



Ombudsman Report

**Investigation into whether
Council for City of Port Colborne
held illegal closed meetings on
March 8, 2010, January 27, 2014,
and December 8, 2014**

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Complaint

- 1 My Office received a complaint about closed meetings held by council for the City of Port Colborne on March 8, 2010, January 27, 2014, and December 8, 2014.
- 2 The complainant alleged that council's discussions at these meetings regarding a development project in the city did not fit within any of the exceptions for closed meetings in the *Municipal Act, 2001* [the Act].

Ombudsman jurisdiction

- 3 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 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.
- 5 The Ombudsman is the closed meeting investigator for the City of Port Colborne.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-laws have been observed.

Council procedures

- 7 The procedure by-law that was in force at the time of the three meetings required council to state by resolution the fact of holding a closed meeting and the general nature of the matter to be considered.
- 8 The by-law also stated that meetings should be open to the public unless they fell within the exceptions outlined in s. 7 of the by-law. The exceptions in the by-law mirrored those in the Act, with three discrepancies:
 - The exception related to land only mentioned "acquisition" of land, omitting the reference to "disposition" of land included in subsection 239(2)(c) of the Act;
 - There was no mention of the exception for "education or training", as set out in section 3.1 of the Act; and
 - The mandatory exception related to requests under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* in subsection

239(3) of the Act was listed in the by-law with the other exceptions as matters that “may” be discussed in camera.

- 9** The city’s procedure by-law was amended in June 2015. The amendments included the addition of a provision for emergency meetings, a provision for recording closed sessions, additional clarity around the resolution to proceed in camera, and a requirement for council to report back in open session following a closed session. The new by-law also correctly refers to both acquisition and disposition of land, and includes the exception for education or training sessions.
- 10** However, the by-law continues to incorrectly state that council “may” meet in closed session to discuss *MFIPPA* requests made to the municipality. This subject is not discretionary and must be discussed in closed session. Port Colborne should amend its procedure by-law to accord with the Act.

Investigative process

- 11** This complaint included three different meetings spanning three different council terms. The Clerk and now-former Chief Administrative Officer (CAO) were present at all three meetings. Six current councillors also served on the previous council (2010 to 2014). Two current councillors and the current regional councillor for the city also served on council two terms ago (from 2006 to 2010), during the March 2010 meeting identified by the complainant.
- 12** Our Office reviewed the meeting documents for the three meetings, including the agendas, open and closed session minutes, presentation materials, memos from staff, and other supporting documentation. We interviewed the Clerk, the former CAO, the Mayor, the eight current councillors, and the current regional councillor. We also spoke with the Chief Executive Officer of the city’s insurance firm, who gave a presentation at the December 8, 2014 meeting.
- 13** Port Colborne’s CAO retired during the course of our Office’s investigation and has since been replaced with a new CAO. In this report, all references to the CAO relate to the former CAO, who held that position during the time of the meetings.

Meeting 1: March 8, 2010

- 14** Port Colborne held a regular council meeting on March 8, 2010. Present were then-Mayor Vance Badawey and all members of the then-council except Cllr William Steele.¹ Also present were the Clerk, the CAO, and four other members of staff.
- 15** The agenda indicated that council was to proceed in camera to discuss three matters:
- A report from the department of planning and development about an agreement of purchase and sale pertaining to Island Estates, closed under the acquisition/disposition of land exception;
 - A second report from the department of planning and development about an offer to purchase two lots, closed under the acquisition/disposition of land exception; and
 - An oral report from the CAO regarding personal matters about an identifiable individual, closed under the personal matters exception.
- 16** The minutes show that council passed a resolution to proceed in camera at 8:35 p.m. for the reasons outlined on the agenda.
- 17** The open session resumed at 9:15 p.m. In open session, council resolved:
- To direct staff to inform Island Estates that the city wanted to re-enter into a purchase agreement; and
 - To have the Director of Planning and Development address the request to purchase two lots.

Island Estates discussion

- 18** The complainant alleged that the first item on the agenda, the discussion pertaining to a purchase and sale agreement for Island Estates, did not fit within any of the exceptions to the Act's open meeting rules.
- 19** Island Estates was a proposed townhouse development on the city's "island" in the Welland Canal. In 2006, the city signed an agreement allowing a developer to purchase and develop the land, subject to certain time-sensitive conditions.
- 20** The evidence reviewed by our Office indicates that it was the city's position during the time of this meeting that conditions in the agreement of purchase and sale had lapsed, rendering the agreement void. Council discussed the matter in camera to

¹ Two current council members, Councillors Bea Kenny and Barbara Butters, were on council in March 2010. Current Regional Councillor David Barrick was a city councillor at the time of this meeting.

determine whether to enter into a new agreement with the developer to further the project.

