



Ombudsman Report

**Investigation into whether
Council for the Municipality of Magnetawan
held illegal closed meetings on
February 28 and March 4, 2015**

**André Marin
Ombudsman of Ontario
June 2015**

Complaint

- 1 In March 2015, my Office received a complaint that council for the Municipality of Magnetawan held a meeting without providing notice to the public on February 28, 2015, and engaged in discussions during a closed session on March 4 that did not fit within the exceptions to the open meeting requirements of the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 2 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.
- 3 As of January 1, 2008, the 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. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 4 The Ombudsman is the closed meeting investigator for the Municipality of Magnetawan.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Council procedures

- 6 The municipality's procedure by-law (by-law 2009-06) states that regular meetings of council are held the second and fourth Wednesday of the month at 7:00 p.m., "or on such other day as may be determined from time to time by council resolution and with appropriate public notice".
- 7 Council meetings are held in the community centre, or at an alternate location with appropriate public notice.
- 8 Notice of meetings is posted on the municipal website. When a regular council meeting is to be held at an alternate time, date, or location, the clerk shall give notice at least seven days in advance through publication in the local newspaper.
- 9 The head of council may call a special meeting of council with 24 hours notice to

members. Public notice must be given on the municipal website as soon as possible and by any other method that is possible within the time frame. The only item of business to be dealt with at a special meeting is that which is listed on the notice of the meeting.

- 10** In the case of an emergency, special meetings of council may be held without public notice. If the community centre is not available, council may meet at another location as determined by a majority of the members.
- 11** All meetings of council must be open to the public, subject to the exceptions to the open meeting requirements outlined in the Act.

Investigative process

- 12** My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law and the Act, as well as the materials for the meetings in question. They also spoke with the Mayor and council, and municipal staff.
- 13** My Office received full co-operation in this matter.

The February 28, 2015 council meeting

- 14** On February 28, council held a special meeting at 10:00 a.m. in a boardroom in the municipal office. The agenda indicated that it would be an open meeting and include a closed session, item 12.1, to discuss the role of the Chief Building Official ("CBO position").

Notice

- 16** The clerk advised my Office that council had been trying for some time to arrange a meeting to consider pulling out of the Joint Building Committee, which fulfills the role of Chief Building Official (including approving building permits) for eight participating municipalities. Magnetawan was interested in hiring its own Chief Building Official with another municipality instead, and the deadline to terminate the agreement with the Joint Building Committee was February 28.
- 17** The clerk advised that he did not find out until the night before the meeting, through a phone call from the Mayor, that a quorum of council would be available

to attend a meeting the next day. The councillors were provided with notice of the meeting through phone calls from the Mayor. The Mayor advised our Office that this notice was provided to council members 24 hours in advance, as required by the procedure by-law.

- 18** With respect to public notice, the information provided to my Office indicates that notice was not posted on the municipality's website until noon on February 28, two hours after the meeting began. The meeting was held in the boardroom instead of the usual community centre, because it was not possible to book the community centre on such short notice.
- 19** The municipality acknowledged that no one from the public attended the meeting, because they did not know when or where the meeting was taking place.

The meeting discussions

- 20** Item 12.1 on the agenda for the February 28 meeting indicated that there would be a closed session held to discuss "CBO Position". According to the Clerk, the closed session was included on the agenda because he anticipated the discussion about the Chief Building Official would include personal information about an individual.
- 21** According to the minutes, at the beginning of the meeting, council voted to adopt the agenda, with the exception of the closed session (item 12.1). Council concluded that discussion of the "CBO position" was not personal in nature and that there was no reason to proceed in camera.
- 22** We were advised that, in open session, council discussed whether the municipality was getting its money's worth through the Joint Building Committee arrangement, or whether it would be preferable to make a new arrangement. The only information captured in the minutes is a resolution to terminate the agreement between the Municipality and the Joint Building Committee, effective June 30, 2015.
- 23** The meeting adjourned at 10:40 a.m.

