

Received June 2, 2020

**REPORT TO
THE COUNCIL OF THE TOWN OF PARRY SOUND
REGARDING THE INVESTIGATION OF AN ALLEGED IMPROPERLY
CLOSED MEETING OF THE COUNCIL OF THE TOWN OF PARRY SOUND**

Complaint

The Town of Parry Sound (“Town”) received a complaint about an in-camera portion (“closed session”) of a meeting of Town Council held on December 18, 2018.

The essence of the complaint is the subject matter of one of the items under consideration at the closed session was not, in its entirety, a proper one for deliberation in a closed session.

The complainant alleged that Town Council had discussed and voted on the matter improperly in closed session.

The complaint was sent to the offices of Amberley Gavel Ltd. for investigation.

Jurisdiction

The Town appointed Local Authority Services (LAS) as its closed meeting Investigator at the time of the complaint pursuant to section 239.2 of the *Municipal Act, 2001*¹, as amended (“Municipal Act”). LAS has delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council of the Town of Parry Sound.

Background

(1) The Municipal Act

Section 239 of the Municipal Act provides that all meetings of a municipal council, local board, or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government. The section sets forth exceptions to this open meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public. One of those reasons in Section 239(2) is:

¹ Municipal Act, 2001, SO 2001, c 25, <<http://canlii.ca/t/534v1>> retrieved on 2018-08-23.

...

(b) personal matters about an identifiable individual....

...

Section 239 also requires that before a council, local board or committee moves into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution must include the general nature of the matter(s) to be deliberated at the closed meeting.

Subsections 239 (5) & (6) limit the actions that may be taken by the council, local board, or committee at the closed session. Votes may only be taken at a closed meeting for procedural matters or giving direction or instructions to staff or persons retained by the municipality such as a lawyer or planner. It provides as follows:

Open meeting

(5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote. 2001, c. 25, s. 239 (5).

Exception

(6) Despite section 244, a meeting may be closed to the public during a vote if,

- (a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
- (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board. 2001, c. 25, s. 239 (6).

Section 239.1 provides that any person can ask for an investigation into whether a council, local board, or committee of either of them has breached the open meeting requirements of the Municipal Act or its own procedural by-law.

Investigation

The Town Clerk was interviewed during the investigation. Documents provided by Town and reviewed included agendas, reports, minutes, the Town's Procedure By-law, along with applicable legislation and other closed meeting investigation reports researched by the Investigator

An investigation under Section 239.1 of the Municipal Act is confined to assessing whether the council, local board, or committee of either complied with the open meetings provision of the Municipal Act or its own procedural by-law. It is not open to the investigator to determine if the responsible body made the right decision with respect to the substantive matter at issue in the complaint.

In addition, an investigator is bound by the rules of confidentiality as stipulated in Section 239.2(5).

Once the investigation is completed, if the investigator “is of the opinion that the meeting or part of the meeting that was the subject-matter of the investigation appears to have been closed to the public contrary to Section 239 or to a procedure by-law under Section 238(2), the investigator shall report his or her opinion and the reasons for it to the municipality or local board, as the case may be, and may make such recommendations as he or she thinks fit” (section 239.2(10)).

(1) The Town’s Procedure By-law

Section 238 of the Municipal Act requires that every municipality and local board pass a procedure by-law. Section 238 reads in part as follows:

- (2) Every municipality and local board shall pass a procedure by-law for governing the calling, place, and proceedings of meetings.
- (2.1) The procedure by-law shall provide for public notice of meetings.

The Town has a Procedure By-law that governs the calling, place, and proceedings of meetings, as well as public notice of meetings.

The Procedure By-law provides for closed meetings of Council and its Committees, and requires that, prior to moving in-camera, Council or Committees of Council pass a motion in public session stating:

- i. the fact of the holding of the closed meeting.
- ii. the general nature of the matter considered at the closed meeting.