- 21** As reflected in the open session minutes, council directed staff to re-enter into an agreement of purchase and sale with the developer. Following this meeting, in May 2010, the city negotiated a new agreement of purchase and sale with the developer for the land in question.
- 22** Council cited the exception in subsection 239(2)(c) for discussions pertaining to a proposed or pending acquisition or disposition of land by the municipality. The complainant alleged that, since the sale had been completed at the time of this meeting, the matter could not have been considered an ongoing acquisition or disposition of land.

Analysis: Application of the "acquisition or disposition of land" exception

- 23** The exception in s. 239(2)(c) for discussions about the acquisition or disposition of land by the municipality is intended to protect the municipality's bargaining position in land negotiations.²
- 24** At the time of this meeting, it was the city's position that the agreement with the developer had lapsed and, if the project were to proceed, a new purchase and sale agreement would have to be negotiated. This position is reflected in the resolution made in open session to re-enter into an agreement with the Island Estates developer, and the signing of a new agreement with the developer in May 2010.
- 25** The city believed that negotiations were ongoing with the developer, and that the information discussed could have harmed the city's bargaining position if released. Accordingly, the discussion fit within the exception in s. 239(2)(c).

Other discussions

- 26** Council also discussed a report regarding an offer to purchase two pieces of land from the city and an oral report from the CAO regarding an identifiable individual. These matters fit within the exceptions in subsections 239(2)(c) and (b), respectively.

² See *Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information*, Toronto: The Committee, July 1984; S. Makush & J. Jackson, *Freedom of Information in Local Government in Ontario*, Toronto: Commission on Freedom of Information and Individual Privacy, 1979, as cited in Final Order MO-2468-F, *Re: City of Toronto*, [2009] O.I.P.C. No. 171.

Meeting 2: January 27, 2014

27 On January 27, 2014, council held a regular meeting that began at 8:10 p.m. Present were then-Mayor Badawey, and all members of then-council except Cllr Dave Elliott.

28 At 8:15 p.m., council resolved to proceed in camera to discuss:

- A staff report pertaining to an appointment to the Heritage Port Colborne committee, closed under the personal matters exception;
- A planning and development report concerning a possible acquisition of land, closed under the acquisition/disposition of land exception; and
- A planning and development report concerning a disposition of land, closed under two exceptions: acquisition/disposition of land and advice subject to solicitor-client privilege.

29 The open session resumed at 8:39 p.m. There was no report back following the closed session.

Island Estates discussion

30 The third item discussed in closed session relates to the development project described above, Island Estates.

31 According to materials reviewed by our Office, council received and discussed a staff report at this meeting regarding the development. The report incorporated legal advice on the matter from the city's solicitors. The report indicated that certain conditions of the agreement signed in 2010 had not been met.

Analysis: Application of the "acquisition or disposition of land" exception

32 As noted, discussions about the acquisition or disposition of land can be held in camera if required to protect the municipality's bargaining position. It is the city's position that negotiations with the developer were ongoing at the time of this meeting because the conditions of the agreement had not been met. This discussion, if held in public, could have harmed the city's bargaining position with respect to any further negotiations with the developer. Accordingly, the discussion fit within the cited exception in subsection 239(2)(c) of the Act.

Analysis: Application of the "solicitor-client privilege" exception

33 During this meeting, council considered advice from legal counsel regarding the status of the agreement with the developer. Counsel was not present at the meeting, but had provided advice on the subject that was included in the staff report. Councillors discussed that advice during the closed session.

34 The right to communicate in confidence with a legal advisor is a fundamental civil and legal right intended to ensure the proper functioning of the legal system.³ The Supreme Court has accepted the following criteria for when solicitor-client privilege will apply:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.⁴

35 The Federal Court has found that "conflict between the right to disclosure and the right to keep communications between solicitor and client confidential should be decided in favour of confidentiality. The right to keep such information confidential is to be maintained unless interference with it is 'absolutely necessary'".⁵

36 The open meeting exception for discussions of advice subject to solicitor-client privilege is limited to instances where some advice from a legal advisor or related communication actually exists and is considered as part of the discussion. As the Information and Privacy Commissioner set out in Order 49, in order for the privilege to apply:

1. There must be a written or oral communication;
2. The communication must be of a confidential nature;
3. The communication must be between a client (or his agent) and a legal advisor; and
4. The communication must be directly related to seeking, formulating or giving legal advice.⁶

³ *Solosky v. the Queen*, [1980] 1 S.C.R. 821 at para. 839.

⁴ *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860; see also *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.) at 288.

⁵ *Stevens v. Canada (Prime Minister) (T.D.)* [1997] 2 F.C. 759 at para. 11.

⁶ Order 49 [1989] O.I.P.C. No. 13.

37 In this case, council was considering written communication from its legal advisor that was intended to provide legal advice on the subject at hand. The advice was communicated as part of a report marked “in camera”. Accordingly, the discussion of the legal advice fell within the exception in subsection 239(2)(f) of the Act and the city’s procedure by-law for advice subject to solicitor-client privilege.

