

## BY EMAIL

September 26, 2022

Council for the Township of Minden Hills  
c/o Brent Devolin, Mayor  
7 Milne Street, P.O. Box 359  
Minden, ON K0M 2K0

Dear Members of Council for the Township of Minden Hills:

### **Re: Closed meeting complaint**

My Office received a complaint regarding closed meetings held by council for the Township of Minden Hills (the “Township”) in 2021 and 2022. The complaint raised concerns that specific topics discussed did not fit within any of the exceptions to the open meeting rules in the *Municipal Act, 2001* (the “Act”).<sup>1</sup> In particular, the complaint was about a series of discussions, including an October 14, 2021 discussion regarding a minor variance application; a November 11, 2021 discussion regarding a request to waive a deposit; a November 25, 2021 discussion about committee applications; a December 9, 2021 meeting about a legal opinion; a January 27, 2022 discussion about a minor variance application; and a March 10, 2022 meeting about a planning application.

I am writing to advise on the outcome of my review. For the reasons set out below, I have found that the Township complied with the open meeting rules in conducting these discussions *in camera*.

### **Ombudsman’s role and authority**

As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public.<sup>2</sup>

---

<sup>1</sup> SO 2001 c 25.

<sup>2</sup> *Ibid* at s 239.1.



Municipalities may appoint their own investigator. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own. My Office is the closed meeting investigator for the Township of Minden Hills.

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](http://www.ombudsman.on.ca/digest).

## Review

My Office reviewed the open and closed meeting materials, including the agendas, minutes and relevant reports for each meeting. We also spoke with the Deputy Clerk. We were advised that the Township does not make audio or video recordings of closed meetings of council.

## October 14, 2021 meeting

Council met for a regular meeting at 9:00 a.m. on October 4, 2021. Council resolved at 3:21 p.m. to move *in camera*, citing the open meeting exception for solicitor-client privilege under section 239(2)(f) of the Act. The resolution indicated that the discussion would concern “advice that is subject to solicitor-client privilege, including communications necessary for that purpose. (Legal Opinion – Minor Variance Application).”

During the *in camera* discussion, Township staff discussed written and verbal legal advice regarding a minor variance application for a property. The legal advice consisted of a written legal opinion drafted by the Township's solicitors, as well as verbal legal advice that had been received by staff during a call with the solicitors before the meeting. The closed session was adjourned at 3:56 p.m.

483 Bay Street, 10<sup>th</sup> Floor, South Tower / 483, rue Bay, 10<sup>e</sup> 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](http://www.ombudsman.on.ca)

Facebook : [facebook.com/OntarioOmbudsman](https://facebook.com/OntarioOmbudsman) Twitter : [twitter.com/Ont\\_Ombudsman](https://twitter.com/Ont_Ombudsman) YouTube : [youtube.com/OntarioOmbudsman](https://youtube.com/OntarioOmbudsman)



### *Applicability of the exception for solicitor-client privilege*

Under section 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the discussion includes communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.

A written legal opinion may be considered in closed session under the exception, or staff may convey legal advice from a lawyer to council during a closed session.<sup>3</sup> For example, in a report regarding the City of Greater Sudbury, my Office found that council discussions pertaining to written legal advice provided by outside counsel for the municipality are permitted by the open meeting rules, including where that information is conveyed to council by staff.

At the October 14, 2021 meeting, council for Minden Hills discussed legal advice obtained in writing and verbally from the Township's solicitors. Accordingly, this closed meeting discussion fit within the exception to the open meeting rules under section 239(2)(f) of the Act.

### **November 11, 2021 meeting**

Council met for a regular meeting at 1:00 p.m. on November 11, 2021. Council resolved at 2:00 p.m. to move *in camera*, citing multiple open meeting exceptions including solicitor-client privilege under section 239(2)(f) of the Act.

As mentioned above, the complainant only raised concerns about the *in camera* discussion under the exception for solicitor-client privilege. For that item, the resolution indicated that the discussion would concern "advice that is subject to solicitor-client privilege, including communications necessary for that purpose. (Legal Opinion – Request to waive deposit)." During the *in camera* discussion, staff advised council about legal advice and associated options provided by the Township's solicitor in writing and verbally. The closed session was adjourned at 3:00 p.m.

---

<sup>3</sup> *Greater Sudbury (City of) (Re)*, 2017 ONOMBUD 2, online: <<https://canlii.ca/t/h4rwp>>.



