



Ombudsman Report

Investigation into closed meetings held by Council for the Municipality of South Huron between November 2008 and December 2013

**André Marin
Ombudsman of Ontario
February 2015**

Complaint

- 1 On September 23, 2014, my Office received a complaint about seven meetings held by the council for the Municipality of South Huron between November 2008 and December 2013. All of these meetings were closed to the public to discuss staffing issues. The complaint alleged that these discussions did not fit within the permitted exceptions to the open meeting requirements in the *Municipal Act, 2001* (the Act) and that illegal votes may have taken place in camera.

Ombudsman jurisdiction

- 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.
- 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 My Office is the closed meeting investigator for the Municipality of South Huron.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the relevant municipal procedure by-law have been observed.

Municipal elections

- 6 The meetings covered by these complaints date back to 2008. Municipal elections were held in October 2010 and in October 2014; the latter took place while our investigation was underway. Only three members of South Huron council who were in office when the complaint was received were re-elected to the present council.
- 7 In this report, all mentions of the Mayor and council refer to the council as it was constituted at the relevant times.

Council meeting procedures

- 8** The municipality's procedure by-law (by-law 71-2008) states that all meetings of council, committees and local boards must be open to the public. Meetings or parts of meetings may be closed to the public pursuant to the provisions of s. 239 of the Act and the procedure by-law.
- 9** Notice of meetings is given, and agendas are posted, at least 48 hours in advance of the meeting.

Investigative process

- 10** After conducting a review of the complaint, my Office notified the municipality on December 1, 2014 that we would be conducting an investigation.
- 11** During the course of our investigation, we obtained and reviewed relevant municipal documents, including minutes and agendas. We also considered the municipality's procedure by-law and applicable legislation and case law.
- 12** Staff members from my Office's Open Meeting Law Enforcement Team (OMLET) conducted telephone interviews with municipal staff and members of council, as well as with a Human Resources consultant who attended one of the meetings.
- 13** We received full co-operation during our investigation.

The in-camera meetings

November 17, 2008

- 14** The November 17, 2008 meeting was a regular council meeting that began at 5:30 p.m. The agenda indicated that there would be a closed session to discuss a personal matter related to human resources. The *Municipal Act, 2001* permits a meeting to be closed to discuss "personal matters about an identifiable individual" (s. 239 (2)(b)).

- 15** According to the public minutes, council passed a resolution to proceed in camera to discuss a personal matter. There was no further information provided in the resolution.
- 16** While in camera, council discussed performance reviews and pay rates of identified employees. Council provided direction to staff to present a policy at a future council meeting relating to salary increases.

Analysis

- 17** On November 17, 2008, council proceeded in camera to discuss the salaries and performance reviews of identified members of staff. 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.
- 18** The IPC has found that an individual's salary, as opposed to a salary range for a position, qualifies as a "personal matter" (See for instance: Order M-5, Order 61, Order 183, and Order P-273). Discussion of employee performance can also fall within the "personal matters" exception, as noted in IPC Order MO-2204.
- 19** The in-camera discussions that took place on November 17, 2008 fit within the "personal matters" exception to the open meeting requirements. Although it was not cited when council proceeded in camera, the "labour relations" exception – s. 239 (2)(d) of the Act – could also have applied to this discussion. This exception refers to the collective relationship between an employer and its employees¹.
- 20** The *Municipal Act* prohibits voting during a closed session unless the vote is for a procedural matter, or for giving directions to staff (s. 239(6)(b)). In this case, council provided direction to staff to prepare a policy for future consideration. This in-camera direction was permissible.

May 7, 2012

- 21** The May 7, 2012 meeting was a regular council meeting that began at 9 a.m. The agenda indicated there would be a closed session to deal with three matters.

¹ IPC Order PO-2057

The complaint to my Office was specifically about item 16.3, which is listed as “Personal matter – Municipal Employee.”

- 22** According to the public minutes, council passed a resolution that simply stated: “That South Huron Council meet in closed session at 10:20 a.m.” The exceptions authorizing the discussion (“personal matters” and “acquisition or disposition of land” – s. 239 (2)(c)) are written in the minutes above the resolution.
- 23** While in camera, council discussed an identified employee’s disagreement with the application of the municipality’s personnel policy as it applied to that individual’s salary. Council received a legal opinion on the matter. No votes were taken with respect to this item.
- 24** Council also discussed a land matter that fell within the acquisition/disposition of land exception.

Analysis

- 25** The May 7 in-camera discussion pertained to the employment of an identified member of staff. As with the November 17, 2008 discussion, this individual’s salary was also discussed. These discussions fit within the “personal matters” exception. The discussions of the personnel policy could also have fallen within the “labour relations” exception.
- 26** Council also considered a specific piece of advice from the municipality’s solicitor during the discussion. Communication can be found to be privileged if it is between a solicitor and their client; is made in relation to the seeking or receiving of legal advice; and is intended to be confidential². As these conditions were met in this case, the “solicitor-client privilege” exception (s. 239(2)(f)) could also have applied.

