

March 29, 2021

Council for the Township of Lake of Bays
1012 Dwight Beach Rd,
Dwight, ON
POA 1H0

Sent by email to tglover@lakeofbays.on.ca

Dear Council for the Township of Lake of Bays:

Re: Closed meeting complaint

My Office received a complaint about a closed meeting held by council for the Township of Lake of Bays on August 19, 2020. The complainant alleged that council approved a licence of occupation application while in closed session and that the discussion did not fit within the closed meeting exceptions in the *Municipal Act, 2001* (the “Act”).

I am writing to share the outcome of my Office’s review.

Ombudsman Jurisdiction

As of January 1, 2008, the *Municipal 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.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 Lake of Bays.

Our 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

¹ SO 2001, c 25.

can or should be discussed in closed session, as well as issues related to open meeting procedure. Summaries of previous Ombudsman decisions can be found in the digest at: www.ombudsman.on.ca/digest.

Review

My Office reviewed the meeting agenda, open and closed session minutes, a staff report, and other relevant documents in relation to the August 19 closed session. We also spoke with the Clerk and the Mayor.

Council's resolution to proceed *in camera* cited the "litigation or potential litigation" exception to the open meeting rules. The Clerk and Mayor told my Office that the purpose of the closed session was to hear from the Township solicitor and Director of Building & By-Law Services in relation to an application for a licence of occupation. According to the closed meeting minutes, the solicitor and the Director provided council with information and answered questions posed by council members.

Application of the "litigation or potential litigation" exception

The complaint we received alleged that the meeting did not fit within the "litigation or potential litigation" exception because there was no ongoing litigation relating to the matter discussed by council in closed session.

Section 239(2)(e) of the Act allows council to discuss litigation or potential litigation affecting a municipality in closed session. The Act does not define what constitutes litigation or potential litigation. In *RSJ Holdings Inc. v London (City)*, the Ontario Court of Appeal considered the "litigation or potential litigation" exception, noting that "[t]he fact that there might be, or even inevitably would be, litigation arising from the [matter discussed] does not make the 'subject matter under consideration' potential litigation."²

In considering the related concept of litigation privilege, courts have found that, while it is not necessary for litigation to have commenced for litigation privilege to apply, "there must be more than a mere suspicion that there will be litigation."³

² *RSJ Holdings Inc. v. London (City)*, 2005 CanLII 43895 (ON CA), aff'd 2007 SCC 29, online: <<https://canlii.ca/t/1m32m>>.

³ *C. R., Re*, 2004 CanLII 34368 (ON SC), at para 21 citing *Carlucci v. Laurentian Casualty Co. of Canada*, [1991] O.J. No. 269.

My Office has found that this exception is reserved for circumstances where the subject matter discussed *in camera* is ongoing litigation or involves a reasonable prospect of litigation.⁴ The exception will apply where there is more than a remote possibility that litigation may commence, although the litigation does not need to be a certainty. Council must believe that litigation is a reasonable prospect and must use the closed meeting to explore that prospect in some way.⁵

We were told by the Clerk that there was no ongoing litigation involving the Township in relation to the licence of occupation at the time of the August 19 meeting, and the Township had not received any verbal or written threats of litigation at the time of the meeting.

The closed meeting minutes for the August 19 meeting record that council briefly explored the prospect of potential litigation with the Township solicitor. The Mayor told us that he believed the matter could lead to litigation because the Township had previously been involved in litigation related to the properties involved in the licencing issue.

In a 2017 report to the Town of Carleton Place, I found that committee members' suspicion that the Town had been exposed to liability by the Mayor's public comments did not constitute a reasonable prospect of litigation.⁶ In that case, the possibility of litigation was too remote for the "litigation or potential litigation" exception to apply.

In this case, the Township had been involved in litigation related to the properties in question, and as a result, council believed it was likely that the Township would be involved in litigation in the future. However, this suspicion does not, on its own, constitute a reasonable prospect of litigation. Lawsuits are expensive propositions, which most people initiate only as a last resort. The fact that litigation was previously initiated against the Township does not mean that litigation would be initiated against the Township again. In this case, the possibility of litigation was too remote to bring the discussion within the exception for litigation or potential litigation.

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

Based on my Office's review of the closed meeting minutes and discussions with the Clerk and Mayor, we also reviewed whether council's discussion fit within the exception for advice subject to solicitor-client privilege, found in section 239(2)(f) of the Act. This exception was not cited by council to go into closed session on August 19.

⁴ *Norfolk (County of) (Re)*, 2016 ONOMBUD 18 (CanLII), <<http://canlii.ca/t/h2st5>>.

⁵ *West Lincoln (Township of) (Re)*, 2015 ONOMBUD 34 (CanLII), <<http://canlii.ca/t/gtp7g>>.

⁶ *Carleton Place (Town of) (Re)*, 2017 ONOMBUD 18 (CanLII), at para 32, online: <<https://canlii.ca/t/hqsph>>.

The “solicitor-client privilege” exception covers discussions that include communications between a municipality and its solicitor in seeking or receiving legal advice intended to be confidential. Communication will only be found to be subject to solicitor-client privilege if it is:

1. Between a client and their solicitor, where the solicitor is acting in a professional capacity;
2. Made in relation to the seeking or receiving of legal advice; and
3. Intended to be confidential.⁷

In this case, the closed session minutes indicate that the Township’s solicitor was present at the closed session. According to the minutes, the solicitor provided council with specific legal advice related to the matter discussed in closed session. The Clerk and Mayor confirmed that the purpose of the closed session was to receive advice from the Township’s solicitor that was intended to be confidential.

My review indicates that council’s discussion fit within the open meeting exception for solicitor-client privilege outlined in s.239(2)(f) of the Act.

No vote during the closed session

The complaint alleged that council decided to approve the licence of occupation application while in closed session, contrary to the open meeting requirements set out in the Act.

Section 239 of the Act requires that all votes of council be taken in open session, except where the matter is permitted to be discussed in closed session, and the vote is procedural or a direction to staff or officers of the municipality.

There is no recorded vote, direction to staff, or consensus of council reflected in the closed meeting minutes. The Clerk and Mayor told my Office that council did not vote during closed session. The Mayor told my Office that council voted on the matter in public after returning from the *in camera* session. This vote is recorded in the open session minutes.

On a balance of probabilities, I am satisfied that council did not vote during the closed session.

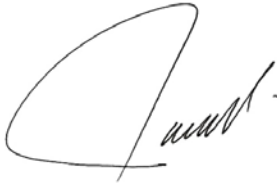
⁷ *Canada v. Solosky* [1980] 1 S.C.R. 821.

Conclusion

My review indicates that the *in camera* discussion on August 19, 2020, did not violate the open meeting rules set out in the Act. Council did not vote during closed session and its discussion fit within the “solicitor-client privilege” exception pursuant to s.239(2)(f) of the Act.

I would like to thank the Township for its co-operation during my review. The Mayor confirmed that this letter would be included as correspondence at an upcoming council meeting. I will also make this letter public on my website.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul Dubé', written over a large, stylized oval shape.

Paul Dubé
Ombudsman of Ontario

Cc: Carrie Sykes, Township Clerk: csykes@lakeofbays.on.ca