Analysis

- 24** The Act requires municipalities to pass a procedure by-law that governs the calling, place, and proceedings of meetings, and provides for public notice of all meetings, including special meetings.¹ The procedure by-law states that public notice of special meetings “shall be given on the municipal website as soon as possible and by any other method that is possible within the time frame.”
- 25** The February 28 special meeting was held without prior notice to the public. It is clear that the municipality had the opportunity to notify the public in advance, because council members received notice at least 24 hours ahead of the meeting.
- 26** Notice was only provided to the public after the meeting had occurred. The municipality did not explore methods of providing notice to the public more quickly than its usual practice of posting notice online, such as posting the agenda in the municipal office.
- 27** As I noted in my report on a complaint about a closed meeting in the Township of Nipissing in 2008:

One of the primary purposes behind the notice requirement is to ensure that individuals wishing to attend an open meeting have an opportunity to do so, because they have been informed when and where it will be held. It is difficult to conceive of a situation when notice of a public meeting given after the fact would satisfy the intent of the Act.²

- 28** The procedure by-law only allows for meetings to be held without notice in cases of “emergency”. “Emergency” is not defined in either the by-law or the Act.
- 29** The Ontario Court of Justice has found that, where the Legislature has chosen not to define a common word or phrase, we can presume that it intended for the common meaning of the word or phrase to be applied. With respect to the meaning of “emergency”, the Court noted, “An emergency has a simple and well understood meaning: a serious, unexpected and potentially dangerous situation requiring immediate action (see the Oxford English Dictionary or Black's Law Dictionary for two examples)”.³

¹ s. 238(2 - 2.1).

² Ombudsman of Ontario, “Report: Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008”, at para. 33.

³ *R. v. Zehr*, [2011] O.J. No. 4493 [QL] at 53.

- 30** The Oxford English Dictionary states that the ordinary modern use of “emergency” is, “a juncture that arises or ‘turns up’, esp. a state of things unexpectedly arising, and urgently demanding immediate action”.⁴ The Black’s Law Dictionary entry for “emergency circumstances” points to “exigent circumstances”, which are defined as a, “situation that demands unusual or immediate action and that may allow people to circumvent usual procedures...”.⁵
- 31** The commonality in these definitions appears to be unexpected circumstances requiring immediate or urgent action.
- 32** The February 28 meeting was classified in the minutes and on the agenda as a “special” meeting. There is no indication that it was meant to be an emergency meeting. There is no evidence to suggest that the subject matter discussed had arisen unexpectedly, such that it had to be addressed as an emergency, particularly because the Mayor was able to give councillors 24 hours advanced notice.
- 33** The February 28 meeting was effectively a closed meeting, since no members of the public had the opportunity to attend. The discussions that took place did not fit within any exceptions to the open meeting requirements. Council violated its own procedure by-law, as well as the Act, by failing to provide public notice of the meeting.

The March 4, 2015 council meeting

- 34** The March 4 meeting was a special meeting held at 10:00 a.m. in the community centre. Notice was provided to the public by posting the agenda on the website on the afternoon of February 27.
- 35** The agenda indicated that there would be a closed session to review applications for the position of public works superintendent. No specific exception to the open meeting requirements was cited.
- 36** The open session minutes indicate that council resolved to proceed in camera at 12:20 p.m. to discuss the closed session item on the agenda.
- 37** The complaint to my Office alleged that, when the open session resumed, council immediately voted to abolish the municipality’s economic development office,

⁴ *The Oxford English Dictionary*, Compact Edition, *sub verbo* “emergency”.

⁵ *Black’s Law Dictionary*, 8th Edition, *sub verbo* “exigent circumstances”.

such that it appeared the subject was discussed in camera. The complaint stated that the subject matter did not fit within any exceptions to the open meeting requirements.

- 38** The closed session minutes indicate that council reviewed applications received for the public works superintendent position. The clerk and all members of council advised my Office that this was the only item discussed in camera. Although the specific exception authorizing the discussion is not noted in the agenda or in the resolution to proceed in camera, the clerk advised that they considered the matter to be closed under the “personal matters” exception.
- 39** During interviews, we were told that the economic development office was discussed in open session prior to the closed session as part of a broader discussion about the municipality’s budget. Following the closed session, council instructed the Clerk to prepare a resolution to abolish the office, based on the prior open session discussion. The open session minutes do not capture any discussion about the economic development office, or the instructions to staff.
- 40** There is no indication in the minutes that council reported back in open session regarding the closed session discussions. Staff told my office that council does not usually report back in open session, as members of the public do not often attend council meetings.

Analysis

- 41** The Act permits closing a meeting to the public if the subject matter being considered relates to “personal matters about an identifiable individual, including municipal or local board employees”.⁶ Job applications and resumes contain personal information, including names, addresses and telephone numbers of identifiable individuals, and information relating to education and employment history.⁷ Accordingly, such discussions fall within the “personal matters” exception to the open meeting requirements.
- 42** The information provided to my Office indicates that, during the in camera session on March 4, council reviewed applications for the public works superintendent position. The evidence does not suggest that any other subject matter was

⁶ s. 239(2)(b).