Other discussions

38 Council also discussed a committee appointment, and a proposed acquisition of land by the municipality. These discussions fit within the exceptions in subsection 239(2)(b) and 239(2)(c), respectively.

Meeting 3: December 8, 2014

39 On December 8, 2014, Port Colborne’s newly-elected council held its first meeting since its inaugural meeting on December 1, 2014.⁷ The Mayor and one councillor were serving their first term on council. Councillors and staff told us that this was an orientation meeting to bring the new members of council “up to speed” on ongoing council matters, including their responsibilities as members of council and the specifics of ongoing confidential matters. Returning councillors told us that the council held similar meetings at the beginning of previous terms.

40 This special council meeting began at 5:30 p.m. Council resolved to go into a closed session at 5:31 p.m. to discuss:

- A. A verbal report from the CAO concerning confidential strategic matters and ongoing litigation impacting the city, the receipt of legal advice, and an update on the disposal of Niagara Regional Broadband Network shares, under section 239(2)(a), (b), (c), (d), (e), and (f) of the Act;
- B. A community and corporate services report pertaining to appointments to boards and committees, closed under the personal matters exception; and
- C. A report from the CAO regarding a potential litigation matter.

41 According to the open session minutes, all members of council were present, as well as the CAO, the Clerk, and three other members of staff. Cllr. Frank Danch arrived 30 minutes into the meeting at 6:00 p.m. The minutes note that the city’s solicitors, representatives from the city’s insurance company, and the Chair of Port Colborne Fibre Inc. were each in attendance for part of the discussion of Item A.

⁷ Council also had a general education session that was open to the public on November 28, 2014, prior to taking office.

42 The open session resumed at 10:30 p.m. Council passed two motions arising from the in camera discussions:

- That the Clerk be directed to bring forward a report in open session with respect to appointments to several boards and committees; and
- That staff suspend the use of the opening prayer at council meetings, pending a decision on the subject from the Supreme Court of Canada.

43 The meeting adjourned at 10:35 p.m.

Island Estates discussion

44 As noted, the city signed an agreement with a developer in 2006 regarding land for a project known as Island Estates. It is the city's position that the conditions in the original agreement were not met. The two parties signed a new agreement in 2010, and again, the city believes the conditions in the agreement were not met. The city decided not to proceed with the sale. At this meeting, council received an update on the matter from its external solicitors.

Analysis: Application of the "litigation or potential litigation" exception

45 The courts have found that, "in order for a document to be privileged it is not necessary that it be created at a time when there is a certainty of litigation but merely that litigation is in reasonable prospect. On the other hand, there must be more than a suspicion that there will be litigation".⁸

46 In this case, council received an update on the expiry of the agreement and legal advice regarding the likelihood of potential litigation. There was more than a mere suspicion that litigation would arise. Accordingly, the discussion fit within the exception in the Act for potential litigation matters.

Presentation by city solicitors

47 In addition to the specific litigation update on the Island Estates matter, the city's lawyers provided an update on three other ongoing litigation files. These discussions also fit within the exception in s.239(2)(e) for litigation or potential litigation.

⁸ *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269 (O.C.G.D. — Master).

48 Prior to providing the updates on specific ongoing litigation files, the lawyers provided council with an “overview of legal obligations and responsibilities of members of council, and provided legal advice respecting same.” Our Office reviewed a copy of their presentation slides. Topics covered in their PowerPoint presentation included:

- Municipal conflict of interest rules
- Role of council / role of staff
- *FIPPA* and *MFIPPA*
- Procedural by-law
- Minute taking
- Confidentiality of closed meetings
- Legislative protection for councillors

Analysis: Application of the “education and training” exception

49 Although missing from the city’s procedure by-law at the time of this meeting, s. 239(3.1) of the Act allows council to hold a closed session for the purpose of educating or training its members, provided that “at the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council.” In order to cite this exception, council must state by resolution the fact of the closed meeting, the general nature of the subject matter to be discussed, and that it is to be closed under that subsection.

50 In a 2009 report, Local Authority Services (LAS) noted that this exception “covers meetings where the sole purpose is to provide education or training but where no transactional business or decision making occurs”.⁹ In that case, LAS relied on the common meaning of the words “education” and “training” to distinguish sessions that fit in this exception from general instances where information relevant to municipal business is imparted to council.

51 In our Office’s 2009 report, “The ABCs of Education and Training”, we explained that the exception is limited to issues that would not normally constitute council business and wouldn’t generally be addressed at an open session.¹⁰ More recently, in our report on a complaint about the Village of Casselman, we explained that the exception is intended to allow councillors to receive information that may assist them

⁹ Local Authority Services, *Report to the County of Essex* (September 2009) online: <http://www.agavel.com/wp-content/uploads/2013/09/Essex_County_Report_Sep_18_Final.doc>.

