

REPORT OF AN INVESTIGATION
INTO A COMPLAINT ABOUT A MEETING
HELD BY
THE TOWN OF FORT FRANCES
ON
JANUARY 10, 2022

PAUL S. HEAYN, CLOSED MEETING INVESTIGATOR
FOR THE TOWN OF FORT FRANCES
March 9, 2022

COMPLAINT

On January 31, 2022, I received a complaint about a council meeting held by the Town of Fort Frances (the "Town") on January 10, 2022. The complainant alleged that council's discussion did not fit within the closed meeting exceptions in the Municipal Act, 2001 (the Act).

JURISDICTION

Under the Municipal Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.

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. Municipalities may appoint their own investigator. The Town has appointed me as the closed meeting investigator for the Town. In investigating closed meeting complaints, I consider whether the open meeting requirements of the Act and the municipality's governing procedures have been observed.

The Ontario Municipal Act section 239.2 provides eleven (11) general exceptions for having open meetings. The Town used the following exception to hold part of their Jan. 10, 2022 meeting in closed session. The section of the Ontario Municipal Act pertaining to that meeting is as follows:

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,

(b) personal matters about an identifiable individual, including municipal or local board employees;

INVESTIGATIVE PROCESS

On February 1, 2022, my Office advised the Town that we would investigate the January 10, 2022 meeting of which part of that meeting was closed to the public and provided the Clerk with a copy of the Complaint.

I reviewed relevant portions of the Town's procedural by-law and the Act. I reviewed the meeting agenda, relevant documents, other Closed Meeting Complaint Reports, websites mentioned by the Requester and the minutes from the open and closed sessions of the meeting. I interviewed the Clerk and received full co-operation in this matter.

BACKGROUND

The Requester provided me with the following documents and information:

1. Letter of January 27, 2022 requesting a closed meeting investigation into the Closed Session of Council on January 10, 2022. The letter proposes that the Closed portion of the January 10, 2022 meeting was held to discuss the Requester's letter to Council dated January 5, 2022 in which it is alleged serious misconduct on the part of the Mayor, based on public documents and records.

2. The Requester's letter provided five (5) reasons why the Council discussion ought to have taken place in open session:
 - a. The conduct of elected members of Council in the exercise of their roles does not attract closed meeting protection. This is why the Code of Conduct requires that reports from the integrity commissioner be received in open session.
 - b. The records related to the Mayor's misconduct were entirely public documents obtained under the Municipal Freedom of Information and Protection of Privacy Act, and I further circulated them to 2 of 3 members of the public upon identifying the Mayor's malfeasance. There was no information at risk of public disclosure.
 - c. The subject of my letter is a continuation of a discussion which took place in the open session of Council on November 8, 2021. That discussion was reported in the media, and I enclose herewith a copy of the article which appeared in the Fort Frances Times. While the leaked document was a legal opinion – which would ordinarily attract a closed session discussion – it is self-evident from the November 8, 2021 meeting that discussion of the contents of this document were not germane to the discussion in open session about the leak of this material to a member of the public. There was also no legal counsel present on January 10, 2022 to extend lawyer-client privilege to Council, nor did the matter pertain to litigation or potential litigation.
 - d. There was no "personal" matter under consideration concerning the Mayor or any other person, and this is an inaccurate characterization of the business item. Regulators have consistently stated that matters of a professional nature or which relate to the office of elected officials do not make out this section. For instance: • The provincial Ombudsman, in his role as closed meeting investigator for the Township of Emo, has stated that "generally, discussions of a council member's actions in the course of their duties are considered to be of a professional nature and do not fall within the "personal matters" exception": <https://canlii.ca/t/jb1g6>. • In his role as closed meeting investigator for the Municipality of Temagami, the Ombudsman has reached similar conclusions, stating that "the information must be about individuals in their personal capacity, rather than their professional, official or business capacity": <https://bit.ly/3GyPkBv>. • Likewise, the Information and Privacy Commissioner has stated that "to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual": <https://canlii.ca/t/1scqh>.
 - e. Even if the subject matter of item 10.3 did pertain to "personal information", the Information and Privacy Commissioner has stated that "[t]o qualify as personal information, [the information] must be reasonable to expect that an individual may be identified if the information is disclosed". The individual was already identified publicly and in publicly disclosed records of the municipality. While this exception is not available to Council in these circumstances, this meeting would not have "exposed" her identity.
3. The January 5th, 2022 letter authored by the Requester to Mayor and Council entitled "Leaked Privileged and Confidential Document"
4. Letter of December 10, 2021 to the Requester from the Town Clerk providing twenty three (23) documents (emails) requested under the Freedom of Information and Protection of Privacy Act (FIPPA).
5. Newspaper Clipping entitled "Council Votes for Amended Resolution on Leak".
6. Council Minutes Session No. 081 of January 10, 2022.
7. Media article entitled "Fort Frances Mayor Accused of Abusing Her Powers".