### *Applicability of the exception for solicitor-client privilege*

As explained above, under section 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the discussion includes communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. At the November 11, 2021 meeting, council for Minden Hills discussed legal advice and associated matters between municipal staff and the Township's solicitors. Accordingly, this closed meeting discussion fit within the exception to the open meeting rules under section 239(2)(f) of the Act.

### **November 25, 2021 meeting**

Council met for a regular meeting at 9:00 a.m. on November 25, 2021. Council resolved at 11:56 a.m. to move *in camera*. As explained above, the complainant raised concerns about a portion of the *in camera* discussion related to committee applications. For that item, the resolution indicated that the discussion would concern "personal matters about an identifiable individual, including municipal or local board employees (Review of Committee Applications)."

During the *in camera* discussion, council reviewed and discussed five applicants for the Township's Unopened Road Allowance Working Group. Following the closed meeting discussion, council moved to appoint all five applicants in open session. The closed session was adjourned at 1:56 p.m.

### *Applicability of the exception for personal matters about an identifiable individual*

Under section 239(2)(b) of the Act, a meeting or part of a meeting may be closed to the public if the discussion would reveal personal information about an identifiable individual. Information about an individual in their professional capacity may qualify as personal information if it reveals something of a personal nature.<sup>4</sup>

We were told that at the November 25, 2021 meeting, personal information about the five applicants, such as their addresses and work history, was circulated to council with the agenda package and that this information was specifically discussed in the closed meeting.

---

<sup>4</sup> *Amherstburg (Town of) (Re)*, 2015 ONOMBUD 13 at para 22, online: <<https://canlii.ca/t/gtp5z>>.



My Office has previously determined that discussions regarding the hiring of a specific individual, including their employment history and past job performance, will generally fit within the personal matters exception.<sup>5</sup> Similarly, information about the education and employment history of applicants for volunteer committee positions, and discussions of their suitability for a committee, may fit within this exception.<sup>6</sup> For example, in a report regarding the Town of Bracebridge, my Office found that while information about an individual in their professional capacity will usually not be considered personal information, discussions of an individual's work history and education can reveal personal information about that individual, including council members' opinions about the individual's suitability for a position.<sup>7</sup>

At the November 25, 2021 meeting, council discussed five specific identifiable individuals. The conversation included information about their suitability as candidates for the working group. This discussion was properly closed under the exception for personal matters about an identifiable individual under section 239(2)(b) of the Act.

### **December 9, 2021 meeting**

Council met for a regular meeting at 9:10 a.m. on December 9, 2021. Council resolved at 3:21 p.m. to move *in camera* citing multiple open meeting exceptions including solicitor-client privilege under section 239(2)(f) of the Act. As mentioned above, the complainant raised concerns about the portion of the *in camera* discussion about a fee waiver request.

For that item, the resolution indicated that the discussion would concern “advice that is subject to solicitor-client privilege, including communications necessary for that purpose; (Legal Opinion) (Legal Review for Request for Waiving of Fees-Planning Application).” During the *in camera* discussion, council discussed a legal opinion obtained about the reimbursement of fees for a planning application and related considerations. The closed session was adjourned at 4:50 p.m.

### *Applicability of the exception for solicitor-client privilege*

As explained above, under section 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the discussion includes communications between the municipality and its solicitor in seeking or receiving legal advice intended to be confidential. At the December 9, 2021 meeting, council for Minden Hills discussed legal

<sup>5</sup> *Russell (Township of) (Re)*, 2015 ONOMBUD 29 at para 31, online: <<https://canlii.ca/t/gtp73>>.

<sup>6</sup> *Bracebridge (Town of) (Re)*, 2015 ONOMBUD 10 at para 41, online: <<https://canlii.ca/t/gtp5r>>.

<sup>7</sup> *Ibid.*



advice obtained from the Township's solicitors. Accordingly, this closed meeting discussion fit within the exception to the open meeting rules under section 239(2)(f) of the Act.

### January 27, 2022 meeting

Council met for a regular meeting at 9:00 a.m. on January 27, 2022. Council resolved at 12:09 p.m. to move *in camera* citing multiple open meeting exceptions.