¹⁰ Ombudsman of Ontario, *The ABCs of Education and Training* (23 March 2009) at para. 29, online: <<https://ombudsman.on.ca/Resources/Reports/The-ABCs-of-Education-and-Training.aspx>>.

in better understanding the municipality's business and/or to acquire skills, rather than to exchange information on an issue relevant to council business.¹¹

- 52** Throughout their presentation, the city's lawyers provided general advice about how to interpret the rules that apply to council and stressed the importance of following the rules. Although it was not cited, this part of the meeting fit within the exception for education or training sessions in s. 239(3.1) of the Act, as the lawyers provided council with general information and training regarding topics like confidentiality, council's role, *MFIPPA*, and minute taking.

Other discussions: Presentation by the city's insurance representatives

- 53** Council next received an update on the city's insurance program from two representatives, including the CEO, of its insurance company. The discussion included what to do and what not to do regarding active insurance claims, and liability for both the corporation and for individual councillors.
- 54** The insurance representatives gave council a general summary of the process for claims against the city and advised that insurance claims are handled administratively by staff and the insurance company. Councillors were advised not to comment publicly on specific claims against the city.
- 55** The CAO told us that the insurance representatives also talked about specific ongoing claims against the city. He said that the insurers updated council on several ongoing claims, naming the individuals involved and describing the nature of their injuries.
- 56** Three councillors said they remembered an insurance presentation that referred to individual cases as examples, but were not sure that happened at the December 8 meeting. Six other councillors and the Clerk told us they don't believe any specific cases were discussed at this meeting, and the presentation was limited to an overview of the insurance process.
- 57** Given the conflicting recollections of councillors and staff, we spoke to the CEO of the insurance company. He said his presentation was limited to general information, including how the claims process works and samples of various denial letters that may be sent to the public. Personal and identifying information was redacted from the sample denial letters.

¹¹ Ombudsman of Ontario, *Restaurant Roundtable* (April 2015) at para. 54, online: <<https://ombudsman.on.ca/Resources/Reports/Village-of-Casselmann-%282%29.aspx>>.

58 The CEO provided us with a copy of his presentation. The only information about claims is a slide showing the number of claims filed in each of the past five years. He said that this is a standard orientation presentation he gives to municipal council members. He told us he couldn't recall any individual claims coming up as examples, but that it is possible examples were raised.

59 Staff suggested that this part of the meeting was held in camera because:

- Insurance claims that are not resolved can lead to litigation;
- Staff directed councillors to refer back to legal advice received in the past regarding their obligations with respect to confidentiality; and
- Specific individuals and the details of their claims were discussed.

Analysis: Applicability of the exceptions for solicitor-client privilege, litigation or potential litigation, and personal matters about identifiable individuals

60 We considered the three exceptions relied upon by the city to move into closed session for this presentation.

61 As noted, the exception in section 239(2)(f) for advice that is subject to solicitor-client privilege applies only to communications between the client and the solicitor. The city's solicitors left the meeting before the discussion about insurance. No communication from the lawyers was considered by council during the presentation. Accordingly, the exception for solicitor-client privilege does not apply to this discussion.

62 As noted, the exception for litigation or potential litigation may apply to discussions where litigation is a real possibility in a specific case. There is no evidence to suggest that council discussed any specific cases where the city faced litigation or potential litigation. The unspecific threat that insurance claims could possibly lead to litigation at some point does not meet the criteria to fit within the exception in s. 239(2)(e).

63 The exception in s. 239(2)(b) relates to personal information about identifiable individuals. Only three witnesses thought that specific cases might have been discussed during the meeting. No specific cases were part of the insurance company's presentation or recalled by the presenter. The CEO also noted that personal identifiers were removed from sample denial letters referred to during the presentation. It is possible that cases were referenced offhand, potentially to illustrate points made during the discussion. However, their absence from the presentation material, the Clerk's notes, and the memory of most of those present indicate that, if such cases were mentioned, they were not central to the issues discussed.

Analysis: Application of the "education and training" exception

- 64** While the exceptions cited by the city do not apply to the discussion about insurance, council could have relied upon the exception for education or training in the Act.
- 65** As discussed above, subsection 239(3.1) of the Act allows council to hold a closed session for the purpose of educating or training its members, provided that "at the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council."
- 66** The information provided by the insurance representatives related to the general claims process and the role of councillors with respect to insurance claims. It did not relate to any specific business or decision-making of council.
- 67** Port Colborne should take care to cite the appropriate exception when discussing matters in camera, to ensure that the matter fits within an exception and to ensure transparency. Further, if relying on the exception for education or training, council must cite the specific subsection of the Act in the resolution to go in camera.

Update on local economic initiatives

- 68** Council next received an update on various economic development initiatives from the Director of Planning and Development. The initiatives discussed included:
- Expressions of interest from three companies that were considered locating in or expanding operations in Port Colborne;
 - A non-profit organization planning to acquire a residential property from a private individual in the city; and
 - A local business interested in leasing land from the city.