I was told that up to the January 10th Council Meeting, the Town was dealing with the leak of a 2019 private and confidential document and legal opinion received from Gowling WLG (Canada) LLP regarding wood rights.

The Clerk sought legal advice about whether council should hold the discussion on the Requester's letter of January 5, 2022 be held in camera or open council at the January 10th, 2022 Council meeting. I was told that the municipality's decision to discuss this matter in closed session was based on the legal advice it received.

THE JANUARY 10TH, 2022 MEETING

Council met for a regular meeting at 5:30 p.m. At 6:24 p.m., council resolved to proceed in camera under the "personal matters" exception (s.239(2)(b)).

At the beginning of the meeting of January 10th, 2022, the minutes record Mayor Caul declaring a conflict of interest relating to a closed session item 10.3.

Item 10 and Resolution #861:

861. Wiedenhoeft-Behan: Mayor Caul declared a conflict on item 10.3. Councillor Hallikas assumed the Chair and called the motion.

Recorded vote called by Councillor Judson

THAT Council now meet in-camera in order to address a matter pertaining to:

3. Personal matters about an identifiable individual, including municipal or local board employees:

Correspondence from the general public raising personal matters about an identifiable individual.

<u>NAME</u>	<u>YEA</u>	<u>NAY</u>	<u>DISLCLOSURE OF INTEREST</u>	<u>ABSENT</u>
M. BEHAN	X			
W. BRUNETTA	X			
J. MCTAGGART	X			
A. HALLIKAS	X			
D. JUDSON		X		
R. WIEDENHOEFT	X			
J. CAUL			X	
CARRIED				

Item 11. Public Session Resumes: at 7:54 P.M. and Resolution #864

864 McTaggart-Brunetta: Councillor Hallikas assumed the Chair.

THAT the Municipal Council of the Town of Fort Frances is very concerned with the unauthorized release of confidential information by the Mayor and hereby formally calls upon the Mayor to issue a public apology for her action on this matter in writing AND FURTHER THAT training be provided to the Mayor and Council on protecting the confidentiality of the Corporation.

CARRIED

ANALYSIS

In analyzing the validity of conducting Council business in closed session, I first considered the reasons provided by the Requester that suggests that the January 10th Council session item 10.3 must take place in open session. Those points that the Requester makes are:

1. The conduct of elected members of Council in the exercise of their roles does not attract closed meeting protection.
2. The records related to the Mayor's misconduct were entirely public documents obtained under the Municipal Freedom of Information and Protection of Privacy Act, and I further circulated them to 2 of 3 members of the public upon identifying the Mayor's malfeasance. There was no information at risk of public disclosure.
3. The subject of my letter is a continuation of a discussion which took place in the open session of Council on November 8, 2021. That discussion was reported in the media, and I enclose herewith a copy of the article which appeared in the Fort Frances Times.
4. There was no "personal" matter under consideration concerning the Mayor or any other person, and this is an inaccurate characterization of the business item. Regulators have consistently stated that matters of a professional nature or which relate to the office of elected officials do not make out this section. For instance: • The provincial Ombudsman, in his role as closed meeting investigator for the Township of Emo, has stated that "generally, discussions of a council member's actions in the course of their duties are considered to be of a professional nature and do not fall within the "personal matters" exception": <https://canlii.ca/t/jb1g6>. • In his role as closed meeting investigator for the Municipality of Temagami, the Ombudsman has reached similar conclusions, stating that "the information must be about individuals in their personal capacity, rather than their professional, official or business capacity": <https://bit.ly/3GyPkBv>. • Likewise, the Information and Privacy Commissioner has stated that "to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual": <https://canlii.ca/t/1scqh>.
5. Even if the subject matter of item 10.3 did pertain to "personal information", the Information and Privacy Commissioner has stated that "to qualify as personal information, [the information] must be reasonable to expect that an individual may be identified if the information is disclosed". The individual was already identified publicly and in publicly disclosed records of the municipality. While this exception is not available to Council in these circumstances, this meeting would not have "exposed" her identity.

