



Ombudsman Report

**Investigation into closed meetings held by
Council for the Town of Amherstburg on
January 10 and June 2, 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
November 2015**

Complaint

- 1** Our Office received complaints that council for the Town of Amherstburg discussed items in closed meetings on January 10 and June 2, 2015 that did not fit within the exceptions to the open meeting rules in the *Municipal Act, 2001* (the Act).
- 2** 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.

Ombudsman jurisdiction

- 3** 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.
- 4** The Ombudsman is the closed meeting investigator for the Town of Amherstburg.
- 5** When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Council procedures

- 6** The town's former procedure by-law (2008-28) was in force at the time of the meeting on January 10. Amherstburg passed a new procedure by-law (2014-91) on January 21 that was in force during the June 2 meeting.
- 7** Both by-laws echo the provision in s. 240 of the Act to allow a majority of council to petition the clerk to hold a special meeting. The by-laws stipulate there shall be at least 48 hours from the receipt of the petition to the time of the special meeting and that the clerk shall give notice of the meeting.
- 8** Both by-laws prohibit voting in closed session except where the Act permits or requires the meeting to be closed, and the vote is for procedural matters or to give directions to staff.

- 9** The older by-law accurately reflects the closed meeting exceptions set out in s. 239 of the Act, including the exception for education or training and the mandatory exception for requests made under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. The new by-law refers to sections 239(3) and (3.1), but does not include any reference to education or training sessions, or meetings to consider *MFIPPA* requests.
- 10** Amherstburg should amend its procedure by-law to account for the discretionary exception in the Act for education or training sessions in s. 239(3.1) and the mandatory exception to consider requests made under the *MFIPPA* in s. 239(3).

Investigative process

- 11** The Ombudsman’s Open Meeting Law Enforcement Team (OMLET) spoke with the complainant and interviewed the Clerk, Chief Administrative Officer (CAO), Mayor, Deputy Mayor, and all five councillors. We reviewed the meeting documents, including the agendas, open meeting minutes, closed session minutes, and supporting documentation. We also listened to the audio recordings of the two meetings, which provided an accurate record of what transpired and greatly assisted us in completing our investigation.
- 12** Our Office received full co-operation in this matter.

The first meeting: January 10, 2015

Petition to call the meeting

- 13** Ahead of the January meeting, four councillors asked the Mayor to call a meeting to discuss concerns brought forward by two municipal employees. The employees had raised concerns directly with councillors about health and safety issues and harassment. The councillors felt the issues were urgent and council should hold a closed meeting to hear from the employees.
- 14** The Mayor asked the town’s Clerk and CAO for advice about the councillors’ request. The Clerk said she did not believe the matter was appropriate for a council meeting because the proper protocol requires employees to raise concerns first with their supervisors, then with human resources (HR) staff, and then with the CAO. She was not aware of any issues having been raised with HR or the CAO. Further, she advised that she did not believe the issue fit within any of the exceptions set out in s. 239 of the *Municipal Act*.

- 15** The CAO advised the Mayor that council would be overstepping its authority if it addressed this issue because health and safety issues are an administrative responsibility. The CAO told our Office that, if concerns are brought to the municipal administration and remain unresolved, staff should raise them with the Ministry of Labour, rather than with council.
- 16** After speaking with the Clerk and CAO, the Mayor determined that the employees' health and safety concerns were outside council's authority and a closed meeting was not warranted.
- 17** Section 240(b) of the *Municipal Act* states that, subject to the procedure by-law, "upon receipt of a petition of the majority of the members of council, the clerk shall call a special meeting for the purpose and at the time mentioned in the petition". This process is echoed in s. 9 of the town's procedure by-law.
- 18** On January 7, 2015, four councillors submitted a petition to the Clerk. Citing s. 240 of the Act, the petition directed the Clerk to call an in camera meeting on January 10 to deal with "personnel matters relating to health and safety issues".
- 19** As required by the Act and procedure by-law, the Clerk called the meeting for January 10 at 9:00 a.m. The agenda cited s. 239(2)(b), personal matters about an identifiable individual, to discuss personnel issues, as indicated in the petition.
- 20** After calling the meeting in accordance with the information in the petition, the Clerk consulted the town's external legal counsel for a legal opinion about council's role with respect to this matter. The Clerk asked legal counsel to attend the meeting to provide advice to council.