Analysis: Potential corporate expansion projects

- 69** City staff told our Office that the corporate expansion plans were discussed in camera because the corporations involved had asked the city to keep the information confidential. Staff suggested that the discussion might have fit within the exception for litigation or potential litigation, because the companies could have sued the city if confidential business information had been disclosed. Staff further suggested that the discussion identified the business owners, such that the exception for personal matters about an identifiable individual applied. Lastly, staff suggested that the discussion fit within the exception for security of the property of the municipality, since the proposals could have included using city-owned land or assets like dockage space.

- 70** As reviewed, the exception in s. 239(2)(e) for litigation or potential litigation is reserved for circumstances where the subject matter discussed is actual litigation that is being considered or ongoing. No litigation was actually being considered in this case and the discussion did not fit within this exception.
- 71** In order to qualify as “personal information”, the information must reveal something about an individual personally. Information about a person in their professional capacity can be considered personal, but only if something personal is revealed.¹²
- 72** Information associated with an individual in a professional, official, or business capacity will not be considered to be personal information about the individual.¹³ In a 2008 decision, the Information and Privacy Commissioner of Ontario determined that a two-part test established to distinguish personal information from business information can be applied to determine whether a discussion constituted personal matters for the purposes of the open meeting rules:
1. In what context do the names of individuals appear? Is it in a personal or business context?
 2. Is there something about the particular information that, if disclosed, would reveal something of a personal nature about the individual?¹⁴
- 73** The IPC found that information outside the scope of the personal sphere and within the scope of profit-motivated business activity will not constitute personal information. In order for the information to “cross over” into the realm of personal in the second stage of the test, one must consider what the information reveals. Information that speaks to a business arrangement, such as a landlord owing money to a tribunal, was found insufficient to cross the threshold.
- 74** In this case, the only information revealed about individuals were the names of the owners of the companies making the business proposals. They were mentioned in their professional capacity and no personal information was disclosed. Their names alone do not reveal anything of a personal nature about these individuals. This discussion did not fit within the exception in s. 239(2)(b) for personal matters about an identifiable individual.
- 75** The Act does not define “security” for the purposes of section 239(2)(a). In 2009, the Information and Privacy Commissioner found that “security of the property of the municipality” should be given its plain meaning, in that it applies to protecting

¹² See Order MO-2204 (22 June 2007) online: IPC <https://www.ipc.on.ca/images/Findings/up-mo_2204.pdf>.

¹³ See Orders P-257; P-427; P-1412; MO-1550-F, online: IPC <www.ipc.on.ca>.

¹⁴ PO-2225 (12 January 2004) online: IPC <https://www.ipc.on.ca/images/Findings/Attached_PDF/PO-2225.pdf>; Order MO-2368 (26 November 2008) online: IPC <<https://www.ipc.on.ca/images/Findings/mo-2368.pdf>>.

property from physical loss or damage (like vandalism or theft), and the protection of public safety in relation to that property.¹⁵ In 2011, the IPC clarified that the term can apply to both “corporeal” and “incorporeal” property, as long as it is owned by the municipality and the discussion is about preventing its loss or damage.¹⁶

- 76** In this case, there was no apparent threat to the municipality’s property, either corporeal or incorporeal. Instead, the municipality had been contacted by businesses that might, sometime in the future, want to establish operations in the city. This discussion did not fit within the exception in s. 239(2)(a).

Analysis: Non-profit organization acquiring property

- 77** Council received an update from the CAO about plans for a non-profit organization to acquire a house from a private individual in the city. The land in question would be transferred between a private landowner and the organization, such that it did not constitute an acquisition or disposition of land by the municipality. Staff and councillors did not point to any specific exception that they relied upon to discuss this matter in closed session, and it does not fall within any of the enumerated exceptions in the Act.

Analysis: Local business leasing land from city

- 78** Council discussed a local business that wished to lease land from the city to expand operations.
- 79** This discussion fit within the exception in s. 239(2)(c) for a proposed or pending acquisition or disposition of land by the city. The exception applies to disposition of land through a lease as well as a sale.¹⁷ The land in question was owned by the city, and council was discussing various options for disposing of that land. As noted above, the purpose of the exception in s. 239(2)(c) is to protect the municipality’s bargaining position. In this case, negotiations with the company were ongoing and the city had not yet decided whether to lease the land.

¹⁵ Order MO 2468-F (27 October 2009) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2468-F.pdf>>.

¹⁶ Order MO-2683-I (30 December 2011) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2683-I.pdf>>.

¹⁷ Order MO-3073 (22 July 2014) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-3073.pdf>>.

