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New Open Meeting Exceptions of the Municipal Act Information Report

Report Number: 2017-30

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In accordance with the Procedure By-law, any member of Council may make a request to the Town Clerk that this Report be placed on an upcoming Committee of the Whole agenda for discussion.

Purpose

To provide Council with information on recent changes to the Municipal Act which add additional open meeting exceptions.

Background

On November 16, 2016, the Honourable Bill Mauro, Minister of Municipal Affairs introduced Bill 68, Modernizing Ontario's Municipal Legislation Act, 2017 ("Bill 68"), which was introduced in response to the Province's review of the Municipal Act and Municipal Conflict of Interest Act. On May 30, 2017 Bill 68 received Royal Assent. Among the many changes to the Municipal Act, four amendments to Section 239 were added to the open meeting provisions of the Act.

Corporate Services - Legislative Services Report 2017-26 was presented to Committee of the Whole on November 27, 2017 with a recommendation to update the Town's Procedure By-law to include these four new exceptions. On December 4, 2017, Newmarket Council passed By-law 2017-75, which amended the Town's Procedure By-law to include the four additional open meeting exceptions in accordance with Section 239 (2) of the Municipal Act.

Discussion

Effective January 1, 2018, Section 239 (2) of the Municipal Act will be amended to include the following exceptions to the open meeting provisions:

- h) information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of any of them;
- i) a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- j) a trade secret or scientific, technical, commercial or financial information that belongs to the municipality or local board and has monetary value or potential monetary value; or,
- k) 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.

These new clauses tend to generally correspond with language found in the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA), which is the provincial legislation that governs the disclosure of municipal records. Given that these are all new clauses in the Municipal Act, and since none of these clauses have been “tested” by a Closed Meeting Investigation, staff are using past interpretations by the Information and Privacy Commissioner of Ontario (IPC), the body that oversees MFIPPA, to help interpret their application to meetings.

Information and Privacy Commissioner Interpretation

It is possible that clause h) will be interpreted in a literal manner, such that information must be explicitly supplied to the municipality in confidence.

With respect to clause i), the IPC has applied a three-part test related to the disclosure of these types of records:

1. The record must contain information that is a trade secret or scientific, technical, commercial or financial or labour relations information;
2. The information must have been supplied in confidence implicitly or explicitly; and,
3. Disclosure of the information must give rise to a reasonable expectation of harm to the competitive position or interfere significantly with the

contractual or other negotiations of a person, group of persons or organization if the information were disclosed.

The IPC notes that all three parts of the test must be met in order to justify not disclosing the records.

With respect to the first part of the test, the IPC has previously defined what is meant by trade secret, scientific information, technical information, commercial information, financial information, and labour relations information.

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- i) is, or may be used in a trade or business;
- ii) is not generally known in that trade or business;
- iii) has economic value from not being generally known; and,
- iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field.

Technical information is information belonging to an organized field of knowledge which would all under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics.

Commercial information relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data.

Labour relations information is information concerning the collective relationship between an employer and its employees.

With respect to the second part of the test, “supplied in confidence”, the following factors have been used to determine if the information was supplied in confidence:

1. The information was sent as confidential and was meant to be kept confidential
2. The information is treated in a manner that indicates a concern for confidentiality
3. The information is not otherwise disclosed or accessible by the public
4. The information is prepared for a purpose that would not entail disclosure

Finally, the third part of the test must also be met, and that is a “reasonable expectation of harm”. The IPC has previously identified that the municipality must demonstrate that the risk of harm exists if the information is disclosed. A reasonable expectation requires more than just a possible or speculative risk, but also does not need to be a certainty.

Again, given the likely narrow interpretation of the above exceptions, it is possible that exception k) will be narrowly interpreted as well. It is possible that in order for a meeting or part of a meeting to be closed in accordance with clause k), there must be discussion of an actual position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried by or on behalf of the municipality.

Conclusion

As these open meeting exceptions are all new, and it is still unclear on how the language will be interpreted, staff will continue to monitor the use of these new open meeting exceptions and any resulting precedent on their application.

Business Plan and Strategic Plan Linkages

This report relates to the well-equipped and well-managed link of the Town’s Community Vision – implementing policy and processes that reflect sound and accountable governance.

Consultation

Legal Services was consulted in the report.

Human Resource Considerations

None.

Budget Impact

None.

Attachments

None.

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