

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASE 2011-0460 (web version)

THE TOWN OF NEEPAWA

REPORT ISSUED ON OCTOBER 3, 2013

SUMMARY

The complainant alleged that on September 6, 2011, Neepawa town council discussed certain matters at a meeting closed to the public (in-camera), which he believed were not eligible for in-camera discussion under section 152 of *The Municipal Act*. The complainant also expressed concern about the posted notice of the meeting, asserting that that posted start times for the regular meeting and in-camera portion of the meeting were unclear to the public and could result in people missing part of the regular meeting.

Based on the evidence obtained through our investigation, we concluded that council did not breach the act when it closed the meeting to the public and discussed items in-camera at the September 6, 2011, meeting of council.

In response to the concern about the posted start times for regular meetings of council, Manitoba Ombudsman suggested an administrative improvement, which the town accepted. The town committed to make changes to the meeting agendas to ensure clarity and to enhance transparency.

No formal recommendations were made.

THE COMPLAINT

On September 9, 2011, we received a written complaint alleging that on September 6, 2011, Neepawa town council discussed certain matters at a meeting closed to the public (in-camera), which he believed were not eligible for in-camera discussion under section 152 of *The Municipal Act*.

The complainant asserted that the posted start times for items on the agenda were confusing and did not provide a clear understanding of the sequence of events as they would occur at the meeting.

Finally, the complainant also expressed concern that he was not provided with an explanation of why the items in question could not be discussed at a meeting open to the public.

BACKGROUND

The complainant is a broadcast journalist who attends meetings of council to report publicly on council's deliberations and decisions.

Notice of council meetings, including the meeting agenda, is distributed to media outlets and posted in the town office. The notice of the meeting in question contains the following caption:

Town of Neepawa
Regular Meeting of Council
Tuesday, September 6, 2011 7:00 pm
Council Chambers, Neepawa Municipal Office, 275 Hamilton Street
Neepawa, MB

Immediately below this are three items:

1. Open meeting: Resolution to approve the Agenda
2. Resolution to approve previous minutes
3. In-Camera – 5:00 pm

This is followed by items #4 through #7, which appear to be items to be considered at the regular council meeting, open to the public. None of these next four items has an identified start time.

4. Standing Committee Reports
5. CAO Report
6. Mayor's Report
7. Public Hearing

The next item, #8, identified specific times for the appearance of two delegations, as follows:

8. Delegation
 - 7:00 pm - Manitoba Planning
 - 8:00 pm – Lily Fest Committee

The agenda contains one further item, #9, captioned Old Business.

The complainant attended the council chambers at or shortly before 5:00 p.m. He advised that the [former] mayor called the meeting to order at 5:00 p.m. and proceeded to discuss items #1 and #2 on the agenda.

The town confirmed that council meeting was called to order at 5:00 p.m. and that resolutions were passed for item #1, approving the meeting agenda, and item #2, approving the meeting minutes from the August 23, 2011 council meeting and public hearing.

It is common ground that the complainant was then asked to leave the council chamber prior to the discussion of the in-camera issues listed under agenda item #3. It is also common ground that the complainant inquired as to the statutory authority for closing the meeting but did not receive an answer.

SCOPE OF THE INVESTIGATION

As part of our investigation, we considered the provisions of *The Municipal Act* which relate to the public's right to attend council meetings and the circumstances under which a meeting may be closed to the public.

We reviewed all materials submitted by the complainant and met with him to confirm his position and his understanding of the facts giving rise to his complaint. We received and considered a written response from the town, setting out its position.

We reviewed the posted agenda for the September 6, 2011 meeting, the minutes of the closed (in-camera) portion of the meeting and the minutes of the regular meeting.

Subsequent to our examination of the documentary evidence, we interviewed the current mayor and the chief administrative officer to gain a better understanding of the reasons why council met in-camera on September 6, 2011, and the concerns with the notice of the meeting and the posted times in the agenda.

POSITION OF THE TOWN OF NEEPAWA

The town's written response to the complaint stated that "The Agenda is distributed to all media...and indicates that the in camera portion of the meeting starts at 5 PM and the Regular Meeting of Council begins at 7 PM. This Agenda is available to the public and is available at the Municipal Office as well as posted on our bulletin board."

The town advised that the agenda was posted in advance of the meeting in accordance with by-law no. 2904, the town's procedures by-law, and stated that the media and public are notified if any change to a meeting time is required.

In response to the allegation that council had discussed items in-camera that were not eligible for in-camera discussion under section 152 of *The Municipal Act*, the town identified the specific provisions of the act it felt demonstrated justification for the decision to discuss the items in camera.

THE MUNICIPAL ACT

The act contains specific provisions setting out the requirement to hold council meetings in public, the public's right to attend council meetings, and the circumstances where a council may close a meeting to the public for the purpose of discussing certain types of matters.

Meetings to be conducted in public

152(1) Every meeting of a council or council committee must be conducted in public.

Public's right to be present at meetings

152(2) Everyone has a right to be present at a meeting of a council or council committee unless the person chairing the meeting expels a person for improper conduct.

Additionally, the requirements enabling council to close meetings to the public and discuss matters in-camera are set out in the act as follows:

When council or council committee may close meeting

152(3) Despite subsections (1) and (2), a council or council committee may close a meeting to the public

(a) if

- (i) in the case of a council, the council decides during the meeting to meet as a committee to discuss a matter, and
- (ii) the decision and general nature of the matter are recorded in the minutes of the meeting; and

(b) if the matter to be discussed relates to

- (i) [repealed] S.M. 2004, c. 2, s. 31,
- (ii) an employee, including the employee's salary, duties and benefits and any appraisal of the employee's performance,
- (iii) a matter that is in its preliminary stages and respecting which discussion in public could prejudice a municipality's ability to carry out its activities or negotiations,
- (iv) the conduct of existing or anticipated legal proceedings,
- (v) the conduct of an investigation under, or enforcement of, an Act or by-law,
- (vi) the security of documents or premises, or
- (vii) a report of the Ombudsman received by the head of the council under clause 36(1)(e) of The Ombudsman Act.

ANALYSIS OF ISSUES AND EVIDENCE

As a preliminary note, a plain reading of the statute confirms that there are circumstances where municipal councils are entitled to discuss certain types of matters in private. Manitoba Ombudsman encourages transparency and openness in government. Accurate and complete information about the basis for government decisions affecting us is critical to our participation in the democratic process in which we engage our governments and assess their performance.

Our experience as the oversight office investigating complaints about refused access under *The Freedom of Information and Protection of Privacy Act* (FIPPA) affords us a broader perspective on the balance between the public's right to know and the legitimate requirement for privacy at certain stages of the government decision-making process.

Municipal councils must sometimes consider competing interests, evaluate advice and opinions offered by staff or others given in confidence, consider and debate what may be unpopular positions, and consider a host of legal matters and personnel issues.

The decisions of municipal councils are reflected in resolutions or by-laws passed at meetings that are open to the public, sometimes on the basis of deliberations held in-camera, and reflected in the official records of council business. In that way the public can be aware of the decisions of their elected officials and assess their performance accordingly. Thus the balance is achieved between the right to hold confidential discussions about decisions to be made and the obligation to make or confirm and record those decisions in an open forum, which allows the public to hold their elected officials accountable.

As a matter of practice, and consistent with the access and privacy oversight role we play under FIPPA, Manitoba Ombudsman does not disclose information obtained in the course of investigations when that information is lawfully kept confidential by the party being investigated. We must also guard against detailed discussions of the decision maker's rationale where such discussions could be used to disclose confidential information. It is critical therefore that when we are supporting the decision to withhold information, we fully explore and understand the basis offered as justification for secrecy and satisfy ourselves that the decision made is appropriate under the law, in this case *The Municipal Act*.

To do this we examine each of the issues discussed in-camera, as reflected in the minutes of the in-camera meeting and supplemented by information we obtain from interviews, and carefully consider the stated rationale basis for the decision to go in-camera against the specific statutory provision set out in subsection 152(3) of the act.

In the case at hand we followed that process and concluded on an item by item basis that in every case there was a justification for the decision to discuss the items in-camera. We observed that in a number of cases there appeared to be more than one basis for the decision to proceed in-camera. We also observed that in other cases the basis for the decision to go in-camera might not be obvious to someone who did not have access to the in-camera minutes.

We are satisfied that the items discussed by council during the in-camera portion of the September 6, 2011 council meeting were eligible for in-camera discussion under subsection 152(3) of *The Municipal Act*.

With respect to the allegation that the posted times of agenda items was confusing, the concern is that any such confusion could result in a loss of, or limitation on the public right to attend and witness the public deliberations of council. The complainant asserted that although both items #1 and #2 were discussed in his presence before council proceeded to the in-camera portion of the meeting, the discussion of these items prior to the designated meeting start time of 7:00 p.m. "does not meet the burden of true public access".

We understand the complainant's concern that the printed notice/agenda might be confusing to some. The top of the published agenda identifies meeting and the date and time as follows: **Regular Meeting of Council / Tuesday, September 6, 2011 7:00 pm**. The agenda clearly

identifies items #1 and #2 as scheduled before the 5:00 p.m. in camera session, and items #4 through #7, as scheduled before the next item with an identified start time, which is item #8, **Delegation**, with an identified start time of 7:00 p.m. The regular meetings of council also have an identified start time of 7:00 p.m. as set out at the top of the agenda.

Based on the agenda as it was posted, one could infer that items #1 through #7 were all to be dealt with before the 7:00 start time of the regular council meeting. The town confirmed that this was not the case and that only items #1 through #3 were dealt with prior to the 7:00 start time. We were advised that this is the usual practice and that only the agenda, approval of the previous minutes, and in camera discussions are dealt with prior to the posted start time of the regular meeting of council.

We have received no further complaints about the agenda for this meeting, nor complaints about the posted agenda for any other meeting of the council. We are advised that the Town of Neepawa has not received any complaints about the agenda, nor any inquiries arising from the agenda as posted.

The complainant attended the meeting from the beginning, so we cannot conclude that his right to attend the public portion of the meeting was obstructed. Despite the concern that the posted agenda might be confusing to some, there is no basis on which to conclude that there has been a breach of subsections 152(1) and (2) of *The Municipal Act* as the public was not denied the right to be present at the meeting of council.

Although our office found no breach of the act had occurred, we raised this matter with the town to see if there was a way to avoid any possible confusion about agenda items for the in-camera portion of the meeting and items to be dealt with at the public part of council meetings. We met with the current mayor and chief administrative officer and although neither was involved in the September 6, 2011 meeting, both understood the concern and committed to an administrative improvement to enhance the transparency of the meeting process.

We were subsequently advised that the town will only deal with two agenda items prior to the start of the regular meeting of council which is open to the public, approval of the agenda and any in-camera business. Approval of the minutes of previous meetings will take place at the regular public meeting. This seems like a reasonable solution because the approval of the agenda is a matter in which there would normally be no public participation. Any citizen requests that might affect the agenda would have to have been raised long before council deals with approval of the agenda at the beginning of a meeting.

The complainant also alleged that he did not receive a response from the former acting chief administrative officer (A/CAO) when he questioned what portion of the act authorized council to discuss the items in-camera. There is no legal requirement to provide such an explanation but had it been feasible in the circumstances to do so, a brief explanation would not have been inappropriate. This issue might have been better addressed at a later date, by either the complainant or the A/CAO, at a time when council and the A/CAO were not occupied with the business at hand.

CONCLUSION

Manitoba Ombudsman found no basis on which to conclude that there had been a breach of the provisions of subsection 152(3) of *The Municipal Act*, as all of the matters discussed in-camera fell within one of the listed categories of information eligible for in-camera discussion.

Despite the possibility that the posted agenda may have been confusing to some, there was no basis to conclude that the complainant or any other member of the public was denied the right attend the open portion of the council meeting of September 6, 2011.

Although we did not support the complaint, we appreciate that the issue of in-camera discussions by municipal councils is an important one for journalists and for the public at large. Strict compliance with the statutory provisions at issue in this case is important to ensure government transparency to the greatest extent possible and to maintain public confidence.

This investigation was delayed because of a number of circumstances beyond our control, including workload and staff turnover in our office. Through the investigation we received the full cooperation of both the complainant and the Town of Neepawa.

MANITOBA OMBUDSMAN
October 3, 2013