Discussion of Port Colborne Fibre Inc. shares

- 80** Council next discussed the Niagara Regional Broadband Network, an internet and telecommunications provider jointly owned by utilities owned by four local municipalities, including Port Colborne Fibre Inc. The Chair of Port Colborne Fibre Inc. attended the meeting during this discussion to provide an update on the disposal of Port Colborne's shares in the company, including the various options before council and the terms of the city's contract with the other owners.
- 81** While the minutes do not reflect which exception applied to this discussion, staff told us that this item was discussed in camera because it relates to the security of the property of the municipality, council had received legal advice on the matter in the past, and council may have faced litigation had it breached the confidentiality clause in the agreement with the other owners of the network.
- 82** After reviewing a preliminary version of this report, the former CAO and the city provided comments regarding this discussion, submitting that it fit within the exceptions in the Act for litigation or potential litigation, security of the property of the municipality, and solicitor-client privilege.

Analysis: Applicability of the exceptions for security of the property of the municipality

- 83** The city told our Office that this discussion fit within the exception in s. 239(2)(a) for security of the property of the municipality because there may have been negative impacts on the city's bargaining position had details of the ongoing negotiations been revealed.
- 84** The exception for discussions about the security of the municipality's property in the Act is narrowly construed and applies only to discussions about protecting the municipality's property from physical loss or damage, and public safety related to that property.¹⁸
- 85** In a 2014 report, Local Authority Services described a closed meeting held by the Municipality of Kincardine to discuss the potential sale of Bruce Telecom, a corporation then wholly-owned by the municipality.¹⁹ The sale was discussed over the course of eleven closed meetings. The municipality told the Investigator that the matter was discussed in closed session because, "a discussion in open session would affect the 'economic value' of the transaction", in that public knowledge that council

¹⁸ *Supra* note 15.

¹⁹ Local Authority Services, "Report to the Corporation of the Municipality of Kincardine Regarding Allegations of Improperly Closed Meetings of the Council for the Municipality of Kincardine between February 6, 2013 and January 20, 2014", online: <<http://www.agavel.com/wp-content/uploads/2015/01/Kincardine-Investigation-Final-Report-July-2014.docx>>.

was considering the sale might have caused a reduction in the value of the asset. LAS concluded that, “Protecting the municipality’s bargaining strategy, in terms of shielding it from financial or economic loss, is not a loss or damage within the meaning of security of property in the *Act*”.

- 86** While we understand the city’s apprehension that discussing ongoing negotiations in public may have decreased the value of its shares, that is not sufficient to bring the matter within the exception in s. 239(2)(a). Whether the exception applies depends on the actual subject matter discussed, rather than the potential ramifications of discussing a subject in public.
- 87** In this case, the subject discussed was the ongoing negotiations for the sale of the city’s shares, rather than the potential decrease in value of those shares if the matter was discussed publicly. Protecting the city’s bargaining position in order to shield it from financial or economic loss does not bring the discussion within the exception in s. 239(2)(a).

Analysis: Applicability of the exception for solicitor-client privilege

- 88** The former CAO told us that this matter fit within the exception in s. 239(2)(f) because council had received legal advice on this matter on numerous occasions and the matter was under consideration by the city’s solicitor.
- 89** The exception for solicitor-client privilege in s. 239(2)(f) applies only to communications between a solicitor and a client. The city’s legal counsel was not present for this part of the meeting. There is no evidence to suggest that legal advice was received or discussed during this part of the meeting. The fact that legal advice has previously been received on a subject does not mean that all future discussions of that subject will fall within the exception in s. 239(2)(f).

Analysis: Applicability of the exception for litigation or potential litigation

- 90** The city told our Office that this matter fit within the exception in s. 239(2)(e) because the city would have faced litigation if council members breached their contracted confidentiality obligations.
- 91** Section 239(2)(e) of the Act states that, “A meeting or part of a meeting may be closed to the public if the subject matter being considered is, ... litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board”.

- 92** A plain reading of the Act suggests that, in order to fit within the exception, the subject matter itself must be litigation or potential litigation, as opposed to a subject that could spur litigation in the future. The latter interpretation would open the exception so broadly as to include anything contentious that could possibly lead to litigation.
- 93** The Ontario Court of Appeal considered the exception for litigation or potential litigation in *RSJ Holdings Inc. v. London (City)*.²⁰ The city had discussed an interim control by-law in camera. The court emphasized that the Act permits a closed meeting where the “subject matter being considered” is litigation or potential litigation. In that case, the subject matter being considered was the by-law. The Court observed that:
- [I]t cannot be said that the subject matter under consideration is potential litigation simply because there is a statutory right of appeal by a person affected by the interim control by-law or because the interim control by-law may be subject to a motion to quash. **The fact that there might be, or even inevitably would be, litigation arising from the interim control by-law does not make the “subject matter under consideration” potential litigation** [emphasis added].
- 94** As with the meeting reviewed by the court in *RSJ Holdings*, Port Colborne’s discussion in camera did not relate to litigation or potential litigation. Instead, the subject matter discussed was the sale of shares in the company. There was no ongoing or pending litigation at the time of the meeting. The fact that there might be, or even inevitably would be, litigation arising from the discussion does not make the subject matter litigation or potential litigation for the purposes of the open meeting rules.
- 95** The discussion about Port Colborne Fibre Inc. did not fit within any of the exceptions to the open meeting requirements in the Act.