As mentioned above, the complainant raised concerns about the portion of the discussion about a minor variance application. For that item, the open meeting materials indicate that the discussion would concern "litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board (Minor Variance Application)." The closed meeting minutes indicated that the discussion concerned "advice that is subject to solicitor-client privilege, including communications necessary for that purpose."

During the *in camera* discussion, staff communicated legal advice obtained from the Township's solicitor pertaining to a potential appeal of a planning decision. The closed session was adjourned at 1:56 p.m.

### *Applicability of the exceptions for litigation and solicitor-client privilege*

Section 239(2)(e) of the Act allows a municipality or local board to proceed *in camera* to discuss "litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board."<sup>8</sup> The Act does not define what constitutes "litigation or potential litigation," but the courts have determined that this exception is reserved for circumstances where the subject matter is related to ongoing litigation or involves a reasonable prospect of litigation.<sup>9</sup>

My Office has previously found that this exception permits council to discuss and prepare for pending litigation before an administrative tribunal in a closed meeting, as well as to receive and consider new information affecting an ongoing appeal.<sup>10</sup>

<sup>8</sup> *Supra* note 1 at s 239(2)(e).

<sup>9</sup> *RSJ Holdings Inc. v London (City)*, 2005 CanLII 43895 (ON CA), at para 22.

<sup>10</sup> *Norfolk (County of) (Re)*, 2016 ONOMBUD 18 at para 36, online: <<https://canlii.ca/t/h2st5>>; Ontario Ombudsman, "Letter to the City of Greater Sudbury," (14 February 2013), online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/municipal-meetings/2013/city-of-greater-sudbury-en>>.



It is not necessary that council also receive legal advice or discuss litigation strategy – council may simply receive information or ask questions about the status of the litigation.<sup>11</sup>

At the January 27, 2022 meeting, staff communicated legal advice to council pertaining to a matter that was to be before a tribunal. Council provided staff direction about this matter. Accordingly, this closed meeting discussion fit within the exception to the open meeting rules under section 239(2)(e) of the Act.

As council for Minden Hills also discussed legal advice obtained in writing and verbally from the Township’s solicitor pertaining to the potential appeal of a planning decision, this discussion also fit within the exception to the open meeting rules under section 239(2)(f) of the Act.

### **March 10, 2022 meeting**

Council met for a regular meeting at 9:00 a.m. on March 10, 2022. Council resolved at 9:48 a.m. to move *in camera* citing multiple open meeting exceptions. The complainant raised concerns about the portion of the discussion related to a planning application.

For that item, the resolution indicated that the discussion would concern “litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; (Planning Application).”

While *in camera*, council discussed a planning application involving a dispute that would require litigation to resolve. The Township’s planner advised council that legal action would be required and recommended that council obtain a legal opinion. The closed session was adjourned at 11:54 a.m.

### *Applicability of the exception for potential litigation*

As noted above, section 239(2)(e) of the Act allows a municipality or local board to proceed *in camera* to discuss “litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.”<sup>12</sup>

<sup>11</sup> *Richmond Hill (City of) (Re)*, 2021 ONOMBUD 8, online: <<https://canlii.ca/t/jf6b3>>.

<sup>12</sup> *Supra* note 1 at s 239(2)(e).





In order for a matter to be discussed *in camera* under the exception in s. 239(2)(e), there must be more than a suspicion that litigation could arise. As the courts have explained with respect to litigation privilege, “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”.<sup>13</sup>

With respect to the March 10, 2022 meeting, council’s *in camera* discussion fit within this exception because the prospect of litigation was more than merely speculative. Council received staff advice that litigation would be required to resolve a dispute relating to a planning application. The discussion also related to the next steps that would need to be taken, including seeking further legal advice. Accordingly, this closed meeting discussion fit within the exception to the open meeting rules under section 239(2)(e) of the Act.

## Conclusion

Council for the Township of Minden Hills did not contravene the open meeting rules when it discussed the matters set out above on October 14, November 11, November 25, and December 9, 2021, and on January 27 and March 10, 2022. I commend the Township for its commitment to ensuring transparency in accordance with the *Municipal Act, 2001*.

I would like to thank the Township of Minden Hills for its co-operation during my review. The Deputy Clerk has confirmed that this letter will be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé  
Ombudsman of Ontario

cc: Vicki Bull, Deputy Clerk, Township of Minden Hills

<sup>13</sup> *Carlucci v Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269 (O.C.G.D. — Master).

