



J. Paul Dubé, Ombudsman

BY EMAIL

Council for Dufferin County
W. & M. Edelbrock Centre
30 Centre Street
Orangeville, ON L9W 2X1

August 31, 2022

Dear Members of Council for Dufferin County:

RE: Closed meeting complaint

My Office received a complaint regarding a closed meeting held by Dufferin County's Infrastructure and Environmental Services Standing Committee (the "Committee") on April 28, 2022.

The complaint alleged that there was no notice provided to the public that the Committee would be closing a portion of the meeting on April 28, 2022. The complaint also expressed concerns about the Committee going into closed session to discuss solicitor advice pertaining to a development project, after first discussing this item and an associated environmental assessment in open session.

For the reasons set out below, I have found that this meeting was properly closed pursuant to the rules and procedures outlined in the *Municipal Act, 2001*¹ (the "Act").

Ombudsman's role and authority

Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.

¹ SO 2001 c 25.

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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, but 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 Dufferin County.

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

In response to the complaint, my Office reviewed the April 28, 2022 meeting materials, including the agenda, addendum, minutes and resolution to proceed into closed session as well as relevant technical reports and legal opinions made public by the County. We also reviewed the video recording of the open portion of the April 28, 2022 meeting, relevant sections of the *Municipal Act, 2001*, and the County's procedure by-law. My Office also spoke with the County Clerk.

Background

At the time of our review, the Township of Amaranth and Dufferin County were exploring a development project within the County rights-of-way in the Township of Amaranth.

Dufferin County's planning consultant advised that a Schedule C Municipal Class Environmental Assessment would be required to proceed with the development project. According to opinions that had been made public, Dufferin County's solicitor concurred with this opinion.

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The Township of Amaranth opposed this opinion, supporting instead the position that a Schedule C Municipal Class Environmental Assessment would not be required. The Township's position is documented in a resolution included as an agenda item under "Correspondence" in the April 28, 2022 Committee agenda published by Dufferin County.

Meeting on April 28, 2022

Dufferin County's Infrastructure and Environmental Services Standing Committee met at 9:00 a.m. on April 28, 2022. The meeting was livestreamed.

At approximately 9:25 a.m., the Committee discussed an agenda item entitled "Infrastructure and Environmental Services – April 28, 2022 – Item #3: OP Trust Lands Development – Update and Environmental Assessment."

A report dated April 28, 2022 from the County's Director of Public Works/Engineer regarding the development project was tabled as an update to the Committee during the course of the open session discussion. Accompanying this report was a legal opinion dated April 26, 2022 from Dufferin County's solicitor indicating that a Schedule C Municipal Class Environmental Assessment would be required to proceed with the project as proposed.

The Committee then heard from expert representatives hired by the Township of Amaranth and the developer, respectively. Both experts asserted that a Schedule C Municipal Class Environmental Assessment would not be required.

As reflected in the meeting minutes, and confirmed by the video recording, at approximately 9:40 a.m. the Committee resolved to move into closed session to discuss advice subject to solicitor-client privilege, in accordance with s. 239(f) of the *Municipal Act, 2001*.

While in closed session, the Committee sought clarification from the Dufferin County solicitor regarding the environmental assessment and any associated risks.

No other items were discussed in closed session. At approximately 10:13 a.m., the Committee resolved to return to open session.

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The Committee then passed a resolution, “that the report from the County’s Director of Public Works / Engineer dated April 28, 2022 be received and that staff work with WSP Global Inc. on a proposal to complete the Environmental Assessment work described in the report.”

The meeting adjourned at approximately 10:26 a.m.

Analysis

Notice

There are no specific notice requirements for *in camera* meetings outlined in the Act. Instead, the Act requires that notice be provided for the meeting as a whole, which occurred in this instance.

While not a legal requirement, providing advance notice of a planned closed session and of specific topics to be discussed is a best practice in the interest of transparency and accountability. During the open session on April 28, 2022, the Committee received information that was in opposition to the County solicitor’s opinion which was dated April 26, 2022. My Office was told that the decision to move into closed session was made subsequent to the discussion in open session because the Committee wanted to seek additional legal advice. In this case, the closed session was not planned in advance, and therefore the Committee could not have provided notice.

Councils, local boards, and committees have the discretion to go into a closed session as required, including to receive legal advice, as long as the meeting itself complies with the open meeting rules.

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

The exception for advice subject to solicitor-client privilege applies to discussions that include communications between the municipality 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.

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



The complaint to my Office suggested that the discussion did not fit within the exception, as the discussion included legal advice from the County solicitor that was not confidential because it had already been made publicly available. While the County had indeed made the County solicitor's legal opinion public, during the open session on April 28, 2022, the Committee received new information from experts that contradicted the publicly available legal opinion of the County solicitor, and that the publicly available legal opinion did not specifically address. Having received additional information, the Committee could therefore choose to seek further legal advice about the project in closed session.

The Committee's discussion appropriately fit within the exception for solicitor-client privilege.

Conclusion

Dufferin County's Infrastructure and Environmental Services Standing Committee did not contravene the *Municipal Act, 2001* on April 28, 2022 when it proceeded into closed session.

I thank Dufferin County for its co-operation during my review. The Clerk for Dufferin County has confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc: Michelle Dunne, Clerk, Dufferin County

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