



Ombudsman Report

**Investigation into whether
Council for the Town of Amherstburg
held an illegal closed meeting on
December 10, 2014**

**André Marin
Ombudsman of Ontario
March 2015**

Complaint

- 1 On January 13, 2015, my Office received a complaint about a closed session held by council for the Town of Amherstburg at its meeting on December 10, 2014.
- 2 According to the complaint, council proceeded in camera to discuss a by-law regarding bank signing authorities, without prior notice that the item would be considered. The complainant alleged that this closed session discussion violated the provisions of the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing 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 Ombudsman is the closed meeting investigator for the Town of Amherstburg.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Investigative process

- 7 My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law and the Act, as well as the meeting materials for the meetings in question. They also spoke with the Mayor, municipal staff, and the council member who moved the motion to proceed in camera for the second closed session on December 10.
- 8 My Office received full co-operation in this matter.

The December 10, 2014 meeting

- 9 The December 10 meeting was a special meeting that began at 9:00 a.m. Notice of the meeting was provided to the public through the posting of the agenda, in accordance with the municipality's procedure by-law. According to the agenda, a

closed session was to be held to consider the appointment of a treasurer under the “personal matters” exception (s. 239 (2) (b) of the Act).

- 10** Included on the agenda under item 6 (By-laws) were two recommendations regarding the appointment of the treasurer, and the appointment of bank signing authorities. Copies of the draft by-laws were attached to the publicly available agenda. By-law 2014-116 appointed a named individual as treasurer commencing December 1, 2014, and By-law 2014-117 authorized the Mayor or Deputy Mayor, together with one of three named members of staff, as authorized bank signing officers.
- 11** According to the open session minutes, council proceeded in camera at 9:07 a.m. for the reasons outlined on the agenda. Present in camera were all of council, the Chief Administrative Officer and the acting Clerk.
- 12** While in camera, council first discussed the former treasurer and the circumstances surrounding the end of his employment. Council then considered staff’s recommendation regarding hiring an identified individual as treasurer. Some council members expressed opinions regarding the individual’s qualifications for the position, and staff provided information about his credentials.
- 13** Council directed staff to provide council with a draft contract and further information about the individual’s qualifications for council’s review.
- 14** The open session resumed at 10:15 a.m. In open session, council voted to defer both the motion to appoint a treasurer and the motion to appoint bank signing authorities.
- 15** Staff told my Office that the matter of bank signing authorities was supposed to be dealt with at the December 1 meeting, but council had deferred it. After it was deferred again at the December 10 meeting, staff decided to speak with the Mayor about the need for council to choose who could act as bank signing authorities. Over the lunch break on December 10, municipal staff met with the Mayor to advise that it was urgent that this issue be dealt with in order for the municipality to continue with its day-to-day business.
- 16** After the lunch break, council again resolved to proceed in camera, at 1:42 p.m. The resolution captured in the open session minutes did not refer to a specific exception in the Act to authorize the discussion, nor did it provide any information about the subject matter to be discussed. Staff told us the failure to provide this information was an oversight. The resolution captured in the closed session minutes stated that council was proceeding in camera under the “personal matters” exception.

- 17** While in camera, council members said they preferred to have only the Mayor and Deputy Mayor as bank signing authorities, rather than have any members of staff assigned in this role. There were no discussions about any particular staff member, or their suitability to act as a bank signing authority.
- 18** The open session resumed at 1:51 p.m. In open session, council voted that By-law 2014-117 regarding bank signing authorities should not be approved, and that By-law 2014-027, which identified the Mayor and Deputy Mayor as the only bank signing authorities for the town, should be passed instead.
- 19** At council's next meeting, on December 15, it was reported in open session council had proceeded in camera under the "personal matters" exception on December 10 to consider the appointment of the treasurer, and that there was nothing further to report. There was no public reporting on the discussion of bank signing authorities on December 15. Staff told us this was because the matter was dealt with through the motion passed in open session on December 10.

Analysis

The discussion of the appointment of a treasurer

- 20** During the first closed session on December 10, council discussed the qualifications of a candidate for the treasurer position, under the "personal matters" exception.
- 21** In reviewing the scope of this exception, my Office often considers decisions of the Office of the Information and Privacy Commissioner (the IPC). Although not binding on my Office, these cases can be instructive.
- 22** The IPC has noted that in order to qualify as "personal information" for the purpose of the open meeting requirements, the information usually must be about an individual in their personal capacity, rather than their professional, official or business capacity¹. However, information about an individual in a professional capacity may still qualify as personal information, if it reveals something of a personal nature².

¹ Order MO-2204, Aylmer (Town) (Re), 2007 CanLII 30462 (ON IPC)

² Order MO-2368, Clarington (Municipality) (Re), 2008 CanLII 68856 (ON IPC)

- 23** Information about a person in their professional capacity can take on a more personal nature if it relates to scrutiny of that individual's conduct,³ or if the discussion involves expressions of opinion about an individual.⁴
- 24** On December 10, council discussed the qualifications of an identifiable individual, who was a current employee of the municipality and a candidate for another position. As noted in IPC Order MO-1909,⁵ information relating to education and employment history falls within the definition of "personal information" in the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).
- 25** Some council members also expressed opinions about this individual's suitability for the position. These discussions were personal in nature and fit within the cited exception.

The discussion of bank signing authorities

- 26** During the second closed session, council discussed its preference to have only the mayor and deputy mayor act as bank signing authorities for the town, rather than members of staff.
- 27** Although three specific staff members were named in the draft By-law regarding bank signing authorities, simply mentioning the names of employees in their professional capacity is not sufficient to bring a discussion within the personal matters exception. The information provided to my Office indicated that there was no discussion of the qualifications of these particular individuals to fulfill this role, or any other personal information regarding these employees discussed during the closed session.
- 28** Accordingly, the subject matter did not fit within the personal matters exception, or any exception to the open meeting requirements, and should not have been discussed in camera.
- 29** When OMLET staff spoke to the Mayor and some members of staff regarding these findings, they expressed disagreement that the discussion of bank signing authorities did not fit within the cited exception. They mentioned that the general "tone" of the meeting was one of distrust of municipal staff, and accordingly it was felt that this rendered the discussion personal in nature. This general tone or concern is not sufficient to bring the discussion within the personal matters exception.

³ Order MO-2519, Madawaska Valley (Township) (Re), 2010 CanLII 24619 (ON IPC)

⁴ Supra, Note 1

⁵ Order MO-1909, Temiskaming Shores (City) (Re), 2005 CanLII 56561 (ON IPC)

- 30** The information my Office received during interviews and through a review of the meeting documents indicated that no personal information about any identified member of staff was discussed during the second closed session on December 10.
- 31** Although after conducting interviews I am not satisfied that it would have made a difference in this case, if council feels that its meeting records are not reflective of the specific in camera discussions that took place during a meeting, council should move to audio or video record closed sessions. This ensures that the most accurate record of the closed meeting is captured for my Office’s review during a closed meeting investigation.

Procedural matters

Resolution to proceed in camera

- 32** Section 239(4) of the Act requires that, prior to proceeding into closed session, council must state by resolution the fact of holding the meeting, and the general nature of the subject matter to be considered. As noted by the Ontario Court of Appeal in *Farber v. Kingston City*,⁶ “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.”
- 33** The resolution for the second closed session did not contain any information about the subject matter to be discussed. Our Office was advised that this was an oversight.

Record of meetings

- 34** As noted in my 2011-2012 Annual Report on open meetings, I strongly encourage municipalities to make audio or video recordings of council proceedings. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings.
- 35** More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include: the Townships of Tiny, Madawaska Valley and McMurrich/Monteith, the Town of Midland, The Municipality of Lambton Shores, and the Cities of Oshawa and Welland.

⁶ 2007 ONCA 173 (CanLII)

Opinion

- 36** Council for the Town of Amherstburg was permitted, under the “personal matters” exception in the *Municipal Act*, to meet in closed session on December 10 to discuss the appointment of a specific individual to the position of treasurer. Council was not permitted to discuss bank signing authorities in closed session at this same meeting, and in doing so violated the Act.
- 37** Council also passed a resolution to proceed in camera that did not meet the requirements of s. 239(4) of the Act.
- 38** I am making the following recommendations to assist the Town in fulfilling its obligations under the Act, and in enhancing the transparency of its meetings.

Recommendations

Recommendation 1

The Town of Amherstburg should ensure that no subject is discussed in closed session unless it comes within one of the exceptions to the open meeting requirements of the *Municipal Act, 2001*.

Recommendation 2

The Town of Amherstburg should ensure that all resolutions to proceed in camera provide a general description of the subject matter to be discussed in closed session.

Recommendation 3

The Town of Amherstburg should implement a practice of audio or video recording its closed sessions.

Report

- 39** OMLET staff spoke with the Mayor, the clerk, the deputy clerk, and the chief administrative officer on March 23 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 40** My report should be shared with council for the Town of Amherstburg and made available to the public as soon as possible, and no later than the next council meeting.



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