² *Solosky v. the Queen*, [1980] 1 S.C.R. 821 at p. 837

May 6, 2013

- 27** The May 6, 2013 meeting was a regular council meeting that began at 9 a.m. The agenda stated that council would be moving into closed session to discuss two matters: A litigation matter related to “property in Exeter Ward” and a personal matter related to “organizational review and employee update.” The complaint to my Office was about the second item.
- 28** The open meeting minutes indicate that council passed a resolution: “That South Huron Council move into closed session at 10:46 a.m.” The exceptions authorizing the discussion (potential litigation and personal matters) are written in the minutes above the resolution.
- 29** Council first discussed a potential litigation matter, including advice received from the municipality’s solicitor. This discussion fit within the cited “potential litigation” exception (s. 239(2)(e)) and could also have fit within the “solicitor-client privilege” exception.
- 30** Under the “personal matters” exception, council discussed a report of the Chief Administrative Officer regarding the performance of an identified employee and the possibility of taking disciplinary measures.

Analysis

- 31** The IPC generally has found that in order to qualify as “personal information,” the information must be about an individual in their personal, rather than their professional capacity (see IPC Order MO-2204). However, information about an individual in a professional capacity may still qualify as personal information if it reveals something of a personal nature, or if the information relates to the scrutiny of that individual’s conduct (see IPC Orders MO-2368 and MO-2519).
- 32** In this case, the discussion of the performance of a particular employee, including consideration of disciplining that employee, fit within the “personal matters” exception.

June 3, 2013

- 33** The June 3, 2013 meeting was a regular council meeting that began at 9 a.m. The agenda indicated that council would be proceeding in camera to discuss personal matters, related to the “organizational review update.”
- 34** The open meeting minutes indicate that council passed a resolution: “That South Huron Council move into closed session at 10:45 a.m.” The exception authorizing the discussion (personal matters) is written in the minutes above the resolution.
- 35** The in-camera minutes simply indicate that council received an oral report from the Chief Administrative Officer regarding the “organization review” during the closed session.
- 36** During our interviews for this investigation, we were unable to obtain consistent information regarding what was discussed at this meeting. The present clerk and Chief Administrative Officer were not employed by the municipality at the time, and due to the significant time that had passed since the meeting, recollections of the few who were present were spotty at best.
- 37** Two council members who were present had some recollection of the meeting, however due to the passage of time they could not recall specific details. They believed the discussion did belong in camera, and that they may have discussed concerns regarding the performance of identified staff members. This was the extent of the information available regarding what was discussed during the meeting.

Analysis

- 38** As noted in my December 9, 2013 review of a meeting held by the Town of Amherstburg³, general discussions about organizational or operational reviews do not fit within the exceptions to the open meeting requirements. However, if the discussion relates to the performance of individuals or other personal information the exceptions to the open meetings requirements may apply.
- 39** Given the lack of detail in the minutes and the difficulty council members had in recalling what was discussed at a meeting a year and a half earlier, it is impossible

³ Available online, here: <https://ombudsman.on.ca/Files/sitemedia/Images/Reports/Amherstburg-Closing-Letter-Dec-9.pdf>

to conclude whether these discussions fit within the cited exception. If the municipality had kept detailed minutes and/or followed a practice of audio recording its closed sessions, this would have greatly assisted in our review of this meeting.

June 17, 2013

- 40** The June 17, 2013 meeting was a regular council meeting that began at 1 p.m. The agenda indicated that council would be proceeding in camera to discuss personal matters, related to the “organizational review update.”
- 41** The open meeting minutes indicate that council passed a resolution: “That South Huron Council move into closed session at 2:55 p.m.” The exception authorizing the discussion (personal matters) is written in the minutes above the resolution.
- 42** During the closed session, council discussed the dismissal of an identified staff member.

Analysis

- 43** As with the May 6, 2013 discussion, this item pertained not only to employment but also to performance matters, conduct, and discipline. This discussion fit within the “personal matters” exception.

October 7, 2013

- 44** The October 7, 2013 meeting was a regular council meeting that began at 9 a.m. The agenda indicated that council would be proceeding in camera to discuss personal matters related to an “employee update.”
- 45** The open meeting minutes indicate that council passed a resolution: “That South Huron Council move into closed session at 10:37 a.m.” The exception authorizing the discussion (personal matters) is written in the minutes above the resolution.
- 46** During the closed session, council discussed a report of a human resources consultant, regarding the dismissal of an identified employee.

Analysis

- 47** As with the June 17, 2013 discussion, this item fit within the personal matters exception.

December 2, 2013

- 48** The December 2, 2013 meeting was a regular council meeting that began at 9 a.m. The agenda indicated that council would be proceeding in camera to discuss personal matters related to “employee recruitments.”
- 49** The open meeting minutes indicate that council passed a resolution: “That South Huron Council move into closed session at 10:37 a.m.” The exception authorizing the discussion (personal matters) is written in the minutes above the resolution.
- 50** According to the in-camera minutes, during the closed session council received an update from a consultant regarding the recruitment of a new manager of corporate services, and a new clerk. The Manager of Corporate Services also provided an overview of the necessity of hiring for a part-time customer service position within the corporate services department.
- 51** Council directed the Chief Administrative Officer and Manager of Corporate Services to proceed with hiring for the position, and for staff to work with the consultants to assist in the recruitment process.
- 52** The information we obtained in our interviews was not entirely consistent. One council member did not recall any identifiable individuals being mentioned during this discussion. Another believed that specific candidates for the positions may have been discussed, but could not say for sure. A third believed that job duties of existing employees may have been discussed, as well as the possibility of modifying existing positions.
- 53** The human resources consultant who attended the in-camera session had the best recollection of the discussions. He recalled that council discussed identified staff members who potentially could fill these positions, and also discussed the salaries of specific staff members for the purpose of finding an acceptable salary range for the new hires.

Analysis

- 54** Some members of council had vague recollections of personal matters being discussed, and the human resources consultant who attended the meeting was able to give clear information about specific personal matters that did arise during the in-camera session. This information included the salaries of identified staff members as well as discussions of the suitability of staff members for two senior positions.
- 55** General discussions about staffing and recruitment for positions that do not involve identifiable individuals do not fall within the personal matters exception under section 239(2)(b). However, based on the information provided from the human resources consultant, I am satisfied that the bulk of the discussions in this case dealt with the qualifications and salaries of identified individuals who could fill the vacant positions. These matters fell within the personal matters exception. I am also satisfied that this discussion fell within the labour relations exception under section 239(2)(d) as the matter related to the relationship between the employer and employees.
- 56** Council also provided two directions to staff, which were permissible under s. 239(6)(b) of the Act.

Procedural matters

- 57** Our investigation also revealed some procedural issues with council's closed meeting practices.

Resolution

- 58** The resolutions to proceed in camera at most of the meetings we reviewed only stated that council would meet in closed session at a given time. As noted by the Court of Appeal in *Farber v. Kingston City*⁴, "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." Council should provide a brief description of the

⁴ [2007] O.J. No. 919, at page 151

subject matter to be considered in closed session, in addition to the wording of the specific exception(s) being relied upon to go into closed session.

- 59** The current clerk told my Office that the municipality has made efforts to improve its resolutions to proceed in camera since the time of these meetings.

Meeting record

- 60** The in-camera minutes from the June 3, 2013 meeting did not provide any specific information about the discussions that took place. Accordingly, I was unable to come to a conclusion regarding whether the discussions fit within the cited exception to the open meeting requirements. The December 2, 2013 meeting record appeared more complete, but during interviews we were told that other discussions took place that were not captured in the minutes.
- 61** In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions, and other proceedings at both open and closed meetings. While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be documented.
- 62** As discussed in my July 7, 2010 report regarding council meetings in the Town of South Bruce Peninsula,⁵ a record of a closed meeting should include reference to:
- where the meeting took place;
 - when the meeting started and adjourned;
 - who chaired the meeting;
 - who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
 - whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
 - a detailed description of the substantive and procedural matters discussed, including reference to any documents considered;
 - any motions, including who introduced the motion and seconders;
 - all votes taken, and all directions given.

⁵ <https://ombudsman.on.ca/Resources/Reports/Town-of-South-Bruce-Peninsula-Council-br---Open-Co.aspx>

- 63** The current clerk advised us that the municipality's current practice is to keep more comprehensive minutes.
- 64** 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.
- 65** As noted in my 2011-2012 OMLET Annual Report,⁶ 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. In this case, audio recordings of the closed sessions would have greatly assisted in reviewing meetings from 2008 through 2013.

Reporting back

- 66** The minutes for the meetings we reviewed do not indicate that the South Huron council follows a practice of reporting back to the public after a closed session. I encourage councils to report back on what occurred in camera, 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 publicly.
- 67** The current clerk told my Office that the municipality is in the process of revising its procedure by-law, and that the new procedure by-law will likely include provisions for reporting back after closed sessions.

Opinion

- 68** Our investigation did not find any violations of the Act at the meetings complained of. However, there was a lack of information available in the minutes for some of the meetings, and in the case of the June 3, 2013 meeting, this absence of any

⁶ <https://ombudsman.on.ca/Resources/Reports/2011-2012-OMLET-Annual-Report.aspx>

detail about the matters discussed made it impossible to conclude whether the in-camera session was justified under the cited exception of the *Municipal Act*.

Recommendations

I am making the following recommendations, which I hope will assist the council for the Municipality of South Huron, in future, to meet its legal obligations with respect to closed meetings as well as to improve its closed meeting practices:

Recommendation 1

The Municipality of South Huron should ensure that its resolutions to proceed in camera 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.

Recommendation 2

The Municipality of South Huron should ensure that its meeting record is complete and accurately reflects all of the substantive and procedural items that were discussed. The Municipality should implement a practice of audio recording closed sessions.

Recommendation 3

The Municipality of South Huron should follow a practice of reporting back to the public after a closed session.

Recommendation 4

All members of Council for the Municipality of South Huron 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.

Report

- 67** OMLET staff spoke with the clerk and Mayor on February 3, 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.
- 68** 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.



André Marin
Ombudsman of Ontario