<https://canlii.ca/t/h4rwt>>.

detract from free and uninterrupted discussion.³ Here, it was not possible for council to separate the confidential legal advice from the general information about the development project. The topics were entwined in such a way that it would not have been realistic to expect council to parse them.

Conclusion

Council for the Township did not contravene the open meeting requirements on July 13, 2021, when meeting in closed session to discuss the Johnston Point Development. The discussion fit within the exception in s. 239(2)(f) for advice subject to solicitor-client privilege.

I would like to thank the Township of South Frontenac for its co-operation during my review. We request that this letter be provided to council and made available to the public no later than the next meeting of council.

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc: Angela Maddocks, Clerk, Township of South Frontenac

³ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 at para 43.