(2) Agendas for the Meeting of Council on December 18, 2018

The Agenda for the Council Meeting of December 18, 2018 indicated that Council was expected to move into closed session by resolution to consider several matters including one relevant to this complaint, being:

“personal matters about identifiable individuals (Appointments to Boards and Committees)”

(3) Minutes for the Open and Closed Sessions of the Council Meeting of December 18, 2018

The record notes that the Council in open session passed the appropriate resolution as indicated on the agenda, and the appropriate resolutions directing staff following the closed session.

The complainant referred to advice received from other parties that suggested that discussing the candidates for appointment to Boards and Committees was not an eligible item for discussion in a closed session, hence the complaint.

Staff had advertised and received expressions of interest from candidates interested in being appointed by Council as lay appointments to two Boards, one Committee and one Commission, as they had been directed by Council.

Following receipt of applications, members of the Clerk's Office prepared a summary report for Council's consideration including the attendance records of former members, experience of applicants, and overall expectations regarding a list of recommended candidates. Every application was also forwarded to each member of Council.

Evidence that we received indicated that the closed session was dominated by other matters that were apparently more pressing in the minds of members of Council and that without discussion, the material presented by staff regarding appointments was not discussed by Council members other than to direct by resolution that the staff recommendations be brought to open Council for its consideration following the closed session.

That direction was followed and Resolution 2018-142 with the attendant schedule was presented and passed in open session making the appointments as recommended.

Observations

Some Councils have the application, selection and appointment process for Board and Committee members take place all in public. The arguments for this completely open process include transparency, and the inability of anyone to say anything in closed session that they might not say in public. In addition, the observation has been made that the selection for Council member is done completely in the public eye, so why should appointments not be made as part of a public process.

On the other hand, the argument is made that if the completely public process is followed, some citizens might not apply for fear of rejection and possible personal ramifications. Committees often offer no remuneration and the risk of rejection may be greater than the possible benefit of being appointed.

Does the closed process for receipt and discussion of such applicants as is being discussed here meet the definition of personal matters about identifiable individuals?

The answer to this question is yes. In previous decisions, the Ombudsman of Ontario, Amberley Gavel Ltd, and the Information and Privacy Commissioner of Ontario have all concluded that the opinion of one individual about the qualifications of another is personal information about an identifiable individual.

An opinion is itself a personal matter, and in some jurisdictions considered a personal matter about the individual holding the opinion. But the general practice in Ontario is to follow the guidance of the Information and Privacy Commissioner who states in the

Commission`s guidance that ``The views or personal opinions of another individual about the individual`` are interpreted to be personal information about the person of whom the opinion is held.

To clarify, the opinion of a staff member of the Town as to whether an individual would make a preferred candidate for a Committee or Board is personal information about the candidate. In addition, should a member of Council have offered an opinion about one or more individuals in closed session that opinion would have also been a suitable subject for closed session discussion, as a personal matter about the individual.

From our investigation, it is our finding that there was no discussion about those opinions, no new ones offered, nor any other information of a personal nature offered by any attendee in the closed session subject of this complaint. The applications of the candidates may have included personal information about them as well, but it was not the primary focus of the submission before Council.

Conclusion and Recommendation

Based on the evidence and our investigation, it is our conclusion that the matter subject to this complaint deliberated at the closed sessions of Town Council on December 18, 2018 fell within the authority of the Municipal Act as one which could be considered in closed session and was appropriately conducted as such.

However, it has been our consistent advice over many years that it could be to the advantage of Council and open local government if candidates were publicly solicited, applications disclosed, and appointments made all in open session of Council. We offer that same advice to the Town of Parry Sound for consideration of future appointments.

Even when the closed meeting process is fully compliant with the Municipal Act and related legislation regarding non-discrimination, we have found that there can be lingering doubts about the integrity of the process that are unhelpful in maintaining confidence in local government.

Public Report

This report is forwarded to the Council of the Town of Parry Sound. The Municipal Act provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council.

Closed Meeting Investigator

AMBERLEY GAVEL LTD.

Per: *Nigel Bellechamber*