



J. Paul Dubé, Ombudsman

BY E-MAIL

December 9, 2022

Council for the Town of Wasaga Beach
c/o Brian Smith, Mayor
30 Lewis Street
Wasaga Beach ON L9Z 1A1

Dear Council for the Town of Wasaga Beach:

Re: Closed meeting complaint

My Office received a complaint that a closed meeting held by the Coordinated Committee of the Town of Wasaga Beach (the “Town”) on July 21, 2022 contravened the *Municipal Act, 2001*¹ (the “Act”). The complaint alleged that a report presented to the Committee in the context of the redevelopment of Town-owned beachfront property was improperly discussed during this closed meeting.

Ombudsman’s role and authority

As of January 1, 2008, the *Municipal Act, 2001* 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 the Town of Wasaga Beach.

¹ SO 2001, c 25.

483 Bay Street, 10th Floor, South Tower / 483, rue Bay, 10^e étage, Tour sud
Toronto, ON M5G 2C9

Tel./Tél. : 416-586-3300 Facsimile/Télécopieur : 416-586-3485 TTY/ATS : 1-866-411-4211

www.ombudsman.on.ca

Facebook : facebook.com/OntarioOmbudsman Twitter : twitter.com/Ont_Ombudsman YouTube : youtube.com/OntarioOmbudsman



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 documents submitted by the complainant and made enquiries with the Clerk about the concerns raised. My Office also reviewed the meeting material for the July 21, 2022 meeting, including the open and closed meeting minutes and the agenda.

The Coordinated Committee

The Coordinated Committee of the Town of Wasaga Beach ("the Committee") is a committee of the whole that combines all the functions of the Town's standing committees. The Committee's agenda is divided into sections, with the Chair of each standing committee chairing the section that relates to their respective committee's business. We were told that closed sessions of the committee always proceed under the "General Government" section of the agenda.

The July 21, 2022 meeting

The Committee met in council chambers on July 21, 2022, at 9:00 a.m.

At 11:57 a.m., the Committee resolved to move *in camera* to discuss four items, only one of which was the subject of a complaint to my Office. The minutes specified that this item was closed under the "security of the property" exception.

Discussions pertaining to the redevelopment of Town-owned beachfront property began at 12:07 p.m. The discussions under this item pertained to two different reports, which my Office was told were treated separately by the Committee. The complaint pertains only to the discussions about the first report (the "report"), which specifically considered a request made by a project developer.

In addition to council members and Town staff members, two solicitors for the Town were present for the closed session discussion of this item, as well as a fairness monitor (responsible for reviewing the procurement process). The Committee received and discussed legal advice from the solicitors related to a request made by a project developer. The Committee also discussed positions and strategies in relation to this request, and these discussions referred to personal information about an identifiable individual. The Committee provided direction to staff.

The Committee moved back into open session at 1:42 p.m. In open session, the Committee resolved to receive the report and to confirm the direction provided to the Chief Administrative Officer in closed session pertaining to the “beachfront negotiations”. The Committee meeting adjourned at 1:47 p.m.

Analysis

Applicability of the exception for security of the property of the municipality

The closed meeting minutes and the open meeting agenda indicate that the Committee relied on the exception for security of the property of the municipality to discuss the redevelopment of Town-owned beachfront property in closed session.

Paragraph 239(2)(a) of the *Municipal Act, 2001* allows closed session discussions about the “the security of property of the municipality or local board”. In previous reports, my Office has found that “security of the property of the municipality” should be given its plain meaning: The phrase applies to the protection of property from physical loss or damage, such as vandalism or theft, and the protection of public safety in relation to that property.² This exception does not include the security or protection of financial or economic interests relating to property.³

In this case, there was no apparent threat to the municipality’s property in relation to the discussion of the developer’s request. No one we spoke with pointed to any threat to municipal property that would bring this discussion within the exception. Accordingly, the discussion did not fit within the exception for security of the property of the municipality.

² *Amherstburg (Town of) (Re)*, 2018 ONOMBUD 8, online: <<https://canlii.ca/t/hvmv1>>.

³ *Port Colborne (City of)*, 2015 ONOMBUD 32, online: <<https://canlii.ca/t/gtp7c>>.

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

My Office confirmed that solicitors were present during the discussion and that legal advice was provided in relation to the report. While not cited by the Town, I therefore considered whether the exception at paragraph 239(2)(f) of the Act, the exception for advice subject to solicitor-client privilege, applies.

