



Ombudsman Report

**Investigation into certain closed meetings
held by the Town of Midland
between December 2011 and March 2012**

**André Marin
Ombudsman of Ontario
September 2012**

Complaints

- 1 Our Office received three complaints regarding the closed meeting practices of council for the Town of Midland. The complaints referred to a January 11, 2012 closed meeting of the Planning and Development Committee, a January 12, 2012 closed special meeting of council, and various *in camera* budget meetings.
- 2 With respect to the January 11, 2012 meeting of the Planning and Development Committee, the complaints stated that the notice provided did not comply with the town's procedure by-law, and that council failed to report back in open session about what had occurred in the *in camera* meeting. The complaints also stated that council regularly failed to report back publicly about closed sessions.
- 3 With respect to the January 12, 2012 closed meeting of council, the complaints questioned whether the meeting was properly held *in camera*.
- 4 Regarding the *in camera* budget meetings, it was subsequently determined that the budget meetings in issue were held on December 1 and 13, 2011. The complainants reported being concerned that council did not report back sufficient information from these meetings at a subsequent open meeting.
- 5 On April 2, 2012, our Office received another complaint relating to voting practices at *in camera* meetings of council on February 21 and March 26, 2012.
- 6 During the course of our review, we were also asked to address a question regarding private briefing sessions that are held between some members of council and town staff. This issue was reviewed separately and will be dealt with in a separate communication to council, as well as during an upcoming outreach and training session with my staff, which will take place at a public meeting of council to be scheduled in the near future.

Ombudsman jurisdiction

- 7 Under the *Municipal Act, 2001* (the Act), municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.

- 8 As of January 1, 2008, changes to the Act gave citizens the right to request an investigation into whether a municipality has properly closed 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.
- 9 The Town of Midland appointed the Ontario Ombudsman as its investigator in November 2011.
- 10 In investigating closed meeting complaints, our Office considers whether the open meeting requirements of the Act, and the relevant municipal procedure by-law, have been observed.

Investigative process

- 11 After conducting a preliminary review of the initial complaints, on March 12, 2012 our Office notified the Town of Midland that we would be conducting an investigation.
- 12 During the course of our investigation, we obtained and reviewed relevant municipal documents, including motions, agendas, minutes, and notes. We also considered the town's procedure by-law, as well as the applicable legislation.
- 13 In accordance with s. 19(1) of the *Ombudsman Act*, members of council and town staff are required to provide our Office with any documents or information requested during the course of our investigations. Council members and town staff co-operated fully with our investigation.
- 14 A two-person team conducted nine in-person interviews of members of council and relevant municipal staff. Two additional members of council, who could not be interviewed while investigators were in Midland, were interviewed by telephone.

Preliminary report

- 15 In accordance with our normal procedures, the town was given an opportunity to review a report containing preliminary investigative findings and analysis, and to make any relevant representations before the report was finalized. Council and staff had the option of receiving a copy of the preliminary report for review upon signing a confidentiality undertaking.
- 16 Seven members of council and two staff members were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. We did not receive any written comments on the preliminary report.

Council meeting procedures

- 17 The town's procedure by-law (2010-42) states that regular council meetings will be held at 7:00 p.m. on the fourth Monday of each month, unless otherwise ordered. Public notice of the meeting shall be provided through the provision of an agenda on the town website the Friday prior to the regular meeting.
- 18 The by-law states that *in camera* meetings shall be called by the Mayor on an as-needed basis. It also states "due to the potential urgent nature of these meetings, the Mayor will endeavor to provide as much notice as is practical given the circumstances." Where the matter is not considered to be of an urgent nature by the Mayor, at least 48 hours notice shall be provided. Public notice of an *in camera* meeting shall be provided through the provision of an agenda on the town website on the day the meeting has been called.
- 19 With respect to special meetings, the by-law states that upon receipt of the petition of the majority of the members of council, the Clerk shall, with a minimum of 48 hours' notice, summon a special meeting for the purpose and at the time as specified.
- 20 The by-law states that all meetings are to be open to the public, but may be closed if the matter being considered relates to one of the exceptions outlined in s. 239 of the *Municipal Act*.

