

# Ombudsman Act Investigation Report

Case 2019-0574: Village of Dunnottar



Manitoba  Ombudsman

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# Manitoba Ombudsman

**REPORT UNDER  
THE OMBUDSMAN ACT  
FILE 2019-0574  
VILLAGE OF DUNNOTTAR  
REPORT ISSUED APRIL 13, 2022**

## **THE COMPLAINT**

We received a complaint about an August 21, 2019, Village of Dunnottar council meeting. The complainant is concerned about council's decision to close part of that meeting to the public. The complainant alleges that closing the meeting did not meet any exceptions outlined in section 152(3) of the Municipal Act. The complainant further alleges the meeting minutes were insufficient.

## **MANITOBA OMBUDSMAN ROLE**

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

An administrative matter for investigation can include any practice, procedure, action or decision that government makes as it implements or administers its laws and policies. We assess whether administrative processes and procedures are followed according to applicable legislation, regulation and/or existing policies.

Manitoba Ombudsman investigations review complaints to identify areas requiring administrative improvement. Our reviews take a broad view that considers the fairness and reasonableness of government actions and decisions.

When investigating complaints that municipal meetings were inappropriately closed to the public, we consider whether the municipality followed the public meeting requirements of the Municipal Act and the municipality's own procedures.

## ISSUE

We reviewed whether the municipal council followed requirements for meeting in closed session.

## EVIDENCE REVIEWED

Our investigation of this complaint included a review of the following:

- Complaint and other correspondence from the complainant
- Relevant portions of the Municipal Act and Municipal Act Procedures Manual
- The municipality's procedures by-law
- The meeting agenda and minutes
- Written explanation provided to us by the chief administrative officer

## MANITOBA MUNICIPAL ACT REQUIREMENTS FOR CLOSED MEETINGS

As explained in the Manitoba government's Municipal Act Procedures Manual, municipalities are expected to operate in an open and transparent manner. By discussing matters at public council meetings, the municipality ensures that the public can hear council's debate and know council's decisions.

Section 152 of the Municipal Act states that all council meetings must be conducted in public unless the matter to be discussed relates to any of the following:

- an employee, including the employee's salary, duties and benefits and any appraisal of the employee's performance,
- 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,
- the conduct of existing or anticipated legal proceedings,
- the conduct of an investigation under, or enforcement of, an Act or by-law,
- the security of documents or premises, or
- a report of the Ombudsman received by the head of the council under clause 36(1)(e) of the Ombudsman Act.

These are the only circumstances in which a municipal council in Manitoba has the right to close a council meeting to the public. The Municipal Act Procedures Manual states that if there is any doubt about whether a meeting may be closed to discuss a particular matter, council should defer the discussion on the matter and request legal advice from the municipality's lawyer.

Section 152(3) of the Municipal Act requires that if council decides to meet in a closed session to discuss one or more of these matters, the decision and general nature of the matter must be recorded in the meeting minutes available to the public.

## **MUNICIPALITY'S PROCEDURES BY-LAW**

We obtained a copy of the municipality's procedures by-law from the Village of Dunnottar website (by-law number 943/17). Sections 8.7 and 8.8 of the by-law reflect the same requirements laid out in the Municipal Act for public meetings and the limited specific circumstances in which the municipality's council may close a meeting to the public.

## **THE COUNCIL MEETING**

The agenda for the August 21, 2019, council meeting stated that the Village of Dunnottar council would be having a regular meeting at 10:00 a.m. that day. The agenda indicated that at the end of the meeting council would have an in camera (closed) session.

The council minutes for the meeting state that at 10:47 a.m. council passed a resolution to close the meeting to the public pursuant to section 152(3) of the Municipal Act in order "to meet as a committee to discuss a matter relating to negotiations."

We asked the municipality to explain why that part of the meeting was closed to the public and how it related to an exception under section 152(3) of the Municipal Act. We also requested any notes of the closed meeting, but the chief administrative officer indicated that she does not keep written notes of discussion in closed session.

The complainant also provided us emails she received from the chief administrative officer explaining why council had closed that part of the meeting to the public.

The information we received from the municipality indicates that during the closed session meeting, council discussed whether to endorse the relocation of postal services to a local store in village rather than village residents needing to travel to the Rural Municipality of St. Andrews to collect their mail. The municipality states that as part of that discussion, council discussed "confidential business information" that a third party had shared with office staff.

