

**INVESTIGATION INTO MUNICIPALITY OF
NORTH PERTH CLOSED MEETINGS
REQUESTED BY RONALD SCOTT**

The Complaint

This investigation deals with two complaints received by the Municipality from Ronald Scott concerning Closed Meetings. The first complaint, dated November 2, 2009 requests an investigation of all in-camera sessions of North Perth Council from September 1, 2006 to November 2, 2009 where the Council “spoke about anything that has to do with the law suit” that Mr. Scott has brought against the Municipality. The second complaint, which was brought separately and subsequently, requested an investigation of the in-camera session of October 13, 2009.

As these complaints overlap, from the point of view of time, I will report on the investigation for both complaints as part of the same report.

Investigation Jurisdiction

The jurisdiction to conduct this investigation is found in Section 239.1 of the *Municipal Act*, 2001, which came into effect on January 1, 2009. Pursuant to Section 239.1, a person may request an investigation of whether a Municipality or local Board has properly closed a meeting to the public pursuant to Section 239 of the *Municipal Act*. This section of the Act

states that the investigation is to be conducted by (a) an investigator referred to in Section 239.2(1) of the Act or the Ombudsman if an investigator has not been appointed. Section 239.2(1) of the *Municipal Act* authorizes the Municipality to appoint an investigator “to investigate in an independent manner, on a complaint made to him or her by any person whether the Municipality or a local Board has complied with Subsection 239 or a procedural By-law under Subsection 238(2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation. On December 10, 2007, by Municipality of North Perth By-law Number 159-2007, I was appointed by the Council as an investigator for the Municipality to conduct investigations pursuant to Section 239.1 of the *Municipal Act*.

Provisions for Closed Meetings

Section 239 of the *Municipal Act*, 2001 states that except as specifically provided in the Act, all meetings of a Municipal Council are to be open to the public. Section 239(2) sets out certain exceptional situations in which a meeting or part of a meeting may be closed to the public:

- (a) the security of the property of the Municipality or local Board;
- (b) personal matters about an identifiable individual, including Municipal or local Board employees;

- (c) a proposed or pending acquisition or disposition of land by the Municipality or local Board;
- (d) labour relations or employment negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the Municipality or local Board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose; and
- (g) a matter in respect of which a Council, Board, Committee or other body may hold a closed meeting under another Act.

The Subsection goes on to outline certain requirements before going into a Closed Session:

“239(4) Before holding a meeting or part of a meeting that is to be closed to the public, a Municipality or local Board or Committee of either of them shall state by resolution,

- (a) the fact that the holding of a closed meeting and the general nature of the matter to be considered at the closed meeting.”

The Act also states that with certain exceptions, the meeting shall not be closed to the public during the taking of a vote. The Act states that a meeting may be closed to the public during a vote if the Act permits or requires the meeting to be closed to the public and the vote is for

a procedural matter or for giving direction or instructions to officers, employees or agents of the Municipality.

The Municipality has adopted By-law 33-2007 which is a procedural By-law passed pursuant to Section 238 of the *Municipal Act*, 2001. Subsection 18 of the Procedural By-law outlines the requirements for conducting a Closed Meeting. That section of the By-law conforms with and repeats the provisions of Section 239 of the *Municipal Act* concerning meetings that are not open to the public.

Section 239(7) of the *Municipal Act* states that a Municipal Council shall record, without vote or comment, all resolutions, decisions and other proceedings at a meeting of the body whether it is closed to the public or not.

Investigation Process

During the investigation, I conducted interviews with the persons I felt would have information relevant to the circumstances. I also reviewed voluminous documentation consisting of minutes, agendas, emails and the relevant Municipal by-laws and litigation.

Findings

1. All In-camera Sessions from September 1, 2006 to November 2, 2009 where Council spoke about anything having to do with the litigation that Mr. Scott has brought against the Municipality.

This particular complaint is rather unusual in view of the extent of the investigation requested.

Normally, complaints of this nature and requests for investigation are relevant to one particular meeting and issues concerning one particular meeting.

The request to investigate pertain to all meetings between September 1, 2006 and November 2, 2009. The amendments to the *Municipal Act*, which provided for the appointment of an investigator came into effect on January 1, 2009. The amendment contained no provision for retroactivity. Therefore, it is my opinion that I have no authority to investigate any meeting prior to January 1, 2009 and I, therefore, have confined my review to the period between January 1, 2009 and November 2, 2009.

During that period, Council held 22 (twenty-two) regular meetings. Of those meetings, there were discussions of Mr. Scott's litigation during Closed Sessions on the following dates:

January 19, 2009, February 9, 2009, March 16, 2009, July 6, 2009, August 24, 2009, September 14, 2009, October 3, 2009 and October 26, 2009.