Investigative findings

- 21 As a result of our investigation, we have determined that council contravened the open meeting requirements of the Act in a number of respects.

December 1 and 13 meetings

- 22 Our investigation reviewed two budget meetings of December 1 and 13, 2011, at which council considered items using the “personal matters about an identifiable individual” exception. Our investigation found that although some matters discussed during these meetings fell within this exception, other matters were discussed which clearly did not, and should not have been discussed in closed session.
- 23 The agenda of both the December 1 and 13 *in camera* meetings stated that council would be holding a closed session to discuss “personal matters about an identifiable individual – Budget.” Those who attended both meetings advised us that they believed it was appropriate to go *in camera* under this exception. They noted that, during the budget meetings, council was discussing individual staff positions. Due to the limited size of municipal staff, council believed it would be easy for members of the public to identify whose job was being discussed. We were provided with information that confirms such discussions occurred and that the public could have easily determined the identities of the persons holding the positions discussed. These discussions therefore fit within the cited exception, as they involved – and potentially affected the terms of employment of – identifiable individuals.
- 24 The closed meeting minutes state that there was also a PowerPoint presentation given at each of these meetings. The Clerk provided our Office with two copies of the PowerPoint presentation, with slight variations. Both presentations are dated December 1, 2011 and there is nothing to indicate when either was presented. Those who were present provided us with conflicting information as to which presentation was given on which date. As such, it is not possible to conclude exactly when the presentations were given.

- 25 We received similarly conflicting information regarding whether the PowerPoint presentations viewed *in camera* on December 1 and December 13, respectively, were shown in the open sessions held on those same dates. The open meeting minutes record that PowerPoint presentations were made, but do not provide details to identify the particular presentation. It is again impossible to conclude which of the two presentations, if either, were subsequently shown in open session.
- 26 In any event, neither presentation appears to fit within the cited exception of “personal matters about an identifiable individual.” The presentations do not identify any individual by name; they only provide an update on the overall budget process and some of its constituent parts. Two members of council who were interviewed stated that they believed the presentations should have been made in public.
- 27 In addition, certain of those interviewed also recalled discussing on December 1 the deployment budget of the fire department and the remuneration and benefits of council. Neither of these subjects are properly the subject of a closed meeting under the “personal matters about an identifiable individual” exception.

January 11 committee meeting

- 28 We also received complaints that the *in camera* meeting of the Planning and Development Committee on January 11, 2012, did not comply with the notice provisions of the town’s procedure by-law. The committee went into closed session pursuant to s. 239(2)(c) of the *Municipal Act* on the basis that it was considering a proposed or pending acquisition or disposition of land by the municipality.
- 29 The town’s procedure by-law requires that agendas for closed meetings of council and committees of council be posted on the town’s website in advance of the meeting. The Acting Deputy Clerk advised us that, due to an “oversight,” this did not occur for the January 11 closed meeting. Two members of the committee advised that they did not attend this meeting because of the absence of notice.
- 30 The meeting did, however, occur. Based on the information obtained during our investigation, it appears council considered acquiring land that had become available, and the discussions in the meeting fell within the stated exception to the open meeting rules.

- 31** Our investigators were informed that a member of the committee brought the insufficiency of the notice to the attention of council. The January 11 meeting was subsequently declared a nullity. Another closed meeting took place at a later date to address the issues originally discussed on January 11.

January 12 special meeting

- 32** The public agenda for the meeting stated that council would be holding an *in camera* “education and training” session. No further information was provided. As required by the Act, the resolution to go *in camera* stated that council was going into a closed meeting for an education or training session pursuant to s. 239(3.1) of the Act.
- 33** The minutes record that this meeting was attended by council, the Acting Clerk/Chief Administrative Officer, the Acting Deputy Clerk, and eight other staff members.
- 34** The minutes state that “during the closed session each department head briefly outlined their department’s projects and work plan for 2012.” The minutes also state that “Council and staff engaged in discussion with respect to items related to meeting process and other items requiring clarification/reorientation.” The following items are listed as having been discussed:
- a) Moment of Silent Reflection;
 - b) In-Camera Meetings;
 - c) Public Hearings on Planning Matters;
 - d) Decorum at Public Meetings;
 - e) Department Head Staff Overtime;
 - f) Consent Agenda; and
 - g) Monthly Budget Meetings.

- 35 The minutes further record that four items were identified as items “requiring action,” which would be forwarded to the next General Committee meeting for consideration:
- Whether or not to continue with the Moment of Silent Reflection.
 - Training for Council and Department Head staff on *in camera* process and procedures, and how to effectively chair a meeting.
 - Decorum requirements for members of the public, council and staff at meetings – opening statement.
 - Department Head overtime.
- 36 Certain members of council also advised us that discussions took place regarding particular named town residents and media organizations.
- 37 The Mayor told our investigators that the impetus for this meeting was that he “wanted a time-out to talk about how we deal with each other.” He stated the agenda was “largely open” and the idea was to talk about what was and wasn’t working with council. The Mayor’s description of the meeting’s purpose is consistent with the description of the meeting provided by the other attendees.
- 38 Two members of council expressed concern at the meeting that it should not have been held *in camera*. They recall the Acting Clerk/CAO and Mayor responding that the meeting was properly closed under the “education and training” and “personal matters about an identifiable individual” exceptions to the open meeting requirements.
- 39 During interviews with our office, two other members of council expressed concern about holding the January 12 meeting *in camera*. The Mayor noted that he did not believe the moment of silence to be properly the subject of a closed meeting, but advised that it was addressed quickly before the meeting moved on to other subjects. He expressed that he did not believe the *Municipal Act* was clear as to when the “education and training” exception to the open meeting requirements applied.
- 40 Provided the procedural requirements have been met, council is entitled under the town’s procedure by-law and the Act (s. 239(3.1)) to hold closed meetings for the purpose of educating or training members, as long as no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of council.

- 41 While the wording of the “education or training” exception is capable of broad interpretation, consistent with the public interest and remedial nature of the open meeting requirements, any exceptions must be narrowly construed. As I noted in my report *The ABCs of Education and Training*, regarding an investigation into a special meeting of the City of Oshawa Developmental Services Committee:

Councils and committees should avoid using closed education sessions as opportunities to consider information that will form the basis for their future decision-making, unless they otherwise come within the exceptions to the open meeting requirements and are properly authorized on that basis.

- 42 Our investigation found that the January 12 special meeting was improperly closed under this exception. In my view, none of the items discussed at this meeting were appropriate for consideration under the “education or training exception,” as the information discussed or exchanged was directly on the subject of council business and was clearly intended to advance the business of council and/or form the basis of future decision-making. While some discussions might have involved personal matters about identifiable individuals, this exception was not cited in the resolution to proceed *in camera*. Accordingly, these discussions were not properly authorized.

Voting in closed session

- 43 In accordance with s. 239(6) of the *Municipal Act*, voting can only take place *in camera* if the meeting is properly closed to the public, and if the vote is for procedural matters or for giving directions or instructions to officers, employees or agents of the municipality. The town’s procedure by-law mirrors this section of the Act. The prohibition on voting other than as prescribed extends to informal votes, such as “straw polls” or a “show of hands.”
- 44 In two of the meetings that were the subject of our investigation, council voted improperly in closed session, in contravention of the Act.

December 1 budget meeting

- 45 The closed meeting minutes of the December 1, 2011 budget meeting state: “Following the presentation, a lengthy discussion ensued at which time council provided direction on a number of items.” No further details of those directions are provided in the minutes.

- 46 The notes taken at the meeting by the Acting Clerk and the Acting Deputy Clerk refer to multiple straw polls, which are unofficial votes on a proposition or issue. Information obtained during our interviews with staff and council members indicates that there were at least two straw polls and as many as four at the December 1 meeting. The subject matter of these straw polls was not procedural or a direction to staff, and included a vote on the remuneration of council and benefits provided to members of council.