The municipality indicates that the primary reason council closed the meeting to the public was to discuss the location of the post office and the private business information the municipality had received related to the location of the postal services. However, the municipality states it was involved in the negotiations to relocate the postal services because the municipality had been working with Canada Post to ensure a post office was available to residents and negotiate where the permanent location of the postal services would be located.

The minutes state that council passed a resolution to resume the regular meeting of council and then the meeting adjourned at 11:25 a.m.

## ANALYSIS

### DID THE MUNICIPAL ACT PERMIT COUNCIL TO DISCUSS THIS MATTER IN CLOSED SESSION?

The Municipal Act is clear that all council meetings must be held in public and that only in limited specific circumstances does council have the option to close a meeting to the public. These are requirements and are not guidelines. As explained earlier in this report, section 152 of the Municipal Act sets out the only circumstances in which a municipal council in Manitoba has the right to close a council meeting to the public.

The village states that it closed the meeting because the matter council discussed related to negotiations. Section 152(3)(iii) of the Municipal Act states that a municipal council may close a meeting to the public if the matter to be discussed relates to

“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”

[emphasis added]

This exception allows a municipality to keep information confidential that could undermine its bargaining position or give another party an unfair advantage over the municipality during an ongoing negotiation.

We were unable to find guidance on the scope of this exception in Manitoba or the test for when this exception can apply. We did find some information on a similar exception in Ontario. Under the Ontario Municipal Act, a municipal council may close a meeting to the public if the matter being considered is:

“a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.”

The Ontario Ombudsman states that in order for this exception to apply, the municipality must show that:

1. The in camera discussion was about positions, plans, procedures, criteria, or instructions;
2. The positions, plans, procedures, criteria, or instructions are intended to be applied to negotiations;
3. The negotiations are being carried on currently, or will be carried on in future; and
4. The negotiations are being conducted by or on behalf of the municipality.

We found the Ontario Ombudsman's step-by-step analysis of the exception to be a helpful way to approach the issue in this investigation.

In this matter, the municipality informed us that a discussion took place in closed session about preliminary negotiations the municipality was involved in about the relocation of postal services for local residents and that council discussed confidential information provided by a third party.

Discussing confidential information provided by a third party is not in itself an exception in Manitoba's Municipal Act to the public meeting requirement. The relevant exception is whether council discussed "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."

While the municipality states the matter related to negotiations it was involved in, we reviewed no evidence that discussing the matter in public "could prejudice a municipality's ability to carry out its activities or negotiations," which is a condition the Manitoba Municipal Act requires for closing a council meeting to the public under the negotiations exception.

As a result, we are not satisfied that council had the authority to discuss this matter in a closed session and exclude the public from this portion of the council meeting.

#### Clarity in the Municipal Act

The municipality states that many municipalities have discussions with businesses, developers and investors and not all of those discussions (at least in the preliminary stage) should be held in public. The municipality suggests that if the ombudsman finds it was not in compliance with the Municipal Act, that the act be amended to allow for these preliminary discussions in closed session, particularly when the information being discussed is not something that the municipality would share with the public if an access to information request was received.

We note that in other provinces, municipal council discussion of third party business information can be discussed in a closed session meeting. In British Columbia the Community Charter Act permits closing a municipal meeting to discuss information that is prohibited from disclosure under the province's access to information legislation, or information that if it were presented in a document would be prohibited from disclosure under that legislation, such as business interests of a third party. We are aware that Alberta and Ontario also have expanded exceptions to the open meeting requirement that could allow closed discussion of third party business interests.

The Village of Dunnottar may wish to contact Manitoba Municipal Relations regarding its suggestion that the Municipal Act be amended to allow closed session discussion of confidential third party business information.

#### **DID THE MEETING MINUTES MEET MUNICIPAL ACT AND PROCEDURES BY-LAW REQUIREMENTS?**

The Municipal Act requires that if council decides to go into a closed session, the minutes of the open meeting must record the decision to close and the general nature of the matter to be discussed.

As already noted, council minutes in this matter state that at 10:47 a.m. council passed a resolution to close the meeting to the public pursuant to section 152(3) of the Municipal Act in order "to meet as a committee to discuss a matter relating to negotiations." However, there was no other information that explained the general nature of the closed session.

When we informed the village's chief administrative officer of our review of this complaint, she promptly notified us that she noticed this error (the lack of an explanation) in the minutes. She indicated she had spoken to the individual who prepares the minutes and instructed her to ensure that when council meets in closed session, if a public resolution is not forthcoming, a brief synopsis of the discussion should be included in the minutes.