⁷ See, for example, Order MO-1909 of the Office of the Information and Privacy Commissioner (March 3, 2005).

discussed during the closed session. This discussion fit within the exception for “personal matters”.

- 43** The complaint to my Office alleged that council also discussed the elimination of the economic development office during the closed session. Although council did give directions to staff on this matter directly after the closed session, the evidence provided to my Office indicates that this matter was discussed in open session as part of a broader discussion about the budget prior to the in camera session, and that these open session discussions formed the basis for the subsequent instructions to staff. Unfortunately, the open meeting minutes do not contain any information pertaining to the discussion of the economic development office, or the subsequent instructions to the Clerk to prepare a resolution to eliminate it.
- 44** Speculation on this matter could have been largely avoided had complete and accurate minutes been kept of the open session, making clear that council had discussed the economic development office before going into closed session.

Procedural matters

- 45** My investigation revealed several procedural issues with council’s closed meeting practices.

Resolution to proceed in camera

- 46** Section 239(4) of the Act requires that, prior to proceeding into closed session, council must state by resolution the fact of holding the meeting and the general nature of the subject matter to be considered.
- 47** The information on the agenda for the March 4 meeting, and the resolution that was passed at the meeting, did not state that council was proceeding in camera under the “personal matters” exception. Although it is not a requirement of the Act, in the interest of transparency, it is a best practice to include in the resolution the specific exception authorizing the closed session.

The meeting record

- 48** The minutes of the March 4 meeting did not include any information about the actual substance of the discussions that took place. Although information provided during interviews indicated that the economic development office was discussed and voted on in open session, this information was omitted from the minutes.
- 49** In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions, and other proceedings at its meetings.
- 50** While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be referred to. All of the substantive and procedural items that were discussed at a closed meeting should be recorded.
- 51** As discussed in my July 7, 2010 report regarding the Town of South Bruce Peninsula⁸, a record of a closed meeting should include reference to:
- where the meeting took place;
 - when the meeting started and adjourned;
 - who chaired the meeting;
 - who was in attendance, with specific reference to the Clerk or other designated official responsible for recording the meeting;
 - whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
 - a detailed description of the substantive and procedural matters discussed, including reference to any documents considered;
 - any motions, including who introduced the motion and seconders;
 - all votes taken, and all directions given.
- 52** I also strongly encourage municipalities to make audio or video recordings of both open and closed council proceedings. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings.
- 53** More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include: the Townships of Tiny, Adelaide Metcalfe, Brudenell, Lyndock & Raglan, and McMurrich-Monteith; the Towns of Midland and Fort Erie; the Municipalities of Lambton Shores and Brighton; and the Cities of Oshawa, Sault Ste. Marie, Brampton, Niagara Falls, and Welland.

Reporting back

⁸ Ombudsman of Ontario, "Open Conflict: Investigation into whether the Town of South Bruce Peninsula Council improperly held closed meetings", (7 July 2010) at para. 79.

- 54** I encourage councils to report back on what occurred in camera, at least in a general way. In some cases, public reporting might consist of a general discussion in open session of subjects considered in closed session. This might be similar to the information in the resolution authorizing the session, together with information about any decisions, resolutions, and directions given to staff. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.

Opinion

- 55** My investigation found that council for the Municipality of Magnetawan contravened the *Municipal Act, 2001* and its own procedure by-law by failing to provide advance notice of the February 28, 2015 meeting. Due to the lack of notice, the public was unable to attend the meeting, such that the meeting was effectively closed. The discussions that took place did not fit within any exceptions to the open meeting requirements.
- 56** My investigation also found that council did not violate the Act when it closed part of its March 4, 2015 meeting to discuss personal matters about identifiable individuals.

Recommendations

- 57** I am making the following recommendations to assist council for the Municipality of Magnetawan to improve its practices with respect to open meetings.

Recommendation 1

The Municipality of Magnetawan should ensure that notice of meetings is provided to the public in advance, in accordance with its procedure by-law.

Recommendation 2

The Municipality of Magnetawan should ensure that its resolutions to proceed in camera provide a description of the issue to be discussed, as well as the exception authorizing the discussion.

Recommendation 3

The Municipality of Magnetawan should ensure that its meeting record is complete and accurately reflects all of the substantive and procedural items that were discussed.

Recommendation 4

The Municipality of Magnetawan should implement a practice of audio or video recording both open and closed session meetings.

Recommendation 5

The Municipality of Magnetawan should follow a practice of reporting back publicly after closed sessions.

Report

- 58** OMLET staff spoke with the Mayor and the Clerk on June 15, 2015 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 59** My report should be shared with council for the Municipality of Magnetawan and made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario