



## **Ombudsman Report**

**Investigation into whether  
Council for the Town of Amherstburg  
held illegal closed meetings on  
July 7, and September 8, 2014**

**André Marin  
Ombudsman of Ontario  
November 2014**

## Complaint

- 1 On September 17, 2014, my Office received a complaint about closed sessions held by council for the Town of Amherstburg at the council meetings on July 7 and September 8, 2014.
- 2 According to the complaint, council proceeded in camera to discuss the hiring of a new Chief Administrative Officer (CAO). The complainant alleged that these closed session discussions violated the provisions of the *Municipal Act, 2001* (the Act), and that council may have also illegally voted while in camera.

## 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 municipal staff.
- 8 My Office received full co-operation in this matter.
- 9 Municipal elections were held on October 27, 2014. A new Mayor was elected, along with a new Deputy Mayor and four new councillors. Our investigation was completed before the new council took office.

## The July 7 meeting

- 10** The July 7 meeting was a special in camera meeting that began at 8:00 a.m. The agenda stated that council would be proceeding in camera to discuss the Chief Administrative Officer selection process under the personal matters and solicitor-client privilege exceptions.
- 11** All council members except one were present for the meeting. The Deputy Clerk, current CAO, and the town solicitor were also present.
- 12** The resolution to proceed in camera mirrored the information available on the agenda.
- 13** While in camera, council discussed a specific candidate for the CAO position. Council also discussed an email an identified member of the public sent to some council members, expressing opinions about a candidate for the CAO position, as well as one councillor's response to that email. Council members and staff expressed opinions about the conduct of the candidate, the identified member of the public, and the councillor.
- 14** Staff expressed concerns that members of the public could be attempting to influence the hiring process by contacting council members. Staff suggested that a hiring committee be formed, with no council members, which would bring a recommendation back for council approval.
- 15** Council voted to direct staff to proceed with forming a hiring committee.
- 16** Throughout the in camera discussion, the town solicitor also provided advice. The open session resumed at 9:30 a.m.
- 17** Staff advised my Office that the specific committee members were not chosen during the July 7 in camera session, but were chosen later by the current CAO and the manager of human resources. As discussed at the July 7 meeting, no members of council were on the hiring committee.

### Analysis

- 18** The information provided to my Office indicates that council discussed the CAO hiring process in camera on July 7. This meeting was closed to the public under the "personal matters" and "solicitor-client privilege" exceptions.
- 19** Legal counsel attended the closed session and the minutes indicate that legal advice was given. Accordingly, at least part of the in camera discussions were permitted by the solicitor-client privilege exception.

- 20 Much of the discussion also fit within the personal matters exception. When reviewing the parameters of the open meeting exceptions, my Office has often considered the case law of the Office of the Information and Privacy Commissioner (the IPC). Although not binding on my Office, these cases can be informative.
- 21 The definition of “personal information” found in the *Municipal Freedom of Information and Protection of Privacy Act*<sup>1</sup> (MFIPPA) includes “the personal opinions or views of another individual about the individual”. The IPC has also noted that, generally, information about an individual in their professional capacity is not “personal” in nature; however, such discussions take on a personal quality if they relate to scrutiny of an individual’s conduct<sup>2</sup>.
- 22 At the July 7 meeting, council discussed the appropriateness of the conduct of two members of the public, and one council member. These discussions fit within the personal matters exception.
- 23 The actions of two members of the public prompted concerns that council members might be unduly influenced during the hiring process, and resulted in council’s direction to staff to form a hiring committee without council involvement.
- 24 Although the *Municipal Act* generally prohibits voting behind closed doors, an exception to this general rule is found in section 239(6) of the Act. This section states that council may vote in camera if the meeting is otherwise permitted to be closed to the public, and if the vote is for a procedural matter or to provide directions to staff. Council’s in camera vote on July 7 was a direction to staff, permitted under section 239(6) of the Act.
- 25 The actual composition of the hiring committee was not decided in camera on July 7; rather, staff made the decision at a later time.

## The September 8 meeting

- 26 The September 8 meeting was a special in camera council meeting that began at 4:00 p.m., prior to the regular 7:00 p.m. open meeting. The agenda indicated that council would be proceeding in camera to discuss personal matters about an identifiable individual.
- 27 All council members were present for the meeting, as well as the CAO, the Clerk, the 5 members of the CAO selection committee, and the town solicitor.
- 28 Council resolved to proceed in camera to discuss the CAO selection process, citing personal matters about an identifiable individual. While in camera, the

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<sup>1</sup> RSO 1990, c M.56

<sup>2</sup> See IPC Order MO-2519



hiring committee provided its recommendation for the successful candidate, and its rationale for supporting that candidate. Council and staff discussed the proposed contract, including the probationary period for the successful individual. The candidate attended the meeting for 15 minutes to answer questions.

- 29** Throughout the discussion, the town solicitor provided legal advice.
- 30** Council directed staff to prepare an appointment by-law for the selected candidate, for discussion at the open meeting. Council moved into open session at 5:15 p.m.
- 31** During the open session, council reported back that they had discussed a candidate for the CAO appointment under the personal matters exception.
- 32** In open session, council voted on the appointment by-law for the candidate chosen by the hiring committee. This vote passed 5-2.

### Analysis

- 33** This meeting was closed to the public under the “personal matters” exception. Council discussed the qualifications of an identifiable individual – namely, the proposed candidate for the CAO position – and also expressed opinions about this individual. The discussion was therefore permitted by the cited exception.
- 34** Although not cited in the resolution to proceed in camera, the “solicitor-client privilege” exception could also have applied to part of the discussion, as the town solicitor was present to give legal advice. The “labour relations” exception could also apply as council was discussing extending an offer of employment to a potential employee, including terms of that individual’s proposed contract.
- 35** The minutes indicate that the only vote taken in camera was a direction to staff to prepare an appointment by-law. This direction was permissible under the Act. The actual vote on the proposed candidate took place in open session.

### **Opinion**

- 36** Council for the Town of Amherstburg was permitted under the exceptions contained in the *Municipal Act* to meet in closed session on July 7 and September 8. The directions to staff at both meetings were also permitted under s. 239(6) of the Act.

## Report

- 37** OMLET staff spoke with Amherstburg's Clerk and Chief Administrative Officer, as well as Mayor Wayne Hurst on November 27 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.
- 38** 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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