CAO’s update on land and labour matters

- 96** Council next received an update on various ongoing land and labour matters from the CAO. The CAO provided updates on two ongoing acquisitions or dispositions of land by the municipality and an ongoing lease negotiation for city-owned property, which fit within the exception in s. 239(2)(c) of the Act. He then updated council on the status of ongoing collective bargaining with unions representing city staff.

²⁰ 2005 CanLII 43895 (ON CA).

Analysis

- 97** The exception for discussions about the acquisition or disposition of land by the municipality is intended to be applied in situations where discussing a matter publicly could harm the municipality's bargaining position. It extends to the acquisition or disposition of land through a lease agreement. In this case, all the land matters discussed were in negotiations and discussing them in public could have harmed Port Colborne's bargaining position.
- 89** The term "labour relations" in s.52(3) of the *MFIPPA* refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. In this case, the municipality was in the process of collective bargaining with its employees. These discussions fit within the exceptions in the Act for acquisition and disposition of land (s. 239(2)(c)), and labour relations or employee negotiations (s. 239(2)(d)).

Committee appointments

- 90** Council next discussed applications for boards and committees, and selected individuals for each of 15 committees and local boards. Councillors were provided with application forms submitted by individuals that included names, addresses, home telephone numbers, email addresses, citizenship status, age, occupation, education, and experience. Staff were directed to bring forward a report and by-law in open session regarding the appointments.

Analysis

- 91** The IPC has confirmed that information about a person's employment history, such as start and end dates, projects worked on, and years of service, qualifies as personal information for the purpose of the *MFIPPA*, whereas the person's name and position title alone would not constitute personal information.²¹ In this case, the forms submitted by applicants and considered by council included information that revealed personal details about the individual applicants. Accordingly, this discussion fits within the cited exception.

²¹ MO-3177-I (30 March 2015) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-3177-I.pdf>>.

Legal advice regarding prayer at council meetings

92 Council considered a report from the CAO regarding council's practice, prescribed in its procedure by-law, of having a prayer at the beginning of council meetings. Staff advised council that the municipality had been threatened with litigation by email. An individual had promised to initiate legal proceedings against the municipality if it continued the practice of saying a prayer at council meetings. Following the closed session, council passed a resolution directing staff to suspend the use of an opening prayer at meetings until the Supreme Court of Canada rendered a decision on the issue.

Analysis

93 In order for the "potential litigation" exception to apply, litigation must be more than a remote possibility. Any council continuing to engage in prayer at meetings pending the Supreme Court's decision was facing the possibility of legal action, but that general possibility would not be enough to support closing a meeting under s.239(2)(e).

94 As noted above, the courts have found that, "in order for a document to be privileged it is not necessary that it be created at a time when there is a certainty of litigation but merely that litigation is in reasonable prospect. On the other hand, there must be more than a suspicion that there will be litigation".²²

95 In a 2010 report, our Office found that the receipt of a letter from a solicitor threatening litigation as a next step was enough to bring the discussion within the exception, because litigation over the matter was a real possibility.²³

96 In the case in Port Colborne, the city faced a specific and realistic threat of litigation. Council's discussion was limited to that threat and how council should respond. The discussion fit within the exception in the Act for litigation or potential litigation.

Procedural matters: Resolution to go in camera

97 Council passed the following resolution to proceed in closed session:

That Council proceed in closed session in order to address the following matter(s):

(a) Verbal report from the Chief Administrative Officer providing a debriefing

²² *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269 (O.C.G.D. — Master).

²³ Letter from the Ombudsman of Ontario to the Town of Kearney (2 December 2010).

concerning confidential strategic matters and ongoing litigation impacting the City of Port Colborne and the receipt of legal advice respecting same, and an update on the disposal of Niagara Regional Broadband Network shares, pursuant to the Municipal Act, 2001, Subsection 239(2)(a) the security of the property of the municipality or local board, Subsection 239(2)(b) personal matters about an identifiable individual, including municipal or local board employees, Subsection 239(2)(c) a proposed or pending acquisition or disposition of land by the municipality or local board, Subsection 239(2)(d) labour relations or employee negotiations, Subsection 239(2)(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board, and Subsection 239(2)(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

(b) Confidential Community & Corporate Services, Clerk's Division Report No. 2014-42, Subject: Appointments to Boards and Committees, pursuant to the Municipal Act, 2001, Subsection 239(2)(b) personal matters about an identifiable individual, including municipal or local board employees.

(c) Confidential Chief Administrative Officer Report No. 2014-04 regarding a matter of potential litigation, pursuant to the Municipal Act, 2001, Subsection 239(2)(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.

98 Council discussed at least five topics under paragraph A in the resolution: a legal overview and update from the city's solicitors; a presentation from the city's insurance broker; a discussion of ongoing economic development projects; a discussion of the city's shares in a broadband network company; and an update on land use and labour issues from the CAO.