In reviewing the various documents pertaining to the meetings, it would appear that in all cases, proper notices and agendas were prepared and published in advance of the meetings and appropriate minutes were kept of the closed portion of the meetings as well as the open session of the meetings. In all cases, the appropriate motions were moved, seconded and passed to authorize moving into closed session.

In an interview with Ms. Patricia Berfelz, the Municipal Clerk, I discussed with her the practices of Council with respect to closed meetings. She indicated that her office office outlines in the agenda for each meeting the topics to be discussed in an in-camera meeting. At the meeting, the Council passes the appropriate motion and moves into an in-camera session. She stated that during an in-camera meeting, Council sticks very closely to the agenda items for the closed session. If one of the Councilors begins to discuss items of business that are not listed on the agenda for the closed session, the Mayor will call the Council to order. On the odd occasion, when the Mayor has not done so, the Clerk herself advises that she will prompt the Mayor to intervene. She indicated at an intervening, the Mayor will remind the Councilor that only the issues on the agenda are to be discussed in the closed session. If the Councilor wishes the item to be discussed in closed session, he will be directed to speak to the Clerk to have the matter listed as a closed session item for a subsequent meeting.

The Clerk indicated that the discussion concerning Mr. Scott during the closed meetings in question concerned the litigation that Mr. Scott has brought as against the Municipality.

The discussion was in the nature of receiving written reports from Counsel representing them in the litigation and in some cases, giving instructions to Counsel. She stated that it could

involve documentation or frequently consisted of a letter from the lawyer updating them concerning the litigation.

My review of the minutes of the various closed sessions confirms the comments made by the Clerk.

I conducted an interview with Mr. Scott. In the interview, I asked him if he could outline for me the concerns he had about the various closed meetings for which he had requested the investigation. He stated that the various meetings for which he requested the investigation were occasions where Council went into closed session to discuss the litigation he has brought against the Municipality. He noted that the Mayor is a named defendant in the litigation.

Mr. Scott stated his concern as being that he feels that because the Mayor is a named defendant in the litigation, he has a conflict of interest and he should not be involved in discussions about the litigation during a closed meeting. He stated that some Councilors have told him that the Mayor has told them that they cannot speak to Mr. Scott concerning this matter. He further stated his view that the Mayor never tells the Councilors about the litigation and as a result, they don't know what is going on. He further stated that if the Councilors knew what was going on, they would have settled the litigation a long time ago. He summarized his concern as that he believes that for the Mayor to go into a closed session concerning this litigation constitutes a conflict of interest on the part of the Mayor.

At the conclusion of my interview with Mr. Scott, I repeated to him what I had recorded above as his concerns and asked if these outlined all of his concerns regarding these meetings. He confirmed that it did.

Opinion

My authority to conduct this investigation is derived from Section 239.2 of the *Municipal Act*. Pursuant to that Section, I am to

“investigate in an independent manner...whether the Municipality or a local Board has complied with Section 239 or a procedure By-law under Section 238(ii) of the Act in respect of the meeting or part of a meeting that is closed to the public and report on that investigation.”

The request from Mr. Scott was to conduct a review of all in-camera sessions of Council from September 1, 2006 to November 2, 2009 where Council spoke about anything having to do with the litigation that he has brought against the Municipality. For reasons already stated, I have confined my investigation for the period commencing January 1, 2009. A review of these meetings and the relevant documentation pertaining to those meetings indicates that in a number of those meetings, there were reports received and direction given with respect to the litigation brought by Mr. Scott.

Section 239(2) of the *Municipal Act* states as follows:

“239(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (e) litigation or potential litigation, including matters before administrative tribunals affecting the Municipality or local Board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose.”

From a review of the relevant documentation and discussion with the Clerk, it would appear that the discussions within those various closed meetings of the matters having to do with the litigation that Mr. Scott has brought against the Municipality would fall within those parameters.

Mr. Scott expressed concern about these various meetings relating to the fact that the Mayor is a named defendant in the litigation and indicating that the Mayor has a conflict of interest and should not be involved in discussions of the litigation during a closed meeting.

The question of conflict of interest on the part of a member of Council is governed by separate legislation, being the *Municipal Conflict of Interest Act*. My authority as an investigator is confined to complaints pursuant to Section 239 of the *Municipal Act* and does not extend to the question of whether the conduct of a member of Council contravenes the *Municipal Conflict of Interest Act*. I, therefore, offer no opinion with respect to that concern as raised by Mr. Scott. It is not my place to offer such an opinion as part of this investigation.

Having completed my investigation, I have not received any information or documentation that would lead me to the conclusion that in those various meetings where Mr. Scott's

litigation was discussed by Council in closed session, there was any violation of Section 239 of the *Municipal Act*.

Council Meeting of October 13, 2009

Mr. Scott has made a separate request for investigation of an in-camera meeting held on October 13, 2009.

I have reviewed the relevant documentation pertaining to this meeting. A Notice was published with respect to a Special Meeting of North Perth Council to be held in the Council Chambers on October 13, 2009 at 7:00 p.m. The agenda for the meeting indicates that there would be an in-camera session to discuss personal matters concerning an identifiable individual, including Municipal or local Board employees and discuss litigation or potential litigation, including matters before administrative tribunals, affecting the Municipality or Local Board. Discussion of both of these areas in closed session is permitted pursuant to the *Municipal Act*. The Minutes of the Special Council Meeting indicate that the required motion for moving into closed session was moved, seconded and passed. I have reviewed the Minutes for the Closed Session. Without revealing the detail of the minutes, there were discussions of certain personal matters relevant to employees of the Municipality, which are permitted. There was also discussion of correspondence received from the lawyer representing the Municipality in the litigation brought by Mr. Scott

against the Municipality which resulted in instructions to the lawyer. Again this is in conformity with the *Municipal Act*.

I interviewed Mr. Scott with respect to his request. Mr. Scott advised me that he had brought a camera into the Council Chambers during a Council meeting. He indicated that as a result of this, he received a letter from the lawyer for the Municipality advising him that if, in future, he brought a camera into a Council meeting, he would be asked to leave. He also advised that, in consulting with his own lawyer, he was advised that there was nothing in the procedural By-law for Council that would prevent someone from bringing a camera into a Council meeting.

With respect to the special meeting of Council of October 13, 2009, Mr. Scott states that he has been advised by persons who were in the meeting that the Mayor engaged in discussion concerning this situation of the camera being brought to the Council meeting and asked the other members of Council what they were going to do about Mr. Scott bringing the camera into the Council meeting.

I interviewed Ms. Berfelz, the Municipal Clerk, concerning Mr. Scott's complaint. She advises that during the in-camera session on October 13, 2009, there was no discussion concerning Mr. Scott bringing a camera into the Council meeting. Concerning the incident in question, Ms. Berfelz states that during the Council meeting, her back had been towards

the gallery and therefore, she was not aware of Mr. Scott having brought a camera into the meeting. She stated that after the special Council meeting had ended, one of the members of Council approached her and asked whether Mr. Scott was permitted to bring a camera into the Council meeting. She states that this request came after the conclusion of the Council meeting and not during the in-camera session. As a result of the enquiry by the Councilor, she subsequently checked the procedural By-law and sought an opinion from the Municipality's lawyer.

In my discussion with Mr. Scott, he indicated that there were certain members of Council who could confirm his position that the discussion regarding his bringing a camera into a Council meeting occurred during a closed meeting. He provided me with the names of the following:

Julie Behrns, who is the Deputy Mayor,

David Johnston, who is a councilor,

Robert Martin, who is a councilor, and

Terry Seiler, who is a councilor.

I followed up with each of these individuals and enquired as to their recollection of the meeting. Ms. Behrns indicated that she does not recall any discussion during the closed meeting of October 13th regarding Mr. Scott or anyone bringing a camera into a Council meeting.

Dave Johnston indicates that he recalls a discussion between the Mayor and the Clerk regarding Mr. Scott bringing a camera into a Council meeting. He does not recall the date of that discussion and does not clearly recall whether or not it occurred in a closed meeting. Robert Martin indicated that he also recalls discussion by Council regarding the question of persons bringing cameras into the Council Chambers during Council meetings. He says his recollection was that it was a very brief discussion and he does not recall whether it occurred in a closed meeting.

Terry Seiler indicates that he recalls the discussion concerning cameras in the Council Chamber. He does not remember the date on which the discussion took place and does not remember whether it occurred in a closed meeting.

Having interviewed the individuals specifically indicated by Mr. Scott, it is clear that there was discussion by Council at some point of the question of bringing cameras into the Council Chamber. What is not clear is whether or not that discussion occurred in a closed meeting. I, therefore, make no finding in that regard. However, I would indicate that if such a discussion did occur during a closed meeting, it would have been necessary to list it on the agenda for the meeting so that there was disclosure as to the nature of the matter that was to be discussed as it pertains to those matters that are permitted under the *Municipal Act*.

Report

The Council of the Municipality of North Perth is required to make this report public in accordance with Section 239.2(11) of the *Municipal Act*.

April 9, 2010

GFS/jbr