

December 15, 2011

Mayor Wayne Hurst
The Town of Amherstburg
271 Sandwich St. South
Amherstburg, ON
N9V 2A5

Dear Mayor Hurst:

Re: Ombudsman Report

I have completed my investigation into whether the Town of Amherstburg Council held multiple closed meetings in contravention of the *Municipal Act, 2001*. My final report is enclosed.

The Town of Amherstburg is required to make my report available to the public under s. 14(2.6) of the *Ombudsman Act*. I will also be posting a copy of the report on my website at www.ombudsman.on.ca.

Yours truly,



André Marin
Ombudsman



Ombudsman Report

**Investigation into whether the
Town of Amherstburg Council
held multiple closed meetings
in contravention of the *Municipal Act***

“Behind Closed Doors”

**André Marin
Ombudsman of Ontario
December 2011**

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Complaints

- 1 On March 18, 2011, our Office received a complaint that the Council for the Town of Amherstburg had improperly voted in closed session at a meeting in January to eliminate the Parks and Recreation committees.
- 2 On March 25, 2011, our Office received another complaint about closed council meetings. This complaint raised concerns about seven closed sessions held in January 2011. It also alleged that on March 25, 2011, council had improperly voted to purchase a vehicle for the fire chief during an *in camera* budget meeting, and that, at some point, council had improperly chosen a specific community in relation to a provincial grant for broadband Internet service, behind closed doors.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, changes to the *Municipal Act, 2001* gave citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Town of Amherstburg appointed the Ontario Ombudsman as its investigator on August 24, 2009.
- 6 In investigating closed meeting complaints, our Office considers whether the open meeting requirements of the Act, and the relevant municipal procedure by-law have been observed.

Council meeting procedures

- 7 The town's procedure by-law (2008-28) states that regular council meetings will be held on the second and fourth Monday of every month at 7 p.m. Notice is to be given to the public at least five days prior to a scheduled meeting, except for an "emergency" meeting, in which case as much notice as possible is to be provided. Meeting agendas, along with supporting materials, are to be prepared and made available to council members by 4:30 p.m. the Thursday prior to a meeting. Agenda materials that are not considered "confidential" are to be made available to the public at that time as well.

- 8** The by-law states that all meetings are to be open to the public, unless the matter being considered relates to one of the exceptions outlined in s. 239 of the *Municipal Act*.

Investigative process

- 9** After conducting a preliminary review of the complaints, on April 27, 2011 our Office notified the town that we would be conducting a formal investigation.
- 10** During the course of our investigation, we obtained and reviewed relevant municipal documents, including minutes, agendas, emails and other municipal records, as well as copies of slide presentations and other materials prepared by consultants and considered by council *in camera*. We also considered the town's procedure by-law and applicable legislation and case law.
- 11** In accordance with s. 19(1) of the *Ombudsman Act*, members of council and town staff are required to provide our Office with any documents or information requested during the course of our investigations. Council members and town staff co-operated fully with our investigation.
- 12** A three-person team conducted face-to-face interviews with all members of council and the Clerk and Chief Administrative Officer.
- 13** After receiving the town's response to our preliminary report on November 30, 2011, we also interviewed four consultants, who had each attended one of the closed meetings under investigation.

Investigative findings

- 14** As a result of our investigation, we determined that the Council had contravened the open meeting requirements in a number of respects.

Improper closed meetings held under the "education or training" exception

- 15** Provided the procedural requirements have been met, council is entitled under the town's procedure by-law (s. 10 (b)(viii)) and the Act (s. 239(3.1)) to hold closed meetings for the purpose of educating or training members, as long as no member discusses or otherwise

deals with any matter in a way that materially advances the business or decision-making of council.

- 16** While the wording of the “education or training” exception is capable of broad interpretation, consistent with the public interest and remedial nature of the open meeting requirements, any exceptions must be narrowly construed. As I noted in my report *The ABCs of Education and Training* regarding an investigation into a special meeting of the City of Oshawa Developmental Services Committee:

Councils and committees should avoid using closed education sessions as opportunities to consider information that will form the basis for their future decision-making, unless they otherwise come within the exceptions to the open meeting requirements and are properly authorized on that basis.

- 17** Similarly, in a report of another closed meeting investigator, it is noted that: “An exchange of information, whether it advances the business of the municipality or not, cannot be said to be ‘educating’ or ‘training’ as those words are commonly defined. To conclude otherwise would allow Council to go into closed session any time a member wanted merely to impart information.¹”
- 18** Our investigation reviewed six meetings at which the town council considered items using this exception.
- 19** The council held two special “educational” or “training” sessions on January 7, 2011, and also considered “educational” or “training” items during closed meetings on January 10, 20, 24 and 25. Our investigation found that in each instance, council improperly applied the exception. The items considered as “educational” or “training” by council went well beyond the scope of what is contemplated by the phrase “education or training” in the Act and entered the realm of town business. In some instances, discussion of a particular topic might have been permitted if it had been properly authorized under another statutory exception. In one case, an educational or training matter was considered, even though it was not even identified in the resolution authorizing the closed session.