December 13 budget meeting

- 47 The closed meeting minutes of the December 13, 2011 budget meeting state: “Discussion ensued following which Council agreed that the direction provided during the *in camera* meeting would be confirmed through a formal motion to be presented at the Budget meeting taking place following adjournment of this meeting.” No further detail of any direction is provided.
- 48 The notes of the Acting Clerk do not record any votes at this meeting. However, the notes of the Acting Deputy Clerk include reference to three votes. Further, nine of those we interviewed recalled there being a show of hands on each of three municipal staff positions that were up for consideration as part of the budget process.
- 49 The open meeting minutes do not clarify what was voted upon in either the closed or open sessions. They state:

“4.3 Draft Budget and Operating

Prior to commencement of the PowerPoint presentation, Mayor McKay spoke to direction [sic] that was recommended during the preceding in-camera session regarding staffing matters and advised that a motion confirming Council’s direction was to be presented...”

- 50 This motion was put forward:

THAT THE COUNCIL DIRECTION GIVEN TO STAFF DURING THE IN-CAMERA SESSION WITH RESPECT TO THE POSITIONS DISCUSSED BE IMPLEMENTED.

- 51 The motion was carried. The minutes provide no further details. There appears to be no official record of the direction given to staff during the *in camera* session.
- 52 The information provided to our Office indicates that the votes taken at the December 1 and December 13 meetings were not merely procedural in nature or solely to provide direction to staff. For example, it was inappropriate for substantive voting regarding council remuneration and benefits to take place during a closed session.
- 53 While it is permissible for council to vote to direct staff while *in camera*, because of the lack of information in the minutes about what was voted on, it is impossible to evaluate whether the “directions” given at these meetings fell within the allowable exception in the *Municipal Act*.

Other instances of voting

- 54 Subsequent to the commencement of our investigation, we received an additional complaint about voting at *in camera* meetings held on February 21 and March 26, 2012. Our Office has not conducted interviews respecting these meetings, but has reviewed the relevant municipal documents.
- 55 The minutes of the February 21 meeting record that voting took place with regard to appointments to the board of directors of the Midland Power Utility Corporation and the Committee of Adjustment, by way of a show of hands. As these votes were not for procedural matters or giving directions or instructions to officers, employees or agents of the municipality, they did not properly take place in a closed session. As stated above, the prohibition on voting in closed session extends to shows of hands.
- 56 The minutes of the March 26 meeting do not record any voting, therefore it is impossible to assess whether any illegal votes took place during this closed session.

Record-keeping practices

- 57 In accordance with s. 239(7) of the *Municipal Act*, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings.

- 58 During our investigation, we noted that the town’s closed meeting minutes do not seem to accurately record what occurred during its *in camera* sessions. Notably, the closed session minutes do not provide any information about the directions to staff given by council during the *in camera* sessions. During interviews, some councillors advised us that this leads to confusion, as there is no official record of council’s decision making.
- 59 Ideally, a written 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 specific documents considered;
 - any motions, including who introduced the motion and seconders; and
 - all votes taken, and all directions given.
- 60 While the Act prohibits “notes or comments” from being included in the official record, this does not mean that the subjects discussed in a meeting should not be referred to. The various substantive and procedural items that were discussed at a meeting should be recorded. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the municipal meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government.
- 61 In the interests of transparency, a number of Ontario municipalities record or allow for the broadcast of their open meetings. This is a sound and reasonable approach as it helps to ensure that there is a clear, comprehensive and accessible meeting record.
- 62 As this investigation demonstrates, in the case of *in camera* meetings, I am often forced to wade through cryptic minutes and conflicting, incomplete and uncertain recollections to attempt to reconstruct what took place behind closed doors, in order to assess whether the closed meeting rules were followed. Council, municipal staff, and the public interest would be far better served if audio or video recordings were made of all *in camera* meetings for future reference. It would also allow for expeditious investigation of closed meeting complaints.

