

BY EMAIL

October 14, 2021

Council for Town of South Bruce Peninsula
c/o Janice Jackson, Mayor
PO Box 310
315 George Street
Warton, ON N0H 2T0

Dear Council for the Town of South Bruce Peninsula:

Re: Closed meeting complaint

My Office received a complaint alleging that council for the Town of South Bruce Peninsula (the “Town”) improperly met in closed session on March 16, 2021, to receive a delegation, contrary to the *Municipal Act, 2001* (the “Act”).¹ Specifically, the complaint alleged that council should have received the delegation about a proposed aquaculture facility in open session.

I am writing to advise that my review has determined that council for the Town of South Bruce Peninsula did not contravene the Act’s open meeting requirements on March 16, 2021.

Ombudsman jurisdiction

As of January 1, 2008, the *Municipal 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. 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 Town of South Bruce Peninsula.

¹ SO 2001, c 25.

My Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Review

My Office reviewed the meeting agenda, open and closed session minutes, and closed meeting materials for the March 16, 2021 meeting. We also reviewed emails related to the delegation request, and spoke with the Town's Director of Legislative Services/Clerk and a delegate from the aquaculture company.

According to the information we reviewed, a company contacted the municipality seeking to delegate to council regarding a proposed aquaculture facility. Following a conversation with municipal staff, the company submitted a formal delegation request form and a copy of its intended presentation. In its email, the company indicated that it wished to present in closed session. We were told that the delegation was added to the closed session agenda for the March 16, 2021 meeting based on the information in this request and the discussion between the company and municipal staff.

On March 16, 2021, council met at 9:00 a.m. in council chambers. A copy of the company's delegation request form, but not its presentation, was included in the public meeting materials. Council resolved to proceed into closed session at 11:02 a.m. and indicated that it was relying on the "information supplied in confidence by a third party" closed meeting exception under section 239(2)(i) of the Act to discuss "Delegation-Gerry Sullivan & Tim Boosamra, Georgian Bay Innovation Group re Proposed Aquaculture Facility".

Once in closed session, delegates from the aquaculture company provided a presentation to council regarding a proposed development in the municipality. We reviewed a copy of this presentation, which contained information about the company's commercial development plans, expected profits, and its intent to use specific proprietary technology. According to the minutes and those we spoke with, council received the information in this presentation and asked clarifying questions regarding environmental approvals, consultation with Indigenous communities, and the legal

structure of the corporation. There was also discussion about a specific, pending land transaction for the company. Following this discussion, council returned to open session at 11:46 a.m. and reported that it received the delegation for informational purposes.

When our Office asked the aquaculture company why it wanted to provide this update in closed session, we were told that the company did not want to jeopardize a pending land transaction or its access to specific proprietary technology that is being licensed on an exclusive basis for each region. We were told that this meant the technology for the facility may no longer have been available if a competitor licensed it first for a particular area. We were also told that in the months following this meeting, the aquaculture company provided public information about its proposed development and business model following the completion of the pending land transaction and other business negotiations.

Application of the “information supplied in confidence by a third party” closed meeting exception

Section 239(2)(i) of the Act allows municipal councils to discuss:

a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

The exception requires that the discussion be about information that:

- Falls into one of the listed types: trade secret, scientific, technical, commercial, financial, or labour relations information;
- Was supplied confidentially, whether explicitly or implicitly, to the municipality by a third party; and
- If disclosed, could reasonably be expected to cause harm, either by prejudicing significantly the competitive position or interfering significantly with the contractual or other negotiations of a person, group of persons or organization.

In a report regarding a closed session in the City of Greater Sudbury, my Office determined that the City was permitted to discuss confidential commercial and financial information belonging to several third parties *in camera*. The report noted that the

proposed project being discussed remained ongoing and that if the information was disclosed, it could have prejudiced the third parties' competitive positions and negotiations.²

In this case, council for the Town of South Bruce Peninsula received and discussed information from a third party company regarding that company's development plans, expected profits, and intended use of proprietary technology. We were told that the third party specifically wished to discuss this commercial information in private because it did not want to prejudice a pending land transaction or alert competitors to the proprietary technology it intended to rely on to create a profitable business in a specific area. We were also told that the company risked not being able to use this technology if a competitor licensed it first in the region. Accordingly, this closed session discussion was permissible under section 239(2)(i) of the *Municipal Act* as council discussed information supplied in confidence by a third party that, if disclosed, could reasonably be expected to significantly prejudice the competitive position of the aquaculture company and significantly interfere with an ongoing land transaction.

While interviewees were able to provide my Office with detailed information about how the aquaculture company would suffer harm if the commercial information it shared with council was disclosed, the delegation form submitted to the municipality did not ask for or contain this explanation. The municipality told us this information was instead discussed verbally with municipal staff, and could not be included on the delegation request form because the procedure by-law requires that every delegation form be included in the relevant meeting package. As a best practice, my Office encouraged the Town to develop an enhanced method to document the rationale for *in camera* delegation requests that respects the need to keep certain information confidential. In response, the Town implemented a supplementary form that requires all delegates seeking *in camera* delegations to specify why they wish to speak to council in private and why a matter cannot be considered by council in open session. The form also specifies that there is no guarantee that a delegation will be heard in closed session or at all. I applaud the Town for implementing this enhanced documentation requirement, and for its ongoing commitment to accountability and transparency.

² *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10, <<https://canlii.ca/t/jfvt3>>.

Conclusion

Council was permitted to rely on the “information supplied in confidence by a third party” closed meeting exception to receive information about a proposed aquaculture facility in closed session on March 16, 2021.

I would like to thank the Town for its co-operation during my review. The Mayor confirmed that this letter would be included as correspondence at an upcoming council meeting.

Sincerely,



Paul Dubé
Ombudsman of Ontario

CC: Angie Cathrae, Director of Legislative Services/Clerk