January 7 special sessions

- 20** The public agendas for the January 7, 2011 special meetings, the first to be held at 12:30 p.m. and the second at 2:45 p.m., both indicated that council would be holding an *in camera* “Educational or Training Session.” No further information was provided in the

¹ Report of Amberley Gavel Inc., on behalf of Local Authority Services (LAS) regarding a July 2, 2009 meeting of Essex County Council.

agendas, or in the resolutions to proceed *in camera* regarding the subject matter to be considered during these sessions.

- 21** In the case of the first closed session, the *in camera* minutes record that a planning consultant provided a presentation regarding the “official plan and zoning by-law.” Witness accounts varied as to what was actually discussed during this closed session. Two councillors advised that the planning consultant considered specific town properties that might be built in the future, and encouraged council to approve their construction. Two councillors explained that the planning consultant only provided general information regarding the zoning by-law. One staff member testified that council was provided with an update on a litigation matter involving a local property.
- 22** The planning consultant, who attended the closed session, explained that she presented general information about the *Planning Act* and the town’s zoning by-law. The slides used for her presentation suggest that the consultant provided council with basic information about the *Planning Act*, and Amherstburg’s official plan and zoning by-law. However, the slides also refer to a number of specific development proposals, including one involving an upcoming Ontario Municipal Board hearing.
- 23** Although a general presentation on municipal planning might properly be considered to fall within the education and training category, it appears that at least some of the content of this first closed session clearly went well beyond general educational matters and what is permitted under the exceptions set out in s.239 of the *Municipal Act*. During this closed session, council business, in the form of specific development proposals, was discussed inappropriately in closed session.
- 24** The *in camera* minutes for the second closed session indicate that council discussed a number of committees, and voted to defer the Parks and Recreation committees; to dissolve the Tourism committee; and to appoint members of the public to various other committees. Council also directed staff to advertise for a livestock evaluator. The majority of those we interviewed could not recall and/or could not explain why these matters were discussed in closed session under the “education or training” exception. The mayor acknowledged that it was “misleading” for council to have discussed various committees of council under this exception. One member of council advised that a number of ratepayers who had been interested in participating on these committees had subsequently expressed concern that the committees had been discussed behind closed doors.
- 25** The Chief Administrative Officer told our investigators that consideration of the Parks and Recreation committees in closed session was justified on the basis that it involved “personnel issues.” She noted that the council considered resumés and applications for committee positions during this closed session, and that these discussions were properly *in camera* because they involved personal matters about identifiable individuals. The Clerk,

in turn, explained that the Tourism committee was dealt with *in camera* because it involved “education about what committees we had already, and a better understanding of where council wanted to go with their committees.”

- 26** In my view, none of the items discussed at the second closed session was appropriate for consideration under the “education or training” exception. While some discussions may have involved personal matters about identifiable individuals, this exception was not cited in the resolution to proceed *in camera*. Accordingly, these discussions were not properly authorized. Other matters, including the decisions regarding the Tourism and Parks and Recreation committees, do not fall within any of the exceptions to the open meeting requirements. All of the subjects considered related to specific items of council business and could not be said to be “education or training.”

January 10 council meeting

- 27** The public and *in camera* agendas for the January 10, 2011 meeting stated that council would be considering an “educational or training” matter. No further details were provided. The closed session minutes indicate that the item considered under this exception involved “an overview of harmonized wastewater rates.”
- 28** The Chief Administrative Officer advised our Office that discussion of this item involved providing the current council with information about how the previous council arrived at the decision to have a harmonized wastewater rate. Council and staff provided us with various reasons why this session was closed to the public, including that councillors had not yet made a decision regarding a potential increase in the rates, and they wanted to make sure that council had a good understanding of the issue before it was made public; that council members wanted to be able to ask questions without embarrassment; and that the discussion was “sensitive to the financial discussions that council (was) also having at the time concerning the budget.”
- 29** In contrast, one council member remarked that since a subsequent presentation on wastewater rates was conducted in open session, he did not understand why the first session had to be held *in camera*.
- 30** The consultant who conducted this session advised that there was a division in the community between those who wanted to maintain the harmonized rates, and those who wanted to return to the old system. He explained that council wanted to understand the pros and cons of each system, in order to determine the best course of action.
- 31** The consultant stated that the January 10 session involved a discussion of general principles, and advantages and disadvantages of harmonization versus de-harmonization. The intent was to educate council on why the decision was made to

harmonize the rates in the first place. Handouts from the session included comparison charts outlining water rates for various areas, under the two systems.

- 32** A closed meeting session to consider general information about wastewater rates may be permissible under the “education or training” exception. However, based on the information we obtained during our investigation, it appears that the January 10 *in camera* discussion of this topic went well beyond what is permitted under the exceptions in the *Municipal Act* and involved improper consideration of specific council business relating to wastewater rates, in order to assist council members with future decision-making on this issue.