In addition, I sought to understand the Municipalities reasons why they chose to place Item 10.3 in camera instead of in the open portion of the January 10, 2022 meeting. It was a very difficult decision for the Staff as they understood that the Ombudsman has ruled in several similar complaints that if a Mayor or Councillor is acting in their professional capacity the matter would be discussed in open session. So, a legal opinion on the Requester's letter of January 5, 2022 was sought because Staff knew the probability of receiving a complaint in subsequent days would be a strong possibility. The Staff are aware that if a Code of Conduct Complaint were to be received, the Integrity Commissioner's investigation is confidential up until Council deals with any recommendations coming from that complaint. The question is, does the individual have the right to privacy during the discussion up until Council decides on the sanctions – if any. Staff considered if the rule of procedural fairness prevails because up to the point of the Meeting Item 10.3, the Mayor was not identified as the guilty party to the leaked document. In addition, Council did not have a copy of the documents that were obtained through Freedom of Information and Protection to Privacy Act (FIPA). Those documents are subject to

solicitor/client privilege. The Requester's letter had some pretty serious accusations in it so an independent solicitor opinion was sought. The solicitor reminded Staff that placing correspondence from members of the public and publishing it on the Town's Council Agenda, in accordance with the Procedural By-law, that they could be enabling defamation and libeling an individual which could bring legal action against the Municipality. The Deputy Mayor reached out to the Mayor who advised him that she would be reaching out to her solicitor for advice. The Deputy Mayor was attempting to figure out what the Requesters January 5th letter was all about. There were assumptions that the Mayor was guilty of the leak but she had not confessed to the breach (until the closed session). Staff was not privy to what Councillors thought about the communication (the Jan. 5th letter), they had to meet to discuss it. In addition, the Clerk could not hide the fact that there were other identifiable individuals other than the Mayor (such as the contributor to the local newspaper who sent articles and requested anonymity).

As for the legal advice that Staff sought, that solicitor's view was that the Letter of January 5, 2022 involves "personal matters" about Mayor Caul. That letter alleges that Mayor Caul knowingly provided the 'newspaper article contributor' with confidential and privileged information of the Town. In addition, the solicitor noted that the Jan. 5th letter cautions that "it is common practice to dismiss public servants for these types of leaks and to refer such matters to police for investigation of the offence of breach of trust by public officer". Because these are serious allegations of a highly personal nature this agenda item easily qualifies for the exception provided by subsection 239(2)(b).

APPLICATION OF THE "PERSONAL MATTERS" EXCEPTION

The question of Open Session or Closed Session is opined by two Solicitors – the Requester and the Solicitor from whom the Staff sought advice. Each has provided opinions that reached conclusions that are at both ends of the spectrum. However, both would probably agree that the numerous rulings that the Ontario Ombudsman concluded in several of his opinion of the Municipal Act subsection 239(2)(b) has been the most used in determining the use of this exemption.

Examples of The Ontario Ombudsman's opinions:

Example #1

Generally, discussions of a council member's actions in the course of their duties are considered to be of a professional nature and do not fall within the "personal matters" exception. However, in some cases information about a person in their professional capacity may still fit within the exception if it reveals something personal or relates to scrutiny of an individual's conduct.

Example #2

In a letter to the Municipality of Temagami, my Office found that council was entitled to discuss a complaint against a member of council in closed session because staff were unsure if the council member was acting in a professional or personal capacity during the incident that gave rise to the complaint.^[4] Similarly, in a letter regarding a closed meeting held by the City of Elliot Lake, my Office found that an *in camera* discussion about unproven allegations that a council member had breached confidentiality fit within the "personal matters" exception. In that case, the allegations had not been investigated or made public and constituted personal information about the council member.

Example #3

In the present case, council's discussion about some councillors' alleged email correspondences related to those councillors' professional capacity as members of council. However, the concerns raised touched on information that was speculative, and in one case refuted by the named member of council. The discussion involved scrutiny of these councillors' conduct and the sharing of opinions related to the conduct. Accordingly, this discussion took on a more personal nature and therefore fits within the "personal matters" exception.

Example #4

The personal matters exception applies to discussions that reveal personal information about an identifiable individual. In order to qualify as personal information, it must be reasonable to expect that an individual could be identified if the information were disclosed publicly. The Act does not define "personal matters" for the purposes of the open meeting rules. When reviewing the parameters of the open meeting exceptions, my Office has often considered decisions of the Office of the Information and Privacy Commissioner. Although not binding on our Office, these cases can be informative. The IPC has found that information will only qualify as personal for the purposes of the Act if it:

- 1) pertains to an individual in their personal capacity, rather than their professional capacity.
- 2) Information about a person in their professional capacity may still qualify if it reveals something personal about the individual, such as information about job performance.
- 3) As noted by the Ontario Superior Court of Justice in Ontario (Ministry of Correctional Services) v. Goodis, "if there is reasonable expectation that the individual can be identified from the information, then such information qualifies...as personal information."

PROCEDURAL MATTERS

The minutes for the January 10th closed session are not detailed, and I relied on the Clerk's recollections of the closed meeting.

It should be noted that the minutes are a summary of the discussion and do not reflect every statement made. The Clerk maintained that the discussion included personal matters regarding identifiable individuals, despite the fact that the meeting minutes do not reflect this. Identifiable individuals includes the contributor to the newspaper article who wished to remain anonymous.

REPORT

The Town was given the opportunity to review a preliminary version of this report and provide comments to me.

I received comments from two individuals: 1) the Requester and 2) Council Judson.

- 1) The Requester:

Conversation with the Requester regarding my Draft Report – March 7, 2022 at 10:00 a.m.

The report, in repeating legal advice that the clerk was given, suggested that the Requester's January 5th letter was defamatory and speculative. The Requester felt that this was interesting because he actually wrote a rather 'matter of fact letter' that just appended the response he received from a municipal freedom of information request. It didn't comment on the inappropriateness of what had happened it really just said in a very matter of fact way, what was already in the public record. The report then touches on the response that almost makes it seem like the Requester had to have some sort of leap of faith to say that this was a legal opinion. The clerk had redacted portions of the response and the

attachments because of 'privilege'. The document and the email itself is a legal opinion so the Requester advised that he did not understand this report, it is not necessarily germane to the issue.

My Reply to the Requester: "No I'm not talking about your legal opinion at all. What I'm concerned about is when not discussed in-camera - the author of the letter to the editor or whatever to the newspaper – would have been disclosed and that disclosure was to be anonymous. That was one of my main concerns here - it has nothing to do with a legal opinion. Your letter laid everything out plainly. So that is not an issue.

The requester advised that the report says that as for the legal advice the Staff sought, that solicitor's view was that the Letter of January 5, 2022, involves personal matters about Mayor Caul. That letter alleges that Mayor Caul knowingly provided the 'newspaper article contributor' with confidential information of the Town. The requester was adamant that that was not true because he never referred to the Mayor as being the article's newspaper contributor. He basically said she gave the article to the 'newspaper contributor' – he said he never used those quotes 'newspaper contributor'. The legal opinion stated that these are serious 'allegations of a highly personal nature' – the Requester does not see how his allegations were a 'personal nature'. The Mayor released the report because she is the Mayor not because she is June Caul private citizen or she has some job outside of being Mayor she received the legal opinion because she is Mayor. She used her Fort Frances account – she forwarded it from her Fort Frances account and the Requester (through a Freedom of Information Request) received it. The Requester said that he received this information from a freedom of information request and he then provided it to the Municipality because of the questions Council had at a previous Council Meeting and in response to the comments Mayor Caul made at that Council meeting. The Requester does not understand what elements of his letter could possibly be construed to be an allegation of a 'personal nature'.

2) Councillor Judson

Councillor Judson sent a Memorandum to all Council, the Clerk, the CAO and myself dated March 7, 2022 entitled Comments on Draft Closed Meeting Investigator's Report. It is a lengthy document and I will not reproduce it here.

I will defer to Council's wishes as to the requests made by Councillor Judson in his Memorandum.

OPINION

The Clerk sought independent legal opinion prior to issuing the Agenda for the January 10th Council Meeting. One of the main points of that opinion centered around the contents of the Requester's January 5th letter in which he states:

"I anticipate that it may be a challenge to decide how to move forward with this information. I note that it is common practice to dismiss public servants for these types of leaks and to refer such matters to police for investigation of the offence of breach of trust by public officer, contrary to section 122 of the Criminal Code of Canada."

The independent solicitor's advice, in my opinion, centred on this paragraph in the Requester's letter i.e. he opined: "Because these are serious allegations of a highly personal nature this agenda item easily qualifies for the exception provided by subsection 239(2)(b)."

I do not share the independent solicitor's view that the Requester, in merely expressing his opinion, "easily qualifies" for the exception provided by subsection 239(2)(b) and is of a "highly personal nature". I do agree with the Requester that the Mayor does not enjoy the "personal matters about an identifiable individual exception" under Section (s.239(2)(b)).

However, since the "contributor to the newspaper article" expressed that he/she remain anonymous, Council dealing with this issue in a public forum of the open Council Meeting, would disclose this person's identity as the recipient of the 'leaked document' and the 'contributor to the newspaper'. I feel that revealing this person's name would expose the Town to possible legal issues. For this reason I feel the Town of Fort Frances did not contravene the *Municipal Act, 2001*, when it met in closed session on January 10, 2022. The discussion fit within the "personal matters" exception to the open meeting requirements of the Act.

Paul S. Heayn,
Closed Meeting Investigator