

RECEIVED
Sept 16/13

September 12, 2013

Paula Parker, Deputy Clerk
Town of Amherstburg
271 Sandwich St. South
Amherstburg, ON
N9V 2A5

Dear Ms. Parker,

Re: Complaint regarding closed meetings

I am writing further to our conversation of September 11, 2013 regarding the outcome of our Office's review of a complaint about five closed meetings that took place on October 9 and November 26, 2012 and January 21, March 4 and March 18, 2013.

Our Office's review process

As you know, the *Municipal Act, 2001* requires that meetings of Council be open to the public, subject to the limited exceptions outlined in section 239 of the Act. Council must also observe certain procedural requirements in order to close a meeting to the public. The Town of Amherstburg appointed the Ontario Ombudsman as its investigator on August 24, 2009.

In reviewing this complaint, our Office spoke with you, the Clerk, Mayor Hurst and Deputy Mayor Sutherland. In addition, our Office also reviewed the agendas and minutes of the meetings in question as well as any relevant documentation brought by third parties that was considered during the meetings. We received full cooperation from the Town during our review.

Information obtained during our review

General information regarding the Town's meetings

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 7:00pm. It is the

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Town's practice to hold any *in camera* sessions of the meeting prior to the public session at 7:00pm.

October 9, 2012 meeting

The complainant claimed that an organizational restructuring plan for the Town, which was discussed during the *in camera* session of a Special Council Meeting on October 9, 2012, did not need to be discussed *in camera* and that council remained *in camera* because it was more convenient than moving in and out of closed session on multiple occasions.

The *in camera* session of the Special Council Meeting began at 9:08am. The public agenda stated that council would be proceeding *in camera* pursuant to s. 239(2)(b) (personal matters about an identifiable individual, including municipal or local board employees), s. 239(2)(d) (labour relations and employee negotiations) and s. 239(2)(f) (advice subject to solicitor client privilege including communications necessary for that purpose) of the Act to discuss "organizational review." The minutes of the *in camera* session show that all members of Council were in attendance, along with the Clerk, the Acting Chief Administrative Officer (CAO), the Town Solicitor, four other managers, and a consultant.

During the *in camera* meeting, the consultant showed a "PowerPoint" presentation on the Town's organizational review. The mandate of the review was to provide "a complete, documented review of each job, union and non-union as well as team and departmental level responsibilities and accountabilities" and "a workflow analysis of all key functions which will provide a graphic depiction of the flow of tasks between individuals, teams and departments." The consultant also provided information on how the findings would impact both unionized and non-unionized staff. There was discussion with regard to the findings and a vote was taken regarding one specific employee of the Town. The minutes indicate that the Town Solicitor also provided input in the discussions.

According to the minutes, Council took a number of breaks during the course of the *in camera* session. The *in camera* session adjourned at 4:05p.m.

The public session of the Special Council Meeting took place later the same day at 6:00pm. During the public meeting, the consultant presented a modified version of the “PowerPoint” presentation on the organizational review. The confidential information was removed from this version of the presentation.

Our Office obtained and reviewed copies of both the *in camera* and public versions of the consultant’s presentations.

Analysis:

Based on the information reviewed, Council did receive and discuss information related to labour relations and employee negotiations, as well as discussing and voting on information about a specific employee. The closed meeting record also shows that the Town Solicitor provided legal advice during the meeting.

As well as providing information related to labour relations, the consultant’s *in camera* version of the presentation, also provided general information about organizational restructuring. Usually, general discussions regarding the municipal organization chart and various staff positions would not be appropriate for *in camera* discussion. However, we understand that this information was to provide some background information and context for the labour relations and other matters being discussed during the *in camera* discussion.

Based on the above, it appears that the October 9, 2012 *in camera* session of the Special Council Meeting was permitted under the Act.

November 26, 2012 meeting

Five items were discussed during the *in camera* session at the November 26, 2012 meeting, one of which was the “CAO Update” under the exceptions to the open meeting requirements in s. 239(2)(b) (personal matters about an identifiable individual, including municipal or local board employees) and s. 239(2)(d)(labour relations or employee negotiations). The complainant alleged that, during discussions on this topic, there was a vote on a separate matter and there was nothing reported back during the public session of the Regular Council Meeting later in the evening.

According to the closed meeting record, the *in camera* session began at 4:30pm and ended at 6:15pm. In attendance during the discussion of the “CAO Update” were all members of Council (except the Deputy Mayor), the Clerk, the Town Solicitor and the consultant.

The confidential minutes indicate that the Town Solicitor provided advice to Council in relation to the CAO. There were then two votes taken under this topic. The first vote was a direction to the Town Solicitor and the second vote was to hire the consultant to advertise for the positions of Director of Corporate Services and Director of Legislative Service in accordance with the re-organizational plan that was discussed at the October 9, 2012 meeting. The complainant was concerned that the second vote was not related to the “CAO Update” and that it should not have been held under that topic. During our Office’s review, we spoke with members of Council and the Clerk to get more information on how the second vote was related to the “CAO Update.” We were provided with clarification on how the second vote related to the reorganizational plan, which the CAO update was also closely linked to.

With respect to reporting back out of the closed session, the minutes of the public session of the Regular Council Meeting indicate that there was “nothing further to report” with respect to the “CAO Update.” During our inquiries, we were advised that there were concerns that personal information regarding the CAO could have been disclosed if any details were provided regarding the *in camera* discussion.

Analysis:

Based on the closed meeting records and the information obtained through our interviews, the discussions that took place during the *in camera* session did include personal information about the CAO. As the confidential minutes indicated that the Town Solicitor also provided advice during the *in camera* session, Council could also have cited that exception (s. 239(2)(f)). Based on the above, it appears that the subject matter of the *in camera* session fit within the exceptions to the open meeting requirements of the Act.

With respect to the second vote that was taken under the “CAO Update,” subsections 239(5) and (6) state that no votes are to be taken in closed session unless the vote is on a procedural matter or unless the vote is to provide direction or instructions to a

staff member, an agent of the municipality or a person under contract with the municipality. The second vote was a substantive vote, and therefore not permissible under the Act, because it was a vote to hire the consultant to carry out work for the Town; this constitutes a procedural violation of the Act. This vote may have been permissible under the Act if it had been framed as a direction to staff to proceed with hiring the consultant to advertise for the director positions.

January 21, 2013 meeting

The complainant claimed that Council's discussion regarding the interview panel for the positions of Director of Corporate Services and Director of Legislative Services was improperly closed to the public and that Council voted on the composition of the interview panel during the *in camera* session, and then repeated this vote in public. The complainant also believed that there was no reporting back in the public session regarding the interview panel.

The *in camera* session of the January 21, 2013 Regular Council Meeting began at 3:15pm. Council voted to go into closed session to discuss seven items, one of which was the "Interview Committee Composition" (Item F) under s. 239(2)(f) (advice subject to solicitor client privilege including communications necessary for that purpose). For the portion of the closed session during which the interview committee was discussed, the closed meeting record indicates that all members of Council were present as well as the Town Solicitor, the Acting CAO and the Deputy Clerk.

According to the confidential minutes, the Acting CAO provided an overview of a report that was before Council (this report was available in the public agenda) and the Town Solicitor then provided advice on that matter. The closed meeting minutes do not indicate that any vote was held regarding the interview committee.

The *in camera* session concluded at 6:00pm.

During our inquiries, we asked the Mayor, the Deputy Mayor and the Deputy Clerk if any vote had taken place during the closed session. We were unable to substantiate the complainant's allegation that a vote had taken place. However, we were advised by one interviewee that, although he/she was not able to recall any vote in this

particular instance, Council frequently comes to a consensus through a “show of hands” during an *in camera* session before voting on a matter during the public session.

With respect to the complaint about reporting back, in the “Report from In-Camera Session” section of the public minutes of the Regular Council Meeting, Item F notes that there is “nothing further to report” regarding the interview panel composition. However, there is an update regarding the interview panel earlier in the minutes, at Item 15.1. The minutes indicate that Council received the report prepared by the Acting CAO, approved dates for the interviews to take place and appointed the members of the interview panel.

Analysis:

Based on our review of the minutes and the inquiries our Office made; the evidence indicates that the Town Solicitor was present during the *in camera* discussion regarding the interview panel and he provided legal advice on the issue. Therefore it appears that it was permissible for Council to discuss this matter *in camera*.

Although we were unable to substantiate that a vote had taken place on this matter *in camera*, we were advised that council does sometimes hold informal votes, such as a show of hands or a ‘straw vote’, in order to come to a consensus before returning to the public session to vote on a matter. As the Ombudsman previously stated in his December 2011 report on the Town of Amherstburg, “*Behind Closed Doors*,” such votes are not permitted under the Act, and Council should only hold votes in accordance with the requirements contained in the *Municipal Act* and the Town’s procedure by-law.

With respect to the issue of reporting back out of closed session, as referenced above, there was a substantial amount of information provided in the public minutes of the Regular Council Meeting at Item 15.1. However, it could have been made clearer that Item 15.1 related to the issues discussed *in camera* if this was specifically stated in the reporting back section of the minutes rather than simply stating that there was “nothing further to report.” As a best practice, the Town should clearly indicate in the minutes of the public session if it is reporting back on items that were discussed *in camera*.

March 4, 2013 meeting

The complainant's concern in regard to the March 4, 2013 meeting was in relation to the "Director Update – Item D", which was closed under s. 239(2)(b)(personal matters about an identifiable individual, including municipal or local board employees) and s. 239(2)(d)(labour relations and employee negotiations).

The closed session of the March 4th meeting began at 3:30pm. According to the closed meeting minutes, the meeting began at 3:30pm and was attended by all members of Council as well as the Clerk and the Town Solicitor. For the portion of the meeting in which the "Director Update" was discussed, the Clerk and the Town Solicitor left, and the Deputy Clerk entered the meeting. Although not listed among the attendees, the consultant was also present during the meeting, as the minutes indicate that he provided some input during the discussion.

According to the closed session minutes, the consultant provided an overview of the interview panel's process, announced the successful candidate for each of the two positions and provided a brief synopsis of each candidate's qualifications. Council then voted to direct the Administration to move forward with the recommendation from the consultant to offer the successful candidates the positions. Council also voted to direct the consultant to review a different matter in relation to another director.

The *in camera* session ended at 5:24pm.

There was no reporting back on the in camera session at the Regular Council Meeting later that evening. The minutes indicate that the reporting back would take place at the March 19, 2013 meeting (the next meeting actually took place on March 18). At the March 18th Regular Council Meeting, the Mayor introduced the successful candidates for the positions of Director of Corporate Services and Director of Legislative Services.

Analysis:

The first issue that needs to be assessed is whether the subject matter was appropriate for an *in camera* discussion. The *Municipal Act* does not define

“personal information.” However, under the *Freedom of Information and Protection of Privacy Act*,¹ both an individual’s employment history and “personal recommendations or evaluations” and character references are considered personal and it is a presumed invasion of personal privacy to disclose such information.

According to the information obtained in our review, Council’s March 4, 2013 closed meeting discussion focused on the qualifications of the successful candidates for the director positions. As such, the closed meeting discussion fell within the “personal matters” exception to the open meeting requirements.

With respect to the votes taken during the closed session, section 239(6)(b) of the *Municipal Act* permits votes that are “for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality.” The three votes that were taken in relation to the “Director Update” fit within this category.

March 18, 2013 meeting

The complainant claimed that Council improperly discussed and voted on a matter *in camera* in relation to the salary of the Director of Recreation and Culture.

The *in camera* session of the March 18, 2013 Regular Council Meeting began at 5:00pm. The agenda indicated that Council would be proceeding *in camera* to discuss three items, including the “Director, Recreation and Culture” under s. 239(2)(b)(personal matters about an identifiable individual, including municipal or local board employees) and s. 239(2)(d)(labour relations and employee negotiations). The closed session minutes indicate that, for the portion of the meeting during which this item was discussed, all of Council was present as well as the Deputy Clerk, the Acting CAO and the Town’s consultant. The consultant provided an overview of the confidential report, including information about the Director’s performance and his salary, that was before Council, and the Deputy Clerk

¹ *Freedom of Information and Protection of Privacy Act, R.S.O. 1990*, s. 21(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information, ... (d) relates to employment or educational history; or ... (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

then confirmed that a motion on whether the report should be approved would be brought before Council during the public session.

The *in camera* session concluded at 6:33pm.

The minutes of the public session, which began at 7:00pm, indicate in the reporting out section that Council voted to approve the confidential report that was presented during the *in camera* session in relation to the Director of Recreation and Culture.

As part of our review, our Office reviewed a copy of the confidential report that was discussed in the closed session and voted on in the open session of the meeting.

Analysis:

Based on our review of the confidential report and our inquiries with the Town, the closed meeting minutes and our inquiries, it appears that the discussion regarding the Director of Recreation and Culture fit within the two exceptions cited, and, therefore, was permissible under the Act.

Based on the minutes and our inquiries, there was no evidence that a vote took place during the *in camera* session.

The complainant also raised a number of concerns about Council business that are outside of our Office's mandate. In assessing closed meeting complaints, our Office is restricted to reviewing whether a meeting was closed to the public in accordance with the relevant provisions of the *Municipal Act* and the municipality's procedure by-law. Our mandate does not allow us to review the substance of Council's decision-making, including whether a particular decision was justified. Accordingly, our review of this complaint was focused on whether Council was permitted under the Act to discuss the matters in camera and whether all procedural requirements were followed.

On September 11, 2013, we shared our findings with you and offered an opportunity to provide any additional information or comment.

We are requesting that you share this letter with the public and with Council as soon as possible, and in any event no later than at the next Council meeting on October 7, 2013.

In closing, we would like to thank you for your cooperation during this review.



Ronan O'Leary
Investigator
Open Meeting Law Enforcement Team