We appreciate the municipality's assistance with resolving this issue and its commitment to meet the Municipal Act requirements going forward. As a best practice, we encourage the municipality to describe the topic discussed in a way that is sufficiently descriptive, but without undermining the municipality's reason for discussing the matter in closed session.

We also acknowledge that in this matter, the minutes indicate under which Municipal Act exception council felt justified moving the meeting into closed session. In our view, this is a positive and transparent practice.



## FINDINGS

### Complying with the open meeting requirement

The principles of transparency and accountability underlie the general requirement in the Municipal Act that municipalities meet in public. The act permits municipal councils to exclude the public in specific circumstances, but councils should only do so after carefully considering whether:

- the matter to be discussed satisfies one of the permitted circumstances, and
- council determines that the public must be excluded from the discussion.

If in doubt, municipalities should keep their meeting open or request legal advice from the municipality's lawyer.

In this case, we are not satisfied that council had the authority to discuss this matter in a closed session. Going forward, we recommend the following:

**The Village of Dunnottar should ensure that no subject is discussed in a closed session unless it clearly comes within one of the Municipal Act exceptions to the open meeting requirement.**

### Council minutes

The village has committed to ensuring an explanation is provided in the open council meeting minutes as to the nature of the matter discussed in the closed meeting. This will enhance transparency and meet the requirements of the Municipal Act. As such it is not necessary for our office to make a recommendation on this matter.

### Closed meeting minutes

The Village of Dunnottar indicates it does not maintain minutes for closed meetings. In our view, a best practice is that municipalities record minutes for closed session meetings. As explained in the British Columbia Ombudsperson's best practices guide for open meetings by local government, closed session minutes should include a detailed description of the discussion, any specific documents considered, any motions, resolutions or votes, and any directions issued.

Closed session meeting minutes may be beneficial to councillors and administrators as a record of what was discussed. It may also help council respond to questions or concerns as to why the meeting was closed.

It is important to note that any record of matters discussed, including minutes taken at a closed session, is confidential and public bodies are not required under the Freedom of Information and Protection of Privacy Act (Part 9.1, Access to Information) to disclose those records upon receiving request from the public.

It should also be noted that while circumstances may require the need to close a meeting to the public, council cannot make decisions in private. Any resolution or by-law can only be passed or adopted at an open council meeting. This helps to balance the need for certain matters to be discussed in confidence with the principles of accountability and transparency.

We also agree with the British Columbia Ombudsperson that it is important municipalities have a process in place to regularly review the information discussed at closed meetings. Information previously discussed at a closed meeting that no longer needs to be confidential should be released to the public.

Going forward, we recommend that:

**The Village of Dunnottar should start writing closed session minutes and ensure the minutes are reviewed by council.**

## RECOMMENDATIONS AND RESPONSE

### Recommendation 1

The Village of Dunnottar should ensure that no subject is discussed in a closed session unless it clearly comes within one of the Municipal Act exceptions to the open meeting requirement.

### Response from the Village of Dunnottar

The Village of Dunnottar council accepted this recommendation and provided this response:

The village will ensure that no subject is discussed in a closed session unless it clearly comes within one of the Municipal Act exceptions to the open meeting requirement. Council made the decision to discuss confidential business information received from a local business knowing that it may not "fit" the Municipal Act clause and will be forwarding a resolution to AMM to amend the Municipal Act to permit closing the meeting for these type of discussions in the future.

**Recommendation 2**

The Village of Dunnottar should start writing closed session minutes and ensure the minutes are reviewed by council.

**Response from the Village of Dunnottar**

The Village of Dunnottar council responded that it will not be writing closed session minutes.

The village explains that council rarely discusses an item in closed session that is not resolved in the same meeting. If a matter is discussed in camera and not resolved in the same meeting, the village states that records are created in responding to the issue or in setting another meeting to continue the discussion.

**CONCLUSION**

We are pleased that council accepted our recommendation to ensure that no subject is discussed in a closed session council meeting unless it is clearly authorized by one of the Municipal Act exceptions to the open meeting requirement.

We acknowledge that council did not accept our second recommendation.

We remain concerned, however, that without closed session minutes, there is a lack of council documentation of closed session discussion and decision, particular for items council feels are resolved at the closed meeting.

We are not suggesting the closed session minutes be made public, but we do feel documentation of discussion and decisions in closed session is critical to municipal government information management practices.

Closed session minutes also facilitate the ability of our office to respond to complaints that a council discussed a subject in closed session that does not meet an exception to the open council meeting requirement.

This report concludes our review of this matter.

**MANITOBA OMBUDSMAN**