Meeting summary

- 21** Amherstburg council held a special in camera meeting on January 10, 2015 at 9:00 a.m. in council chambers. In attendance were all of council, the Clerk, the CAO, and the town's external legal counsel. The two employees who had raised the health and safety issues were in the building during the meeting, but waited outside council chambers.
- 22** Councillor Diane Pouget brought a motion in open session to close the meeting pursuant s. 239(2)(b), personal matters about an identifiable individual to discuss "personnel matters". The Mayor asked if anyone had a concern about the issues being heard in a closed session. Councillor Leo Meloche expressed concern about the meeting and said that the discussion overstepped council's jurisdiction. The motion to close the meeting was then carried and council went in camera.

- 23** Council discussed the details of the allegations of harassment and health and safety concerns put forward by the employees. The two employees were identified by name throughout this discussion.
- 24** The CAO and the town's external legal counsel explained the procedures employees should follow to raise such concerns. Counsel provided legal advice regarding administrative process, the role of council, and treating complaints confidentially.
- 25** Council directed staff to provide council members with documents relevant to the employees' concerns, to meet with the employees, and to review confidentiality protocols.
- 26** Council came out of the in camera session at 10:45 a.m. and the meeting ended.

Analysis

- 27** When we spoke with staff and councillors, their concerns about closing the meeting to the public were conflated with the issue of whether this matter should have come before council at all for the reasons set out by the town's legal counsel. In accordance with the Ombudsman's current authority, our analysis is limited to the application of the open meeting requirements of the *Municipal Act* and the town's procedure by-law.

Applicability of the exception for personal matters about identifiable individuals

- 28** In accordance with the petition that caused the meeting to be called, council cited s. 239(2)(b), personal matters about an identifiable individual, to close the meeting.
- 29** The Information and Privacy Commissioner (IPC) has found that information will only qualify as personal for the purposes of the Act if it pertains to the individual in his or her personal, rather than professional, capacity. However, information about a person in his or her professional capacity may still qualify if it reveals something personal.¹ Discussions about an individual's conduct will generally be considered personal.²
- 30** During the discussion on January 10, councillors named two individual town employees and described the specifics of their complaints against other town employees. The information discussed went beyond the individuals' professional

¹ See Order MO-2204 (22 June 2007) online: IPC <www.ipc.on.ca>.

² Order MO-2519 (29 April 2010) online: IPC <www.ipc.on.ca>.

duties, and included harassment allegations and the individuals' personal concerns about their work environment. This aspect of the discussion fit within the exception for personal matters in the *Municipal Act*.

Applicability of the solicitor-client privilege exception

- 31** Although not cited in the resolution to close the meeting, the discussion in camera on January 10 also fit within the exception in s. 239(2)(f) for advice that is subject to solicitor-client privilege. The CAO and Clerk told our Office that, had the meeting not been called by petition, they would have cited s. 239(2)(f).
- 32** The open meeting exception for discussions of advice subject to solicitor-client privilege applies in instances where advice from a legal advisor or related communication is considered as part of the discussion. As the IPC set out in Order 49, in order for the privilege to apply:
1. There must be a written or oral communication;
 2. The communication must be of a confidential nature;
 3. The communication must be between a client (or his agent) and a legal advisor; and
 4. The communication must be directly related to seeking, formulating or giving legal advice.³
- 33** On January 10, Amherstburg's legal counsel was present throughout the closed meeting. In that confidential setting, she provided extensive legal advice to council on all subjects discussed. Accordingly, these discussions fit within the exception for advice subject to solicitor-client privilege in s. 239(2)(f) of the Act.

The second meeting: June 2, 2015

- 34** Amherstburg council held a special in camera meeting at 6:00 p.m. on June 2, 2015 in council chambers. All council members attended, along with the CAO, the Clerk, the Human Resources Manager, and the town's external legal counsel. Also in attendance were a labour relations consultant and an external investigator retained by the town. The external investigator had been retained as an independent third party to review the health and safety concerns raised by municipal employees in January. Her report was first presented to council at a special in camera meeting on May 4, and she returned on June 2 to answer additional questions.

³ Order 49 (10 April 1989) online: IPC <www.ipc.on.ca>.

- 35** Council passed a resolution to move into a closed session to discuss “ITEM A – Fire Investigation Report”, under the exception in s. 239(2)(b) – personal matters, and s. 239(2)(f) – solicitor-client privilege.
- 36** During the closed session, councillors asked the investigator questions about her investigation process, her report, and matters related to the issues she reviewed. The investigator left the meeting at 6:54 p.m.
- 37** Councillors next asked the labour consultant about the conduct of a particular employee. They also asked questions about health and safety regulations. The consultant explained how the town’s health and safety policies apply to issues raised by employees and explained the steps that employees should take if they have health and safety concerns.
- 38** Council next discussed options for addressing the recommendations in the investigator’s report with respect to employees. The CAO and legal counsel advised council about various options and the implications of each for the town. The CAO also responded to questions from council about specific employee matters. Legal counsel provided advice regarding interpretation of a by-law, the role and authority of council, and council’s oversight of staff.
- 39** A motion was carried to direct staff to terminate the employment of two municipal employees.
- 40** Councillors Diane Pouget and Jason Lavigne left the meeting at 9:18 p.m. Both told our Office they left because they thought the meeting was nearly finished.
- 41** The remaining councillors next discussed options with regards to another employee. The CAO and legal counsel provided advice about council’s options with respect to the employee, including legal advice.
- 42** The meeting concluded at 9:57 p.m.
- 43** At a special council meeting on June 8, council reported in open session that they held a closed meeting on June 2 and discussed a “Fire Investigation Report” under ss. 239(2)(b) and (f). It notes that as, “a result of that discussion, Council directed the CAO to dismiss 2 Volunteer Firefighters”.

Analysis

Applicability of the exception for personal matters

- 44** As summarized above, the exception for personal matters about identifiable individuals in s. 239(2)(b) of the Act applies where something inherently personal

is discussed about the individual, rather than simply professional or business information.

- 45** Councillors and staff told us they cited this exception because the investigation report included information about employees, including with respect to conduct and discipline. Council was considering how to address the issues raised in the report. Council also discussed another employee's conduct and how best to proceed with respect to that matter. The focus of the discussion was on the individuals and their conduct, rather than general health and safety matters.
- 46** The labour consultant provided general information to council about health and safety requirements, but this advice was interspersed with comments about specific individual employees. Based on the audio recording of this portion of the meeting, it does not appear that the personal matters could have easily been separated from the general matters discussed. As the court found in *St. Catharines (City) v. IPCO*, it is unrealistic to expect members of municipal council to parse their discussions to exclude references to related or background information.⁴ Accordingly, these discussions fit within the exception for personal matters in s. 239(2)(b) of the Act.

Applicability of the exception for solicitor-client privilege

- 47** As described above, solicitor-client privilege attaches to communications between a solicitor and client and applies where a solicitor communicates confidential legal advice to his or her client.⁵
- 48** Council's external legal counsel was present throughout the in camera meeting and provided legal advice to council on the matters discussed. The discussions fit within the exception for solicitor-client privilege in s. 239(2)(f) of the Act.

Applicability of the exception for labour relations or employee negotiations

- 49** Although not cited by Amherstburg, the matters discussed also fit within the exception for labour relations or employee negotiations in s. 239(2)(d) of the Act.
- 50** In 2003, the Ontario Court of Appeal found that the meaning of "labour relations" can extend to the relations and conditions of work, beyond those related to

⁴ 2011 ONSC 2346.

⁵ Order 49, *supra* note 3.

collective bargaining.⁶ In 2014, the Information and Privacy Commission also clarified that “labour relations” can apply to relationships outside a strict collective bargaining relationship, as long as they are analogous to those governed by collective bargaining legislation.⁷

- 51** During this closed session meeting, council members discussed the conditions of work for three specific employees, as well as the general work environment for all employees in a specific department. They decided to terminate the employment of two of employees. Based on the definitions endorsed by the Ontario Court of Appeal and the IPC, this discussion fit within the exception in s. 239(2)(d).

Opinion

- 52** My investigation found that council for the Town of Amherstburg did not contravene the open meeting rules in the *Municipal Act, 2001* when it discussed matters in camera on January 10 and June 2, 2015.

Report

- 53** OMLET staff spoke with the Mayor, Clerk, and CAO on November 12, 2015 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.
- 54** My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario

⁶ *Ontario (Minister of Health & Long-Term Care) v. Ontario (Assistant Information & Privacy Commissioner)* 2003 CarswellOnt 4071, [2003] O.J. No. 4123, 126 A.C.W.S. (3d) 185, 178 O.A.C. 171. See also Orders PO-3311 and PO-3311, online: IPC <www.ipc.on.ca>.

⁷ Order MO-2997 (15 January 2014). See also Order PO-2057 (29 October 2002) online: IPC <www.ipc.on.ca>.