The purpose of the exception for advice subject to solicitor-client privilege is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.⁴ The Supreme Court of Canada has found that solicitor-client privilege extends when three conditions are met:

- i. There is a communication between a lawyer and a client;
- ii. Which entails the seeking or giving of legal advice; and
- iii. Which is considered to be confidential by the parties.⁵

In this case, two solicitors attended the Committee's meeting to communicate with their client, the Town. During the meeting, the Town's solicitor provided legal advice to the Committee pertaining to a potential action and next steps, and considered questions and comments from members of council. The Committee's decision to hear this advice *in camera* indicates that both parties considered it to be confidential.

The closed meetings minutes reviewed by my Office reveal that legal advice was provided throughout the discussion of the report and that the primary purpose of the discussion was for Town's solicitors to weigh in on certain aspects of the redevelopment of the Town-owned beachfront property. My Office did not identify anything in the closed meeting minutes that was not closely intertwined with the legal advice provided. Accordingly, this discussion fit within the exception for advice subject to solicitor-client privilege under paragraph 239(2)(f) of the Act.

Applicability of the exception for plans and instructions for negotiations

My Office was also told that the discussion touched on positions and strategies in relation to the redevelopment of the Town-owned beachfront property. Therefore, I also examined whether the exception for discussions about a position, plan, procedure, criteria or instruction for negotiations applied.

⁴ *Letter from the Ombudsman of Ontario to the Municipality of Temagami* (1 December 2021), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2021/municipality-of-temagami-en>>.

⁵ *Solosky v. The Queen*, 1979 CanLII 9 (SCC), online: <<https://canlii.ca/t/1mjtq>>.

The purpose of the exception for plans and instruction for negotiations at paragraph 239(2)(k) of the Act is to allow “a municipality to protect information that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation.”⁶ In order for the exception to apply, the municipality must show that the following conditions are met:

- i. The *in camera* discussion was about positions, plans, procedures, criteria, or instructions;
- ii. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
- iii. The negotiations are being carried on currently, or will be carried on in future; and
- iv. The negotiations are being conducted by or on behalf of the municipality.⁷

In this case, the Committee strategized with counsel in relation to potential courses of action for the redevelopment of Town-owned beachfront property. This discussion concerned the Town’s position, in the context of a request that required the Town’s consent. Such negotiations were being carried on at the time of the meeting and were being conducted by the municipality. Accordingly, this discussion fit within the exception for plans and instructions for negotiations under paragraph 239(2)(k) of the Act.

Applicability of the exception for personal matters about an identifiable individual

The complaint raised with my Office a concern that personal matters about an identifiable individual may have been purposefully included in the report in order to discuss it in closed session. The Committee did not cite the exception for personal matters about an identifiable individual to move *in camera*, but we confirmed that such information was indeed discussed.

Paragraph 239(2)(b) allows a meeting to be closed when discussions pertain to personal matters about an identifiable individual. Personal information is information that can be reasonably expected to identify an individual.⁸ Our Office has already stated that information about an individual in a professional capacity is not considered to be “about” the individual,⁹ unless it reveals something of a personal nature.¹⁰

⁶ *Grey Highlands (Municipality of) (Re)*, 2021 ONOMBUD 11 at para 17, online: <<https://canlii.ca/t/jfzr8>>.

⁷ *St. Catharines (City of)*, 2019 ONOMBUD 1 (CanLII), at paras 30-31, online: <<https://canlii.ca/t/hxrk5>>.

⁸ *Ontario (AG) v. Pascoe*, 2002 CanLII 30891 (ONCA).

⁹ *Letter from the Ombudsman to the Township of Russell* (8 August 2014), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/township-of-russell>>.

¹⁰ *Letter from the Ombudsman to the Town of Midland* (4 February 2014), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2014/town-of-midland>>

My Office confirmed that personal information about an identifiable individual was discussed and that it was intertwined with the discussion about potential courses of action for the redevelopment of Town-owned beachfront property. Accordingly, the exception for personal matters about an identifiable individual under paragraph 239(2)(b) of the Act also applies.

Conclusion

Council for the Town of Wasaga Beach did not contravene the *Municipal Act, 2001* on July 21, 2022 when council moved *in camera* to discuss a report about the redevelopment of Town-owned beachfront property.

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

Sincerely,



Paul Dubé
Ombudsman of Ontario

Cc: Dina Lundy, Clerk, Town of Wasaga Beach