January 20 council meeting

- 33** The public agenda for the January 20, 2011 meeting indicated that council would be considering an “educational or training” matter. The *in camera* agenda for the session referred to this item as “strategic planning.” The closed session minutes record that the Chief Administrative Officer and a consultant led a strategic planning exercise.
- 34** The Chief Administrative Officer advised our Office that the “strategic planning” item related to a very general discussion to update the new council members on a number of issues, including current litigation. The majority of council members we interviewed indicated that the *in camera* session involved discussions of what council’s priorities should be over the next term. Two councillors acknowledged, in hindsight, that this discussion should have taken place in open session.
- 35** The strategic planning consultant, who co-led this session, explained that its purpose was to train council on strategic planning and to discuss council’s vision for the town’s future. He indicated that during the session, council established a set of strategic priorities that were to be communicated to the municipality’s management team.
- 36** Consideration of council priorities, updates on council business and strategic planning generally do not fit within the scope of the “education or training” exception. *In camera* discussion of litigation affecting the municipality might be permissible under s. 239(2)(e), but only if the resolution authorizing the session specifically lists this as a subject for discussion.

January 24 council meeting

- 37** Council held two meetings on January 24, 2011 – a 2 p.m. closed session and a regular council meeting at 7 p.m. There was no reference in the public or *in camera* agenda for the closed session to an “education or training” item. The resolution authorizing the

closed session did not identify “education or training” as one of the matters to be considered. While the council reported back in public at the 7 p.m. meeting about three matters it had considered *in camera*, no reference was made to an “educational or training” issue. Despite this, the closed session minutes indicate that a “backflow specialist” discussed an “education matter pertaining to backflow prevention.”

- 38** The majority of council members we interviewed advised that the “education” portion of the session involved the specialist demonstrating a device that could prevent backflow, in order to bring town properties into compliance with the new backflow prevention program. The Chief Administrative Officer explained that this session was held *in camera* because council wanted to ensure its own procedures were in place before it informed the public about the new program. Four of the seven members of council advised our Office that they felt this discussion should have been held in open session.
- 39** The consultant, who attended this session, advised that he spoke to council about what backflow is, why backflow prevention devices are necessary, and what Amherstburg’s administrators are doing to bring buildings owned by the municipality up to the appropriate standard. The consultant also explained that he discussed that, in the future, a new by-law would be necessary to ensure that privately-owned buildings have these devices as well.
- 40** Many of the slides from the consultant’s presentation contain general background information about backflow prevention, including backflow prevention standards. However, some slides describe Amherstburg’s specific backflow prevention program, including details about the cost of addressing backflow risks within municipal buildings. In addition, there are slides setting out a step-by-step guide to the future phases of Amherstburg’s backflow prevention program – including bringing town properties into compliance, implementing a backflow prevention by-law and notifying business owners of new requirements.
- 41** It is apparent that council’s consideration of backflow prevention during this closed session was not merely an educational exercise. Council went on to review the specific steps it would have to take to ensure backflow prevention in the municipality. This aspect of the discussion was obviously not educational in nature, and would inevitably inform future council decision-making on this issue. In addition, council’s failure to publicly identify and formally record that this item would be considered in a resolution authorizing the closed session rendered consideration of this item improper.

Improper closed sessions held under the “a matter under another Act” exception (s. 239 (1)(g))

- 42** Provided the procedural requirements have been met, council is entitled under s. 239(1)(g) of the *Municipal Act* and section 10(b)(vii) of its procedure by-law to hold a closed session to discuss “a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.”
- 43** The exception pertaining to holding a closed meeting “under another Act” is not often cited to justify *in camera* discussion, likely owing to the fact that the circumstances where it applies are quite circumscribed.
- 44** In *London (City) v. RSJ Holdings Inc.* [2007] S.C.J. No. 29, the Supreme Court of Canada considered whether this exception applied to closure of a meeting under the *Planning Act* to consider an interim control by-law. The court concluded that the city’s obligation to give notice and hold a public meeting under the *Municipal Act* was distinct from the provision in the *Planning Act* permitting interim control by-laws to be passed without a hearing or public participation, and that the meeting should have been conducted openly. The court did offer an example to illustrate when this exception might be applied, observing under the *Emergency Management and Civil Protection Act* certain municipal meetings are required to be closed for security reasons.
- 45** In two of the meetings we reviewed, Amherstburg town council relied on the “a matter under another Act” exception to support discussing an issue in closed session.
- 46** In closed meetings on January 10 and 24, council cited the “a matter under another Act” exception to permit *in camera* discussion of appointments to the Library and Police Services boards respectively. Staff advised our Office that these discussions were held in closed session because council was appointing members in accordance with the *Public Libraries Act* and the *Police Services Act*. However, there is no reference in either of those acts to meetings regarding appointments being held in closed session. In considering these appointments, council clearly misapplied this exception and improperly engaged in discussion behind closed doors.
- 47** As an alternative explanation, town staff suggested that, while discussing appointments to these boards, council was considering resumes containing personal information. Council is entitled to close a meeting to address “personal matters about an identifiable individual” (s. 239(2)(b)). However, this was not the basis upon which closed meeting consideration of the appointments was authorized by council resolution and, accordingly, this justification cannot be used to legitimize the discussion after the fact.

- 48** Finally, in the January 24 closed session, council also considered appointments to a committee that does not appear to have any connection to legislation authorizing closed meetings.

January 10 council meeting

- 49** The public agenda for the January 10 closed meeting indicated that council would be proceeding into closed session for discussion of an “other matter under another Act.” No further information was provided in the agenda, or in the resolution to proceed *in camera*. The *in camera* agenda simply referred to: “other matter under another Act pertaining to the Essex Library Board members.”
- 50** The council members we interviewed either could not recall this discussion, or could not recall why it would have been held in closed session under this exception. The Chief Administrative Officer advised us that this exception was cited because board members “have to apply for and be appointed the board under the...*Library Act*.”

January 24 council meeting

- 51** The public agenda for the January 24 meeting indicated that council would be proceeding into closed session to discuss: “other matter under another Act.” Once again, no additional details were provided in the agenda, or in the resolution to proceed *in camera*. The *in camera* agenda similarly did not provide any information regarding what would be discussed under this exception. According to the *in camera* minutes, council discussed two items under this exception: 1) appointing a member of the public to the Police Services Board; and 2) appointing two councillors to the Big Creek Watershed Project Committee.
- 52** The Chief Administrative Officer advised us that, with respect to the discussion of the new member of the Police Services Board, this item was discussed under the “a matter under another Act” exception because the new member would be appointed in accordance with the *Police Services Act*. The Clerk advised our Office that this matter was discussed in closed session because council would be reviewing resumes containing personal information.
- 53** Three council members advised us that they recalled voting *in camera* for a particular member of the public to be appointed to the Police Services Board. This vote was captured in the closed session minutes. The Mayor acknowledged that this discussion likely should have taken place in open session.

- 54** The Chief Administrative Officer advised us that the Big Creek Watershed Project Committee topic involved a discussion and decision on which council members would be “most comfortable” sitting on this committee. No one we interviewed could explain why this item was discussed under the “a matter under another Act” exception.

Voting in closed session

- 55** In accordance with s. 239(6) of the *Municipal Act, 2001*, voting in closed session can only be done in limited circumstances for procedural matters or for giving directions or instructions to officers, employees or agents of the municipality. Subsection 10(e) and (f) of the town’s procedure by-law mirror these provisions of the *Municipal Act*. The prohibition on voting other than as prescribed extends to “straw polls” or a “show of hands.”
- 56** We reviewed four meetings to determine whether council voted improperly during closed session.
- 57** Our investigation found that, in the case of three of the meetings we considered, council had voted improperly in closed session, in contravention of the Act and its own by-law. Municipal staff advised us that council only voted in closed session to provide direction to staff. However, in my view, some of the voting at these meetings was neither procedural nor instructional in nature. In addition, most members of council we interviewed, including the Mayor, acknowledged that council regularly comes to a consensus *in camera* via a “show of hands,” on both substantive and procedural matters.
- 58** During our investigation, many council members acknowledged in hindsight that they should not have voted *in camera* on some items. Our Office had previously advised the town in a letter in March 2011 (in response to an earlier complaint) that the council’s practice regarding voting in closed session was problematic. Several of the council members we interviewed told us council has since revised its practice and no longer votes in closed session, except as permitted by the Act.

January 7 special meeting

- 59** During one of the January 7, 2011 *in camera* sessions, council voted to defer (indefinitely suspend) the Parks and Recreation committees, and to dissolve the Tourism committee. Although municipal staff characterized these votes as “directions to staff” or “council confirmations,” it is clear that these were votes on substantive matters relating to committees of council, improperly taken while council was *in camera*.

January 10 council meeting

- 60** Similarly, at one of the January 10 meetings, council voted while *in camera* to appoint a member to the Essex Library Board, and on January 24, council voted in closed session to appoint members to the Police Services Board and the Big Creek Watershed Project Committee. These votes should have been taken in open session.

January 24 council meeting

- 61** On January 24, council went *in camera* under the “proposed or pending acquisition or disposition of land” exception (s. 239(2)(c)). The closed session agenda stated that this discussion would pertain to “decommissioning of the existing arena site.” Those we interviewed advised that during the session, council discussed what could be done with the old arena site, given the completion of a new recreation complex. Among the options considered by council at the meeting was selling all or part of the old property.
- 62** During the *in camera* session, council voted to direct the administration to close the arena building to the public and to schedule an open house to hear public suggestions regarding future use of the site. While these votes appear to come within the exception allowing council to vote *in camera* to give direction to staff, the possibility of a future sale of the property was only one of the options contemplated at the meeting. Under the circumstances, it appears that the scope of council’s consideration of this topic and consequent instructions may have gone beyond what was intended by the exception relied on to justify the *in camera* discussion. In addition, the closing of the old arena sparked considerable public concern. This could have been anticipated – and addressed – had council chosen to discuss the matter openly.

March 25 budget meeting

- 63** We were advised that two meetings were scheduled for March 25 – an open budget session followed by an *in camera* budget session meeting. The town calendar advised that the meeting would begin at 9 a.m. The publicly available agenda for the *in camera* session states that the session would begin at 9 p.m. A resolution included on the agenda states that council would move into a closed session to discuss labour relations/personnel matters at 4:30 p.m. Clearly the times noted on the agenda are incorrect. No further information about the *in camera* discussion is provided on the agenda.
- 64** The agenda for the open budget session states that council would hold a special public meeting to discuss its review of the capital budget. The agenda states that the session would be held at a local sportsman’s club, and would begin at 9 a.m. According to the agenda, the meeting would begin with opening remarks, followed by “budget review as

indexed” from 9:15-12 p.m., then a break for lunch followed by further “budget review” from 12:30 p.m. – 4 p.m. No further information was provided regarding the discussions.