- 63** Several jurisdictions in the United States require that municipal closed meetings be electronically recorded or videotaped, and others have adopted this practice to enhance the accountability and transparency of their proceedings. For example, the Illinois *Open Meetings Act* states that all public bodies must keep a verbatim record of all their closed meetings in the form of an audio or video recording¹. Similarly, Iowa’s legislation² requires that audio recordings be made of all closed sessions, and Nevada requires that public bodies record audio of open and closed meetings or use a court stenographer to transcribe the proceedings³.

Reporting back in open session

- 64** It is not Midland town council’s practice to report back in open session about what occurred in an *in camera* meeting, except to the extent that certain motions are voted on in open session that refer to votes taken in closed session.
- 65** I encourage municipalities to report publicly in open session on what transpires in closed session, at least in a general way. In some cases, public reporting might simply consist of a general accounting in open session of the 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.

Complaint procedure

- 66** Until recently, Midland had as part of its “Municipal Closed Meeting Investigator Policy” a procedure that required those making complaints to complete a “Request Form For Municipal Closed Meeting Investigator” that was to be submitted to my Office or the town Clerk. During our investigation, we informed Midland that no special form was required and clarified that members of the public could contact my Office directly by phone, mail, e-mail, online, via mobile device or in person to make a complaint about an improperly closed meeting. After our investigation was completed, Midland amended its policy, which now provides information on how to contact my Office directly.

¹ 5 ILCS 120/2.06

² Iowa Code § 21.5(4)

³ N.R.S 241.035(4)

Opinion

- 67 Our investigation confirmed that the council for the Town of Midland discussed issues in closed session on multiple occasions in circumstances that were not permitted under the exceptions to the Act. Council improperly used the “education or training” and “identifiable individual” exceptions to justify *in camera* discussion of items that should have been considered in open session. Finally, the council routinely engaged in improper voting behind closed doors.
- 68 During our investigation, we also observed a number of problematic practices, including an instance of insufficient notice, and multiple instances of inadequate record keeping and failing to report back publicly in an informed way about closed meetings.
- 69 We have been told by many members of council that council is looking to improve its closed meeting practices and would like the assistance of our Office in doing so. While I will make recommendations arising from our investigation, it is clear that council must display more rigour in complying with its legal obligations with respect to closed meetings. It is also important for council members to take note that they are individually and collectively bound to ensure that the open meeting provisions are observed.
- 70 I am making the following recommendations, which I hope will help Midland council meet its legal obligations with respect to closed meetings as well as generally improve its closed meeting practices. Our Office has also contacted the Clerk to arrange for members of our Open Meeting Law Enforcement Team (OMLET) to provide council with training on the municipal meeting requirements.

Recommendations

Recommendation 1

The Town of Midland should ensure that no subject is discussed in a closed “education or training” session that materially advances the business or decision-making of council.

The Town of Midland should not hold “education or training” sessions unless the subject of discussion is solely for the purpose of education and training and the town has properly cited this exception in its resolution to go *in camera*.

Recommendation 2

The Town of Midland should ensure that discussions that take place in closed session under an exception to the *Municipal Act's* closed meeting requirements are limited to those matters that council is permitted to discuss in closed session under the exceptions in the Act. Council should not allow discussion of additional matters in closed session, which do not fall within the exceptions under the Act.

Recommendation 3

The Town of Midland should ensure that no vote is taken at a closed meeting except in accordance with the town's procedure by-law and the Act. A vote should not be taken unless the procedural requirements for voting are followed including authorizing motions, and resolutions. Similarly, informal votes via a "show of hands" are not permitted to be taken *in camera*.

Recommendation 4

The Town of Midland should follow a practice of record keeping, including recording all resolutions, votes, decisions and proceedings at a meeting, regardless of whether the meeting is closed or not, in accordance with s. 239(7) of the Act.

Recommendation 5

The Town of Midland should record audio and/or video of all *in camera* meetings and store such recordings in a confidential and secure fashion for future reference.

Recommendation 6

The council for the Town of Midland should follow a practice of reporting back publicly after a closed meeting generally on all matters considered *in camera*.

Recommendation 7

All members of council for the Town of Midland should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the Act and its own procedure by-law.

Report

71 My report should be made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario