

# Manitoba mbudsman

## REPORT UNDER

## THE OMBUDSMAN ACT

CASE 2016-0156 AND 2016-0157

RURAL MUNICIPALITY OF ROSSER

REPORT ISSUED ON APRIL 26, 2017

### CASE SUMMARY

Manitoba Ombudsman received complaints regarding a decision by the Rural Municipality of Rosser (the RM) council to re-open its August 11, 2015 council meeting. The complainants believe the re-opening of the meeting was procedurally improper and question whether it was consistent with legal requirements.

The RM states that council re-opened the meeting in order to pass a resolution in accordance with the Municipal Act approving the absence of the reeve at three consecutive council meetings.

In this instance, the re-opening of the August 11 council meeting resulted in procedural irregularities that contravened certain requirements in the RM's procedures by-law. As a result, we recommend the following:

- In the future, if the RM council wishes to suspend requirements in its procedures by-law it should, as required by section 3.1 of the by-law, vote on the suspension of the by-law in a council meeting. If the majority of council approves the suspension of the by-law, the minutes should clearly indicate which by-law requirements council chose to suspend.

We also suggest that the RM develop a formal procedure to track attendance of council members with respect to council meetings to ensure that if a council member is absent for three consecutive meetings, a resolution is passed in accordance with the requirements in the Municipal Act.

The RM advised that it accepts our recommendation. It has also indicated that it has implemented a procedure to track council members' attendance.

## **OMBUDSMAN JURISDICTION AND ROLE**

Under the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or a municipal by-law. On other occasions, it is written policy or established procedures implemented to give effect to legislative purpose.

The goal of ombudsman investigations is to review complaints and to identify areas requiring administrative improvement.

## **KEY ISSUE**

- **Did the RM of Rosser council act contrary to applicable law and policy when it re-opened its August 11, 2015?**

## **BACKGROUND**

Clause 94(1)(a) of the Municipal Act states that a council member loses their seat if he or she is absent for the full duration of three consecutive regular council meetings, unless council passes a resolution approving the absences at:

- any of the three meetings in which the council member is absent;
- the meeting prior to the three meetings in which the councillor is absent; or,
- the meeting following the third absence.

In this matter, the reeve of the RM missed three consecutive regular council meetings (June 9, June 23 and July 14, 2015) and council had not passed a resolution approving the absences.

The RM advises that the reeve stated she had missed the June 23 and July 14 council meetings due to family medical emergencies and she acknowledged that council had not approved those two absences. She believed that council had approved her absence for the June 9 council meeting when it approved her attendance at an out-of-province conference from June 5 to June 8, 2015. However, no council resolution approving her absence from the June 9 meeting was recorded.

In order to prevent the reeve's disqualification from council, the RM council on September 8, 2015, re-opened its August 11, 2015 council meeting (which was the meeting following the third absence) in order to pass a resolution approving the reeve's absences.

## September 8, 2015 Council Meeting

A regular council meeting had been scheduled for 9:00 a.m. on September 8, 2015. Prior to calling the council meeting to order, council met as a committee of the whole at 9:00 a.m. on this date. The RM's committee of the whole is comprised of all five RM councillors and it meets periodically. RM legal counsel attended this committee meeting to explain (in closed session) council's options for addressing the reeve's three consecutive absences. All councillors were present at this meeting.

Following the presentation by RM legal counsel, council passed the following resolutions:

- Council passed a resolution (in open session) to re-open the August 11 regular council meeting. (This resolution is recorded at item 25 in the August 11 council meeting minutes, but no date or time of the resolution is in the minutes.)
- Council passed a resolution to add an agenda item to the August 11 council meeting regarding approving a leave of absence for the reeve.
- Council passed a resolution approving the reeve's June 9, June 23 and July 14, 2015 absences.
- Council passed a resolution to adjourn the re-opened August 11 council meeting. No date or time of adjournment is recorded in the minutes.

Our office received conflicting accounts regarding whether council passed these resolutions while meeting as a committee of the whole, or whether council passed the resolutions after calling the September 8 regular council meeting to order. The RM minutes do not specify the sequence of events.

The RM minutes clearly indicate, however, that council approved the August 11, 2015 council meeting minutes at the September 8 council meeting, and the minutes included the resolutions regarding the re-opening of the meeting and the approval of the reeve's absences.

## **POSITION OF THE COMPLAINANTS**

The complainants are concerned that the reeve of the RM of Rosser missed three council meetings without obtaining the required permission from council, which disqualifies her from council as per s. 94(1) of the Municipal Act. They believe the RM council acted contrary to law by re-opening its August 11, 2015 meeting to retroactively grant permission for the reeve to be absent from the three council meetings. They contend that council passed the resolutions related to re-opening the August 11 meeting before it called the September 8 council meeting to order, which they state would not meet the requirement in s. 141 of the Municipal Act that resolutions be passed at council meetings.

The complainants note that at a subsequent council meeting an RM councillor presented council an opinion by a professional parliamentarian that was contrary to that of RM legal counsel. In the parliamentarian's view, it was an error to re-open the August 11 meeting because the Municipal

Act and the RM procedures by-law do not contain provisions that authorize doing so, and in his view, there is no parliamentary authority that allows for re-opening a meeting once that meeting is adjourned.

## **POSITION OF THE RM OF ROSSER**

The RM referred our office to its legal counsel to obtain information about council's decision making process in this matter. RM legal counsel indicated that due to an administrative oversight, council did not approve the reeve's absences at the meeting following the third absence. When it realized its mistake, council consulted RM legal counsel on its options.

On September 8, 2015, RM legal counsel advised the municipal council that to prevent the reeve's disqualification from council, council's only option was to re-open the August 11, 2015 regular council meeting, add the item of the reeve's absence to the agenda and pass a resolution approving the reeve's absences. Four councillors voted in favour of the resolutions that implemented this approach, and one councillor abstained. The abstaining councillor was the same councillor who presented council the professional parliamentarian's opinion on the re-opening of the council meeting.

The RM made public the briefing note summarizing the opinion provided to the RM council by its legal counsel regarding its options for addressing the reeve's three consecutive absences, as well as case law supporting this opinion. The briefing note states that in the opinion of RM legal counsel, there is no law regarding the issue of re-opening a council meeting. It also notes that *The Law of Canadian Municipal Corporations* states that council resolutions must be in good faith and in the public interest or the well-being of the municipality as a whole. The RM's legal counsel is of the view that the resolutions at issue met this threshold.

## **SCOPE OF THE INVESTIGATION**

Our investigation of this complaint included the following:

- Interviews with complainants
- Review of the records submitted by the complainants
- Review of the records submitted by the RM
- Interview with RM legal counsel
- Discussion with the RM chief administrative officer, assistant chief administrative Officer and RM councillors
- Review of relevant legislation and by-laws, including the Municipal Act, the RM procedures by-law (by-law no. 8-12) and RM organizational by-law (by-law no. 9-12)
- Review of the Manitoba government's Manitoba Municipal Act Procedures Manual

## ANALYSIS

### **Did the RM of Rosser council act contrary to applicable law and policy when it re-opened its August 11, 2015?**

#### Municipal Act

The Municipal Act requirements regarding councillor absences are strict and, to our knowledge, the act does not provide a mechanism for councils to address oversights regarding the approval of councillor absences. The scope of our investigation did not include whether the act's provisions regarding councillor absences should be amended.

The RM states that council's failure to initially pass a resolution authorizing the reeve's absences in accordance with the Municipal Act was an oversight, and when it realized its mistake, it re-opened its August 11, 2015 council meeting in order to pass a resolution approving the reeve's three absences.

The Municipal Act is silent on whether an RM may re-open an adjourned meeting at a later date.

#### Procedures By-law

Under the Municipal Act, every municipality must pass a procedures by-law that provides rules for matters such as a regular council meeting schedule and the procedure for changing the time of a regular council meeting. Subsection 149(2) of the Municipal Act states that a municipal council must govern itself in accordance with its procedures by-law.

Our office investigated whether council's decision making process was consistent with the RM's procedures by-law.

#### *Amending the council meeting agenda*

The RM procedures by-law sets out detailed requirements for notification and amendments of council meeting agendas. Section 7.1 of the by-law requires that a draft agenda of each regular council meeting, together with copies of supporting materials, be available to councillors and the public seventy-two hours before the council meeting.

The procedures by-law states that a council meeting agenda may be amended in the following manner:

- 7.3 *Items may be added to the Agenda at a regular meeting of Council by a majority vote of the members present, **prior to** adopting the final Agenda for the regular meeting of Council.*

[emphasis added]

The RM indicated to our office that this provision was not followed, as council passed a resolution to amend the August 11 meeting agenda long after having approved the final agenda for this meeting. The RM also stated, however, that council had suspended this provision, as per section 3.1 of the procedures by-law (which is discussed in more detail later in this report).

#### *Changing the date and time of the council meeting*

While the Municipal Act is silent on council's ability to re-open an adjourned council meeting, subsection 149(3) of the Municipal Act requires that an RM's procedures by-law set out the day, time and place of regular council meetings, the type and amount of notice to be given of regular council meetings, and a procedure and type and amount of notice for changing the day, time or place of a regular council meeting.

Section 8.1 of the procedures by-law states that regular council meetings shall be held at 9:00 a.m. on the second Tuesday of each month and at 6:00 p.m. on the fourth Tuesday of each month (except for July, August and September) in the RM's council chambers.

The procedures by-law states that the date and time of a council meeting may be changed in the following manner:

- 8.5 *Council may by resolution vary the date and time of a regular meeting as circumstances may require.*
- 8.6 *Notice of any change of day or time of a regular meeting of Council must be posted in the municipal office and on the municipal website at least fourteen (14) days before the regular scheduled date of the meeting.*

The RM indicated to our office that these provisions were also suspended, as notice was not posted in the municipal office and on the municipal website that the August 11 meeting would be re-opened on September 8, nor did council pass a resolution changing the time of the September 8 council meeting (and notify the public accordingly).

#### *Suspending requirements in the procedures by-law*

Section 3.1 of the procedures by-law states that any rule in the procedures by-law may be suspended by a vote of the majority of members present, except in cases where some other vote is required in the Municipal Act or procedures by-law.

The RM indicated to our office that council was aware it was suspending some provisions in the procedures by-law by re-opening the meeting. As noted previously, council indicated it had suspended sections 7.3, 8.5 and 8.6 of the by-law in making this decision. There is no evidence, however, that council held any vote regarding the suspension of these procedural requirements, which was required as per section 3.1 of the by-law.

## **FINDINGS AND RECOMMENDATION**

We have not reviewed any evidence that the reeve's reasons for missing the three council meetings were inappropriate or that council was acting in bad faith when it decided to re-open the August 11, 2015, council meeting to prevent her disqualification from council.

We recognize that the disqualification of an elected official from their position would be a significant consequence for an administrative oversight. The record of council's three votes on this matter (in September 2015, January 2016 and April 2016) demonstrate that council's will was to approve the reeve's three absences.

It is unfortunate that in doing so council needed to suspend requirements in the RM's procedures by-law in order to rectify an administrative oversight. This raises concerns about the lack of notice to the public that council would be re-opening a meeting that it had adjourned four weeks prior and adding a new item to that meeting's already finalized agenda. The RM indicates that in the circumstances, there was insufficient time to notify councillors or the public in advance of the proposal to re-open the council meeting and add this new agenda item. Nevertheless, this lack of public notice is a significant procedural irregularity that violated RM procedures by-law requirements regarding changing the date and time of council meetings and amending the council meeting agenda.

We are also concerned about a lack of transparency in how the council minutes record the resolutions regarding the re-opening of the August 11 council meeting. The relevant resolutions are recorded at the end of the approved minutes for the August 11 meeting, but there is no indication that the resolutions were passed on September 8 and the minutes do not specify whether the resolutions were passed before or after that day's council meeting had been called to order. Nor is there any indication of the time of day the re-opened portion of the meeting was held, who was present, or when it adjourned. This information should have been recorded in the council minutes so that the minutes clearly indicated when council re-opened the meeting and who was present for that decision.

Given that section 141 of the Municipal Act states that a resolution is not valid unless it is passed at a council meeting, we are particularly concerned that the minutes do not indicate whether the resolutions regarding the re-opened portion of the meeting were passed before or after the September 8 council meeting was called to order. We contacted the RM councillors, staff and legal counsel who were present when the resolutions were passed in order to clarify the sequence of events. Some individuals recalled the resolutions being passed during the committee of the whole meeting, and others recalled the resolutions being passed after the September 8 council meeting was called to order (but before council approved the August 11 minutes). As we have received these conflicting accounts and the RM minutes are silent on this point, we are unable to conclusively determine whether the resolutions regarding the re-opening of the council meeting met or did not meet the Municipal Act requirement that resolutions be passed during a council meeting.

We are aware that efforts were eventually taken on the part of council to allow the public to have input into the decision to reopen the August 11 meeting. That matter was formally revisited at

two council meetings (January 12, 2016 and April 5, 2016) and a public meeting was held on March 31, 2016. It is positive that these opportunities for involvement and education regarding the decision to re-open the meeting were available to the public.

We understand and accept council's intention to address its oversight by way of suspending sections of its procedures by-law and conclude that it was done in good faith. That being said, it is our view that the re-opening of the August 11 council meeting did result in procedural irregularities that contravened certain requirements in the procedures by-law.

As we noted previously, subsection 149(2) of the Municipal Act states that a municipal council must govern itself in accordance with its procedures by-law. While the RM's procedures by-law gives council the right to suspend requirements in the by-law in certain circumstances, suspending requirements in this by-law should not be done lightly, and when done, evidence of the vote should be recorded in the minutes. As a result, we recommend the following:

### **Recommendation**

- In the future, if the RM council wishes to suspend requirements in its procedures by-law it should, as required by section 3.1 of the by-law, vote on the suspension of the by-law in a council meeting. If the majority of council approves the suspension of the by-law, the minutes should clearly indicate which by-law requirements council chose to suspend.

We also suggest that the RM develop a formal procedure to track attendance of council members with respect to council meetings to ensure that if a council member is absent for three consecutive meetings, a resolution is passed in accordance with the requirements in the Municipal Act.

### **RESPONSE TO RECOMMENDATION**

The RM advised that it accepts our recommendation and that in the future if council wishes to suspend the requirements of its procedures by-law a resolution will be passed indicating which section of the by-law is being suspended.

The RM further advised that in 2016, it began recording the attendance of each council member at each meeting. Recorded attendance is included with each agenda to allow council members to confirm the accuracy of the record.

We are pleased that the RM has accepted our recommendation and that it is tracking the attendance of council members.

This report concludes our investigation into this complaint.

**MANITOBA OMBUDSMAN**