- 65** We received conflicting evidence as to whether council had voted to purchase a vehicle for the fire chief in closed session on March 25. While it appears that a vote to purchase the vehicle did occur on that date, two councillors told us this vote was taken in closed session; four councillors indicated it was taken in open session, and the Clerk and the Chief Administrative Officer could not recall when the vote was taken. The final minutes prepared in connection with the open budget meeting noted that the vote was taken in open session. Under the circumstances, we were unable to substantiate that the vote was improper. However, we did discover some irregularities connected with this closed meeting.
- 66** The minutes for the *in camera* session state that council moved *in camera* at approximately 9:20 a.m. to discuss labour relations/personnel matters, and adjourned at 11:10 a.m. No further information was provided in the publicly available minutes. The closed session minutes confirm that the *in camera* discussions pertained to labour relations matters, which is permissible under s. 239(2)(d) of the Act.
- 67** In this case, there clearly were some inaccuracies in the agendas, which may have led to confusion. The closed session obviously was not intended to start at 9 p.m. as stated in the agenda. Assuming the agenda was meant to say 9 a.m., this still would have been confusing, as this was also the start time for the open special public meeting. Furthermore, the resolution included on the closed session agenda stated that council would move *in camera* at 4:30 p.m. In fact, it appears that council moved *in camera* at 9:20 a.m. The agenda for the open budget meeting indicated that council would be holding an all-day budget discussion, from 9 a.m. until 4 p.m. In fact, council was only in open session for 20 minutes, and the meeting only lasted a little over two hours in total.
- 68** Agendas are intended to provide notice to the public of what items will be discussed in open and in closed session, so citizens can exercise their right to attend municipal meetings and be aware of council business. These rights are undermined when inaccurate information is provided to the public about council meetings.

Resolution authorizing closed sessions

- 69** The *Municipal Act, 2001* requires that before holding a meeting or part of a meeting that is to be closed to the public, a municipality must state by resolution the fact that a closed meeting will be held, as well as the general nature of the subject matter to be considered (s. 239(4)). In the case of education or training sessions, the fact that a meeting or part of a meeting is to be closed under the educational or training exception must also be

identified. The resolution must occur in public before the closed meeting takes place. Section 10(d) of the town's procedure by-law mirrors this section of the Act.

- 70** Our investigation found that when council does pass a resolution prior to going into closed session, that resolution merely re-states the relevant exception (for example: "A labour relations matter will be discussed.") There is no mention of the subject matter that will be considered. Similarly, the publicly available closed meeting agendas provide no information to the public other than referring to the exception authorizing the closed session. The councillors we interviewed also indicated that council members themselves rarely, if ever, have any more information than the public about what is to be discussed in closed session.
- 71** In my report *Municipal Government by Stealth*, regarding an investigation into a meeting of Council of the Township of Emo, I observed:
- ...simply reciting the wording of the exception (in the resolution) doesn't provide very meaningful information. The information should be as specific as possible. A preprinted recitation of exceptions is insufficient to achieve this purpose. As noted by the Ontario Court of Appeal in *Farber v. Kingston (City)*², "the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public."
- 72** Understandably, there may be instances when providing more information about a subject to be considered *in camera* might effectively compromise the need for confidential discussion. However, even in such cases, council members and the clerk should be aware of the substantive nature of the subject to be discussed *in camera*.
- 73** In my view, the council's resolutions authorizing closed sessions, which were reviewed during this investigation were deficient and failed to provide adequate notice to the public, as well as individual members of council, as to the nature of the proposed subject matter and the justification for having an *in camera* meeting.

Discussion of items without advance notice

- 74** The town's procedure by-law states that notice of regular and special council meetings will be provided to the public at least five days in advance. All agenda materials that are not considered confidential will be made available to the public by 4:30 on the Thursday preceding the scheduled meeting, or as soon as the material is completed and published.

² [2007] O.J. No. 919, at page 151.

- 75** All members of council we interviewed agreed that items that were not the subject of prior notice could be discussed at a meeting under the “new business” section. The Chief Administrative Officer advised that the “new business” section is for items that do not require a great deal of background information for council to make decisions.
- 76** The town’s procedure by-law does not set out a specific process for adding items of “new business” to meeting agendas. The Chief Administrative Officer advised that, although there are no limits on what can be considered under “new business,” staff does encourage council members to raise items via a “notice of motion,” which allows councillors time to consider the matter.
- 77** Council’s practice of routinely adding items to an agenda under “new business” runs the risk of undermining the public’s right to know what items will be discussed at a council meeting so they can exercise their right to attend and be aware of council business. Consistent with the principles of openness, transparency and accountability that underlie the open meeting requirements, council should generally avoid discussing items that have not been the subject of prior notice. Matters should not be added at the last minute unless they are clearly urgent, or there are significantly compelling reasons to justify suspending the normal notice procedures. As a best practice, many municipalities require a formal resolution suspending the normal meeting rules before a new item can be added to a meeting agenda.

Reporting back

- 78** It is Amherstburg Town Council’s current practice to provide information about staff directions and decisions made during closed sessions at the end of regular council meetings. However, no information is provided about other matters discussed *in camera*, including education and training sessions.
- 79** I encourage municipalities to report publicly in open session on what transpires in closed session, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided.

Broadband Internet grant

- 80** Our investigation did not substantiate that council met behind closed doors to discuss applying for a substantial provincial grant, intended to go towards the provision of broadband Internet service for Bob-Lo Island. It is beyond my Office’s mandate to investigate allegations about whether the decision to apply for the grant for Bob-Lo Island was proper or not.
- 81** This was clearly a controversial decision that attracted local media attention. The decision resulted in allegations that the affluent residents of Bob-Lo Island had received preferential consideration to the exclusion of other deserving areas of the community.
- 82** Initially, town staff identified three areas that would potentially benefit from the provincial grant. On June 14, 2010, council voted publicly to make the initiative a priority. On March 21, 2011, council voted to authorize execution of a provincial funding agreement with respect to Bob-Lo Island. As far as we can determine, there was no discussion by council, either publicly or in closed session, concerning selecting Bob-Lo Island over the other two locations for consideration for the grant.
- 83** We were provided with a series of emails between a member of council and municipal staff in which the council member requested information about how the decision was made to apply for the grant for Bob-Lo Island, rather than the other two areas. The response initially provided by the Manager of Information Technology was that “the previous council had approved the application specifically for Bob-Lo Island.” The council member then requested a copy of the resolution and/or minutes demonstrating when the previous council made this decision. After further back-and-forth communications, the Chief Administrative Officer responded that after consultation with the Mayor and with the full understanding of council, she had made the decision to pursue the grant for the Bob-Lo Island location.
- 84** Two council members told our investigators that they recalled voting on the grant in open session, based on a staff recommendation. (This is not supported by the available council minutes). Two council members said they were told by staff that the previous council had voted to pursue the grant for Bob-Lo Island, and that they had no choice but to vote to “approve” that decision. (There is no evidence that the prior council chose the site). Two council members advised that they believed it was an administrative decision made by staff. As far as we were able to determine, this appears to have been the case.
- 85** Although our Office found no evidence that an improper closed session of the present council was held to discuss applying for the grant, as a best practice, the council could have given the public more information in open session about the process by which the decision was made to pursue the grant for Bob-Lo Island, rather than another area. This

might have helped avert public speculation that the decision was the result of an improper closed session of council.

Opinion

- 86** Our investigation confirmed that the Council for the Town of Amherstburg repeatedly contravened the *Municipal Act, 2001* and its own procedure by-law. Council discussed issues in closed session on multiple occasions in circumstances that were not permitted under the exceptions to the *Municipal Act*. Council improperly used the “education or training” and “a matter under another Act” exceptions to justify *in camera* discussion of items that should have been considered in open session or under another exception to the open meeting requirements. Finally, the council routinely engaged in improper voting behind closed doors.
- 87** During our investigation, we also observed a number of problematic practices, including incomplete and inaccurate meeting agendas, failure to report back publicly in an informed way about closed meetings, and adding meeting items without prior notice. Council also provided insufficient information in its formal closed meeting resolutions about the subjects to be considered behind closed doors.
- 88** We have received some assurances from council members that the town has stopped the practice of voting in closed sessions in circumstances that are not permitted by the *Municipal Act*. However, it is clear that council must display significantly more rigour in complying with its legal obligations with respect to closed meetings. Our investigators were told that at times, tensions between individual council members – and between council members and staff – have contributed to confusion and, ultimately, violations of the open meeting requirements. It is important for council members to take note that they are individually and collectively bound to ensure that the open meeting provisions are observed, and that this might require overcoming individual differences.
- 89** I am making the following recommendations, which I hope will assist the council to meet its legal obligations with respect to closed meetings as well as generally improve its closed meeting practices. Our Office is also available to provide training on the open meeting requirements to council members, free of charge.

Recommendations

Recommendation 1

The Town of Amherstburg should ensure that no subject is discussed in a closed session unless it has been identified in an authorizing resolution in open session, and should ensure that no subject is discussed in closed session unless:

- a) It clearly comes within one of the statutory exceptions to the open meeting requirements;
and
- b) The subject has been described with as much specificity as possible so as to maximize the information available to the public, without undermining the reason why the matter is being dealt with *in camera*.

Recommendation 2

The Town of Amherstburg should ensure that no subject is discussed in a closed “education or training” session unless it is clear that the presentation or discussion is only for the purpose of education or training, and that its use of the “a matter under another Act” exception is limited to the rare circumstances in which it is permitted by the *Municipal Act, 2001*.

Recommendation 3

The Town of Amherstburg should ensure that no vote is taken at a closed meeting except in accordance with the town’s procedure by-law and the *Municipal Act, 2001*. A vote should not be taken unless the formalities are observed, including authorizing motions, and resolutions. Similarly, informal votes via a “show of hands” should not be taken *in camera*.

Recommendation 4

The Town of Amherstburg should ensure that its meeting agendas identify the items to be considered in closed session accurately and with as much detail as possible, given the nature of the subject matter.

Recommendation 5

Council for the Town of Amherstburg should avoid discussing items that have not been the subject of prior notice unless they are clearly urgent, or there are compelling reasons to justify formal suspension of the town’s normal notice practices. Council should also consider amending its procedure by-law to incorporate this requirement.

Recommendation 6

The Council for the Town of Amherstburg should follow a practice of reporting back publicly after a closed meeting generally on all matters considered *in camera*.

Recommendation 7

All members of Council for the Town of Amherstburg should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Response

- 90** We gave the Mayor and senior town officials a preliminary opportunity to review my findings, opinion and recommendations. On November 30, 2011, the Chief Administrative Officer provided a written response, which is appended to this report.
- 91** Unfortunately, it is evident from the Chief Administrative Officer's remarks that the Town of Amherstburg continues to misconstrue the exceptions to the open meeting provisions and my role as a closed meeting investigator.
- 92** While I do not intend to address the Chief Administrative Officer's comments in detail, I will briefly discuss a few of the issues that she raised.

Education or training exception

- 93** In her response, the Chief Administrative Officer emphasized that the three consultants who respectively attended closed sessions on January 7, 10, and 24 would all confirm that the sessions they took part in were held for educational purposes and that town business was not advanced. She also maintained that the second closed session conducted on January 7, without a consultant, involved education and training for members on the town's committee structure. In addition, she generally criticized my application of the "education or training" exception.
- 94** After reviewing the town's response, we interviewed the three consultants who had participated in the *in camera* sessions on January 7, 10, and 24, as well as a fourth consultant who had attended a session on January 20. Their evidence is incorporated in this report. Contrary to the Chief Administrative Officer's suggestion, the information obtained from these consultants and included in the slide presentations and materials that they used during their "education or training" sessions, is consistent with and supports my earlier findings.
- 95** While there were educational elements to the discussions led by the consultants, in each case, other matters were discussed that were obviously not educational in nature.

- 96** While the second session held on January 7, 2011, might have involved some discussion of general information about the town’s committee structure, clearly the primary purpose of that meeting was to address participation on and appointments to specific committees.
- 97** Amherstburg council’s *in camera* consideration of **specific** development proposals, council committees and appointments, public division on wastewater rates, strategic planning and priorities; and backflow prevention steps required in future did not involve “education or training.” All of these discussions related to council business; some of it touching on potential future decision-making and, in the case of the second January 7, 2011 meeting, council went on to improperly make decisions on committee appointments. Closed-door review of all of these matters contravened the open meeting provisions.
- 98** There are no court decisions interpreting the “education or training” exception. However, the open meeting provisions were clearly intended to be remedial in nature with the purpose of protecting the public interest in ensuring that the municipal decision-making process is transparent and accessible to the public. Consistent with this intent, all exceptions to the open meeting rules should be narrowly construed. In my view, to come within the “education or training” exception, the **sole** purpose of a session must be to provide education or training. I note that another closed meeting investigator has applied the same interpretation of this exception.³
- 99** The Chief Administrative Officer has conceded that in the case of the second January 7 session and the January 20, 2011 closed meeting, council should have raised multiple exceptions to justify closure. However, consistent with the principles of transparency, openness and accountability reflected in the Act’s open meeting provisions, when council resolves to go into closed session it should be known in advance what exceptions are being relied on. It is insufficient to attempt to retroactively justify *in camera* meetings through reference to other exceptions.
- 100** The procedural notice and resolution requirements of the *Municipal Act, 2001* are not mere technicalities. The public is entitled to know in advance what subjects council intends to consider behind closed doors and council must be clear on what basis it intends to exclude the public.

Other matter under another Act exception

- 101** In her response, the Chief Administrative Officer also suggests that my reference to the Library Board discussion “illustrates a fundamental misapprehension of the nature of the

³ Report of Amberley Gavel Inc., on behalf of Local Authority Services (LAS) regarding a July 2, 2009 meeting of Essex County Council

exemption” and that to say more in a public agenda would render the exemption meaningless.

- 102** As noted earlier, Amherstburg council considered appointments to the Library Board under the “other matter under another act” exception in the second closed session held on January 7, 2011. Based on the Supreme Court of Canada’s explanation of this phrase, I concluded that council applied this exception improperly. Council has not provided my office with any reason to believe my interpretation was incorrect.

Conflicting recollections

- 103** With respect to the first closed session on January 7 and the January 10 closed session, the Chief Administrative Officer has suggested that my report provides no rationale for accepting one witness account over another. While we obtained conflicting information about what was discussed at these meetings, sufficient information was available for us to conclude that the sole purpose of these meetings was not education or training of council. Our subsequent interviews with the consultants who attended these meetings reinforced my opinion that the discussion was not strictly educational in nature.

Best practice suggestions

- 104** Finally, the Chief Administrative Officer asserted that I had no authority to discuss or make recommendations relating to best practices, where no specific violation of the open meeting provisions has been identified. For example, she challenged my recommendation that new business should not be introduced at a meeting without advance notice, unless there are exigent circumstances.
- 105** It is entirely consistent with the role of an investigator enforcing the open meeting provisions to make general recommendations that promote more open and transparent government at the local level. This is an approach that has been adopted by a number of closed meeting investigators in this province.
- 106** Many municipalities follow a practice, to enhance transparency, of only considering last-minute additions to meeting agendas where an issue is urgent. While it is ultimately up to council to decide how to respond to my recommendations, the Town of Amherstberg’s attitude towards adopting best practices that enhance transparency is regrettable.

Report

108 Amherstburg council is required to make this report public in accordance with s. 14 (2.6) of the *Ombudsman Act*.



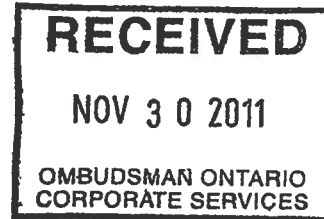
André Marin
Ombudsman of Ontario

Appendix:

**Letter from the Town of Amherstberg,
November 28, 2011**



The Corporation of The
Town of Amherstburg



PAMELA MALOTT
pmalott@amherstburg.ca

November 28, 2011

Andre Martin
Ombudsman of Ontario
Bell Trinity Square
483 Bay Street 10th Floor South Tower
Toronto ON M5G 2C9

RE: Town of Amherstburg Preliminary Report- Your File 238966

On November 2nd I met with members of your staff to review the preliminary report concerning your investigation of whether the Town of Amherstburg held multiple closed meetings in contravention of the Municipal Act. Also in attendance at this meeting were Mayor Wayne Hurst and Brenda Percy, Manager of Council and Legislative Services.

In accordance with s.18 (3) of the Ombudsman Act, I am providing written representation regarding the preliminary report.

January 7/11: First session- The independent Planning Consultant in attendance and presenting at the meeting will confirm in writing if required that this meeting gave education to Council members on the Planning Act and that there was no advancement of Town business. Specific properties discussed in examples did include property subject to litigation. There is conflict in the recollections no rationale expressed in the adoption of one account over the other.

Second session – The Committee discussion did involve education and training to Council members on the Committee structure of the Town. Additionally, individual applications to the various Committees containing personal information were part of the meeting agenda. It is agreed that multiple exemptions should have been noted.

January 10/11: The Independent Water and Wastewater Consultants in attendance for the duration of the educational session on Harmonized Water rates and will confirm in writing that no business was advanced and the meeting was for educational purposes only.

There is conflict in the accounts between the CAO and one member of Council as to the nature of the meeting. There is no rationale expressed in the adoption of one account over the other.

The reference to the Library Board discussion illustrates a fundamental misapprehension of the nature of the exemption. To say more in a public agenda would render the exemption meaningless.

January 20/11: The meeting involved "strategic planning" which is a matter for educational and training sessions. Further, litigation matters were discussed, which are an allowed exemption. It is agreed that multiple exemptions should have been listed. As this was the first planning session for new Council members, it was held in-camera. Subsequent planning sessions have been held in open session.

January 24/11- An independent Consultant was in attendance for the duration of the educational session on Back Flow Prevention and will confirm in writing that no business was advanced and the meeting was for educational purposes only. The investigator was advised of the nature of the backflow presentation which is clearly educational in nature.

March 25, 2011: Budget Meeting- The times for all budget meetings are approximate. The budget meetings are based on Council discussion and agreement of items. The meeting was scheduled from 9:00 AM to 4:00 PM. However, Council concluded at 11:10 AM much earlier than anticipated. It would not have been in the public interest for Council and staff to remain at the meeting without items for discussion for the balance of the day.

Recommendation 5: I am unclear as to the items which did not receive prior notice which are referenced in this recommendation.

Additional comments:

Concerning the comments on introduction of 'new business' according to the Town's Procedural By-Law, while we appreciate the objective for advance notice, the Ombudsman does not have jurisdiction to deal with the issue the discussion of items without advance notice. The Ombudsman has jurisdiction to deal with whether the provisions for closed meetings have been properly complied with.

With respect to the Broadband Internet grant, the Ombudsman recognized that the complaint was outside his jurisdiction. To proceed to comment further is not appropriate.

I would like it noted that some of the findings indicate issues related to 'clerical error'. These errors were in part a result of a new staff member doing the agenda compilation as of January 1st, 2011 who had limited training due to a resignation over the holiday period. While this is not meant in any way to suggest the clerical errors were acceptable, there is reality in the resources of a smaller municipality to make a smooth transition.

In closing, with all due respect to the opinion of the Ombudsman, the Municipal Act section 239 sets out the exemptions to the open meeting rule of council. The exemptions have been the subject of judicial consideration. Item 15 in the report identifies the judicial definition of "educational or training sessions" in section 239(3.1) to be broad. However, the report then concludes that the exemptions should be narrowly construed and relies on the Ombudsman definition of exemption. The evidence examined does not match the conclusions presented in the findings in all instances.

The recommendations of the Ombudsman are clearly understood with the exception of recommendation 5. It should be noted that throughout the 2011 year, changes have been implemented

in the process and procedure for our In-Camera sessions and reporting out from In-Camera which conform to all the recommendations set out in the preliminary report.

Yours truly,



Pamela Malott
Chief Administrative Officer

cc: Michelle Bird, Ombudsman Ontario

cc: Mayor Wayne Hurst

cc: Brenda Percy