99 Only two specific topics are referenced in that paragraph (the disposal of broadband network shares and ongoing litigation). Six exceptions were cited in paragraph A (subsections 239(2)(a) to (f)), but the resolution does not indicate which of the exceptions applies to each discussion topic. Various staff and councillors interviewed gave different answers when asked which exception applied to each topic discussed.

100 The CAO told us that this meeting was approached as "alphabet soup", in that the city tried to lump everything that fit within any exception together in one meeting. Since this meeting, the Clerk has made efforts to ensure that resolutions more clearly state the exception that applies to each discussion item. The city has also amended its procedure by-law to provide additional clarity around resolutions to proceed in camera and to more accurately reflect the exceptions set out in the Act.

Analysis

101 The Act requires municipalities, before holding a closed meeting, state “the fact of holding a closed meeting and the general nature of the matter to be considered at the closed meeting”.²⁴ This requirement is echoed in the city’s procedure by-law.

102 As the Ontario Court of Appeal noted in *Farber v. Kingston (City)*²⁵,

[T]he resolution to go into closed session 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.

103 By providing incomplete information regarding the subjects to be discussed in closed session, the City of Port Colborne violated the requirement in the Act to describe the general nature of the subject matter to be discussed in a way that maximizes the information available to the public.

In the interest of transparency, the city should clearly indicate in its resolution to proceed in camera which exception and section of the Act it is using to discuss each specific matter in closed session.

Opinion

104 The items discussed in camera on March 8, 2010 and on January 27, 2014 fit within the exceptions to the open meeting requirements in the *Municipal Act, 2001*.

105 Council’s discussions on December 8, 2014 regarding litigation updates, including with respect to the Island Estates matter; a training session by the city’s lawyers; a training session by the city’s insurers; a discussion about leasing city-owned land to a local business; updates from the CAO about land and labour matters; a discussion about committee appointments; and a discussion of a potential litigation matter all fit within the exceptions to the open meeting requirements in the Act.

106 However, Port Colborne violated the open meeting requirements in the Act and the city’s procedure by-law when council members discussed the following matters in camera, as they do not fit within any of the enumerated exceptions: updates on three potential corporate expansions in the city; a discussion of a non-profit organization

²⁴ *Municipal Act, 2001*, s. 239(4)(a).

²⁵ 2007 ONCA 173, 2007 CarswellOnt 1473, 156 A.C.W.S. (3d) 463, 222 O.A.C. 32, 279 D.L.R. (4th) 409, 31 M.P.L.R. (4th) 31.

acquiring private property in the city; and a discussion of the disposal of shares in Port Colborne Fibre Inc.

- 107** Finally, Port Colborne violated the requirements of subsection 239(4)(a) of the Act, as well as its procedure by-law, by failing to state the general nature of the matters to be considered in the resolution to proceed in camera on December 8, 2014.

Recommendations

Recommendation 1

All members of council for the City of Port Colborne should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

Port Colborne should ensure that no matter is discussed in a closed session unless it clearly falls within one of the enumerated exceptions in section 239 of the *Municipal Act*.

Recommendation 3

When proceeding in camera, Port Colborne should pass a resolution that clearly sets out the fact of the closed meeting and the general nature of each of the matters to be discussed. When the city closes a meeting for education or training pursuant to s. 239(3.1) of the Act, Port Colborne must also reference that particular subsection in the resolution.

Recommendation 4

As a best practice, the city should clearly indicate which exception to the open meeting rules it relies upon to discuss each subject in closed session.

Recommendation 5

Port Colborne should amend its procedure by-law to reflect that the exception in s. 239(3) of the Act is a mandatory exception, such that a meeting shall be closed to the public if the subject matter relates to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act* if the council, board, commission, or other body is the head of an institution for the purposes of that Act.

Report

- 108** The Clerk, former CAO, current CAO, the current Regional Councillor, the city’s external legal counsel, and all current members of council were given the opportunity to review a preliminary version of this report and provide comments to our Office. We received written comments from the former CAO and from the city. All comments were considered in the preparation of this final report.
- 109** In addition to comments about specific matters in this report, the city submitted that, “the City’s position is that the exemptions outlined under the *Municipal Act, 2001* fail to address instances where Council is required to meet in closed session in order to discuss sensitive business/commercial negotiations”.
- 110** The Ministry of Municipal Affairs and Housing is currently conducting a legislation review that includes a review of the *Municipal Act*. The Ministry accepted comments and suggestions for changes to the legislation until October 31, 2015. Our Office suggested that the City of Port Colborne could consider participating in that review with respect to their submission regarding the need for an exception to allow council to meet in closed session to discuss sensitive business or commercial negotiations.
- 111** My report should be shared with council for the City of Port Colborne and made available to the public as soon as possible, and no later than the city’s next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario