



Cunningham Swan

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CONFIDENTIAL

September 1, 2022

Delivered by email: Tara.Warder@grey.ca

Mayor and Members of Council
c/o Tara Warder, Clerk
Grey County
32 Mill Street East
Box 310
Thornbury, Ontario
N0H 2P0

Dear Mayor and Members of Council:

**RE: Closed Meeting Investigation
Our File No.: 37274-1**

This public report of our investigation is being provided to Council in accordance with Section 239.2(1) of the *Municipal Act*. We note that Section 239.2(11) of the *Municipal Act* requires that Council make the report public. The Clerk should identify on the agenda for the next open session Council meeting that this report will be discussed. Staff should consider whether it is appropriate to place the full report on the agenda in advance of Council deciding how the report should otherwise be made public.

Should Council desire, the Closed Meeting Investigator is prepared to attend at the open session meeting to present the report and answer any questions from Council.

At the meeting, Council must first receive the report for information. Council does not have the authority to alter the findings of the report, only consider the recommendations. Per section 239.2 (12), if the report contains a finding that all or part of a meeting was held in

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closed session contrary to the *Act*, then Council is required to pass a resolution stating how it intends to address the report.

The Closed Meeting Investigator has included only the information in this report that is necessary to understand the findings. In making decisions about what information to include, the Investigator is guided by the duties set out in the *Municipal Act*. Members of Council are also reminded that Council has assigned to the Investigator the duty to conduct investigations in response to complaints under the *Municipal Act*, and that the Investigator is bound by the statutory framework to undertake a thorough process in an independent manner. The findings of this report represent the Investigator's final decision in this matter.

PRELIMINARY REVIEW

On July 8, 2022, our office was referred a closed meeting complaint which was made to Grey County on June 28, 2022. The complaint pertains to two meetings; an item in the Committee of the Whole's closed session held June 9th, 2022, added to the public agenda by amendment; and Committee of the Whole's closed session held June 23, 2022.

The *Municipal Act* provides the Closed Meeting Investigator with powers which include the ability to interview witnesses and review documents deemed relevant to the investigation process. In conducting the preliminary review, our process included:

- Reviewing the relevant provisions of the *Municipal Act*;
- Correspondence with the complainant; and
- Reviewing agendas, closed session resolutions, and similar documentation.

During the preliminary review we assume that the facts as set out in the complaint are true. We do this not for purposes of finding a breach, but to test the merit of the complaint. In other words, would the allegations, if true, amount to an illegally closed meeting? If so, we undertake a full investigation to determine whether the allegations are true. If the allegations, even if true, would not constitute an illegally closed meeting there is no reason to undertake a full investigation. It is important to understand that we make no finding of fact during the preliminary review - we simply assume the facts are true as a method to assess the merit of the complaint at this stage.

Our initial review of the materials provided indicated that, even if all of the facts alleged in the complaint were true, both meetings were properly held in closed session. That is to say, none of the allegations made in the complaint would result in a finding that either matter ought not have been discussed in closed session. For that reason, this matter was concluded without further investigation.

FACTS:

The facts in this matter are quite simple and pertain to two meetings of the County's Committee of the Whole.

On June 9th, 2022, Committee of the Whole resolved to move into closed session. Prior to doing so, an amendment was passed as follows:

That the Committee of the Whole agenda dated June 9, 2022 be amended to add an additional closed meeting matter subject to Section 239 (2) of the Municipal Act, 2001 regarding a potential planning litigation matter:

- i. Advice subject to solicitor-client privilege, including communications necessary for that purpose
- ii. Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board

The minutes of the closed session indicate that the discussion related to recently completed litigation before a statutory board. Additionally, Committee of the Whole considered correspondence relating to the position taken by the County during said litigation.

On June 23rd, 2022, Committee of the Whole resolved to move into closed session. The resolution read as follows:

That Committee of the Whole does now go into closed session pursuant to Section 239 (2) of the Municipal Act, 2001 as amended to discuss:

- i. Personal matters about an identifiable individual, including municipal or local board employees (compensation); and

That the following staff remain in attendance: Kim Wingrove, Jennifer Moreau and Tara Warder.

Municipal Act

239 (1) Except as provided in this section, all meetings shall be open to the public.

Exceptions

- (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

[...]

- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
 - (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,
- (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or
 - (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

ANALYSIS:

Under the *Municipal Act*, the default position is that meetings of Council and similar bodies are open to the public. This is an important rule, as it reinforces principles of open and responsible government. However, there will, naturally, be circumstances in which Council must address issues that should not be discussed in public; for this reason, the *Act* includes a number of exceptions.

The scheme of the *Act*, and previous decisions of closed meeting investigators, make clear that for a meeting to be properly closed to the public, the following requirements must be met:

1. The meeting must begin in open session, and a resolution must be passed to move into closed session;
2. The resolution to move into closed session must cite the section of the *Act* relied upon and must give a general description of the matters to be discussed; and
3. The content of the meeting must actually fall within the cited exception.

Even where an exception applies which permits a meeting to be held in closed session, the *Municipal Act* still imposes certain restrictions to ensure the possibility for a level of public scrutiny.

First, the motion to proceed into closed session must itself be held in open session. That is to say, a member of the public must be able to enter or log-in to the meeting as it is called to order, and as the motion to move to closed session is moved and voted on. Only once the motion passes can the public be excluded.

Second, the motion to move into closed session must provide the “general nature” of what is to be discussed. In *Farber v. Kingston (City)* 2007 ONCA 173, the Ontario Court of Appeal described the contents of this requirement as follows:

I think that the 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.

A member of the public, not having been permitted to be present during the closed session, must nevertheless be able to review the motion and have a general idea as to what was discussed. This is important, not least of all because, without this step, the public has no way to otherwise hold its Council accountable with respect to the closed meeting.

Did Committee of the Whole Pass an Appropriate Resolution in Open Session to Move into Closed Session

June 9th

The minutes, reproduced above, indicate that Committee of the Whole began in open session, and later passed a motion to move into closed session. Early in the minutes, Council moved to add the discussion in question to the closed session agenda. Strictly speaking, the minutes do not reflect that change, and show only the motion as was originally planned. That being said, all of the elements required of a closed session motion are contained in the moved amendment to the agenda.

The amendment provides a brief description of the topic to be discussed, and the reason it will be discussed in closed session. The description is, in our opinion, sufficient to provide a member of the public with a general idea of what is being discussed, while maintaining the intent of the closed meeting. Accordingly, we find that Committee of the Whole met the requirements to move into closed session.

June 23rd

The motion to move into closed session, as reproduced above, contains the cited exception under the Municipal Act, and provides a brief description of the reason for doing so. It was passed in open session, prior to excluding the public. Accordingly, Committee of the Whole passed an appropriate resolution to move into closed session.

Did the Meeting Actually Fall within the Cited Exception

Having determined that the resolution to move into closed session met the necessary form requirements, we must now consider the substance of the meetings.

June 9th

We have had the opportunity to review the agenda and minutes used in closed session. As noted above, the meeting was closed under two sections. The question before us, is whether the discussion included information subject to privilege, or addressed litigation.

In our opinion, the discussion in question clearly meets the requirements of the litigation exception. Committee of the Whole was provided updates on the position taken by the County and the reasons for it.

The complaint raised two reasons why this ought not have been discussed in closed. First, the complaint referenced the fact that litigation was complete, and that the positions being discussed were contained in a published decision. We disagree with the proposition that the litigation exemption ceases to apply when litigation is complete or a when the County's position is made public. This interpretation would mean that a municipality can never have a post-litigation debrief or discussion in closed session, and would preclude discussion on how the litigation strategy was or was not effective. The *Act* does not specify that the litigation must be ongoing, only that it must be real or potential.

Second, the complaint alleged that certain correspondence considered by Committee of the Whole during this discussion ought not have been discussed in closed session. Having had the opportunity to review the correspondence in question, we disagree. The correspondence clearly references the litigation and the positions the County took therein. Discussion of the correspondence, therefore, properly constitutes discussion of the litigation itself.

Having determined that the subject matter was appropriate for discussion in closed session under the litigation exception, this matter was determined at the preliminary stage and no investigation was conducted. Accordingly, we have not considered whether the solicitor-client privilege exemption applies as, even if it does not, the meeting was nonetheless properly closed.

June 23rd

We reviewed the minutes of this closed session, and particularly the report submitted by staff, in order to consider whether the subject matter properly related to personal matters of identifiable individuals.

Subsequent to commencing our review, the County chose to publicly release the report discussed in closed session. For this reason, we are considering the entirety of the contents of this report to be public. Nonetheless, our analysis considers whether the meeting was properly closed to the public at the time it was held. We note, in the interest of clarity, that even if a matter is properly held in closed session, the Municipality is not *required* to do so. Therefore, there is no consequence, for the purposes of this analysis, created by the fact that the contents of the meeting were later made public.

The report presented to Committee of the Whole during the June 23rd meeting provided recommendations regarding salary increases for senior County management, along with justifications to support these increases. This was not an abstract discussion; the report specified particular positions and the proposed increased salaries for those positions.

Decisions of other closed meeting investigators are not binding on us. However, they are useful in considering how the closed meeting exceptions should be interpreted. Whether salaries are covered under the personal matters exception has been considered by both the Ontario Ombudsman and Local Authority Services on numerous occasions. In *Brighton (Municipality of) (Re)*, 2015 ONOMBUD 28, at paras 29-32, the Ombudsman's Office provides references to several decisions where salaries of individual staff members have been treated as personal information, which in turn resulted in meetings being properly within closed session.

We are in agreement with the conclusion in the *Brighton* decision, and others that it references. Discussion of the salaries of identifiable individuals is a discussion of those employees' personal information. In this case, Committee of the Whole had before it a report that contained specific salary recommendations for specific positions. In our view, this was enough to warrant that the matter be discussed in closed session.

The complainant raised a particular concern regarding this meeting: prior to Committee of the Whole resolving to go into closed session, it was stated that staff wished to "have a fulsome discussion" regarding the report. Our jurisdiction is limited to considering whether the meeting is properly closed – which, in our opinion, it is – and does not, strictly speaking, include considering whether the reasons for holding a discussion in closed session are otherwise appropriate. However, in the event I am wrong, and we are required to consider whether a "fulsome discussion" is an appropriate reason to move into closed, I would find that it is.

Published closed meeting investigator reports have considered the purpose of other sections, but not that of the personal information exception. The use of the legal advice exception has been found, on numerous occasions, to be to enable staff to speak freely, while the purpose of the labour relations exception was described as “to protect discussion relating to the relationship between a municipality and its employees”. That same report found that discussion of remuneration falls within the labour relations exception. In my opinion, the particular use of the personal information exception – to share details regarding the salaries of particular staff and reasons for increasing them – has parallels to the labour relations and legal advice exceptions, in that, at its core, it is meant to allow council to have a thorough discussion containing the personal information of an identifiable individual, without fear that such information would become public. To that extent, moving into closed session in order to have a “fulsome discussion” in this context is permitted under the exception.

CONCLUSION AND RECOMMENDATIONS

We determined during our preliminary review of the complaint that the allegations of the complainant, even if true, would not result in a finding that either discussion was improperly closed. All of the facts alleged by the complainant, and the supporting documentation that they provided, supported a finding that the meetings were properly closed.

This concludes the investigation and report in this matter.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



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