



Ombudsman Report

**Investigation into whether
Council for the Township of Chamberlain
held illegal closed meetings between
November 2013 and February 2015**

**André Marin
Ombudsman of Ontario
June 2015**

Complaint

- 1 In March 2015, my Office received a complaint that council for the Township of Chamberlain held several closed meetings between November 2013 and February 2015 to deal with staffing matters, and may have illegally voted during the closed sessions. The meetings included:
 - a meeting in November 2013 to consider the termination of the clerk-treasurer;
 - a meeting in December 2013 to consider the appointment of a new clerk-treasurer;
 - a meeting in June 2014 to consider the resignation of the clerk-treasurer;
 - a meeting in February 2015 to consider a change of employment for a particular employee; and
 - a meeting in February 2015 to discuss the appointment of a chief administrative officer.

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 The Ombudsman is the closed meeting investigator for the Township of Chamberlain.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

The 2014 municipal election

- 6 The municipal election was held on October 27, 2014, and the new council was sworn in on December 1. Two members of the previous council returned for the new council term. Any mention of “council” at meetings held prior to December 1, 2014 refers to the council as it stood at the time of the meeting.

Council procedures

- 7 The township's procedure by-law (by-law 623), which was passed in June 1995, states that regular meetings of council are held the first and third Tuesday of every month at 7:30 p.m. However, the township's website states that meetings are only held the first Tuesday of the month.
- 8 The by-law does not state how notice of meetings is provided to the public. The township's website indicates that notice of meetings is provided "in the local media". Staff told my Office that this is only correct in the case of special meetings, which are announced on a local radio station. Agendas are posted in the township office in advance of meetings.
- 9 Section 6 of the by-law states that all council and committee meetings shall be open to the public, subject to certain exceptions:
 - i) The security of the property of the Township
 - ii) Personnel matters about an identifiable individual
 - iii) Proposed or pending acquisition of Real property
 - iv) Employee negotiations or labour relations
 - v) Litigation or potential litigation
 - vi) Receiving of advice that is subject to solicitor client privilege, including communications necessary for that purpose.
- 10 Items i, ii, iii, and v do not reflect the actual wording of the exceptions found in s. 239 of the *Municipal Act*. Furthermore, the exceptions found in s. 239(2)(g) of the Act (a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act), s. 239(3) (consideration of requests under the *Municipal Freedom of Information and Protection of Privacy Act*), and s. 239(3.1) (education and training sessions) are missing entirely.
- 11 Section 6(c) states that, prior to proceeding in camera, council must state by resolution that the meeting will be closed, as well as the general nature of the matter that is being considered.
- 12 Staff advised my Office that the township was in the process of revising its procedure by-law. The new by-law should:
 - reflect council's current practice of holding meetings the first Tuesday of the month;
 - specify how and when notice of both regular and special meetings is provided to the public, as required by s. 238(2.1) of the Act; and

- reflect the actual wording of all open meeting exceptions of the Act.

Investigative process

- 13** 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 materials for the meetings in question. They also spoke with the current Reeve and clerk, the former Reeve, a member of the current council who was present for the last council term during the meetings in question, and former members of staff.
- 14** My Office received full co-operation in this matter.

The November 2013 council meeting to discuss the termination of the clerk

- 15** My Office was told by current and former staff members, as well as the member of council who was present, that a meeting was held around November 2013 to discuss and decide upon the termination of the then-clerk. However, the current clerk – who was not with the township at the time - was unable to find any record of this meeting, including closed session minutes.
- 16** Both the former clerk and the former deputy clerk advised that they believed such a meeting took place, but they did not attend to keep minutes. Those who would have been present for the meeting were unable to recall details more than a year after the fact.

The December 3, 2013 council meeting to discuss the appointment of a new clerk

- 17** The current clerk told my Office that there was a closed meeting held on December 3, 2013, before he joined the municipality. Although the subject matter of the meeting was not clear, it is possible that this was the meeting at which council discussed appointing a new clerk.
- 18** The December 3 meeting was a regular council meeting that began at 7:30 p.m. in council chambers. None of the council or staff members who attended the meeting are still with the municipality.

- 19 The open session minutes indicate that council passed a resolution to proceed in camera at 8:15 p.m. No exception was cited, and no further information was provided regarding the subject matter of the closed session.
- 20 The open session resumed at 9:00 p.m. There is no further information in the open session minutes about the closed session discussions. The current clerk told my Office that closed session minutes for the meeting could not be located. The former deputy clerk advised that she did not attend this meeting to take minutes, and was not aware if anyone else did.

The December 9, 2013 meeting to conduct interviews for a new clerk

- 21 The open session minutes indicate that this was a special council meeting to conduct interviews for a new clerk-treasurer. The deputy clerk and all members of council were noted as being present.
- 22 The open session minutes state that council conducted interviews from 6:00 p.m. to 8:30 p.m., and the meeting adjourned at 9:30 p.m. when council “finished their discussions.” There is no resolution to proceed in camera in the minutes.
- 23 As with the above meetings, the current clerk was unable to locate closed session minutes for this meeting. The former deputy clerk told my Office that she was present for the first part of the meeting, during which she handed out evaluation forms to the council members. She did not stay for the interviews or subsequent discussions, and did not take any closed session minutes. The former deputy clerk did not believe that notice of the meeting was provided to the public.

Analysis of the 2013 meetings

- 24 For the December 3, 2013 meeting, although council did pass a resolution to proceed in camera, there was no information provided in the resolution to indicate the substance of the discussion.
- 25 For the December 9, 2013 meeting, it appears it was council’s intention to hold a special closed council meeting to interview candidates for a clerk-treasurer position. Council failed, however, to follow any procedural requirements for doing so, including providing notice, passing a resolution to proceed in camera, and keeping closed session minutes.
- 26 In cases where council members discuss the performance and termination of an employee and assess the personal qualifications of individual applicants for a

position, I have found that the exception to the open meeting requirements pertaining to “personal matters about an identifiable individual” at section 239(2)(b) of the *Municipal Act, 2001* generally applies.¹ However, given the lack of meeting records and information from those we spoke with about what was discussed during these three meetings, I am unable to find that the open meeting provisions of the Act were respected or that the discussion that took place was permitted within the exception.

- 27** My Office was advised that the lack of available information as to what was discussed during the 2013 meetings is partially due to the fact that the municipality experienced significant turnover in both its council and staff between 2013 and when the complaint was received. In addition, those we spoke to had only vague recollections of these meetings.
- 28** Of greater concern, however, is the complete lack of documentation and record of the meetings or the discussions that took place during the meetings. The township’s document retention by-law (by-law 588), which was passed in 1990, states that minutes must be kept permanently. However, closed session minutes for three meetings held in 2013 could not be located. It is unclear whether any minutes or records of these meetings were ever kept in the first place.

The January 7, 2014 council meeting to appoint a new clerk-treasurer

- 29** This was a regular council meeting that began at 7:30 p.m. The agenda indicated that council would be considering a by-law to appoint a new clerk-treasurer.
- 30** The open session minutes indicate that council passed a by-law to appoint an individual as its new clerk-treasurer. There is no closed session noted on the agenda or in the minutes.
- 31** The complaint to my Office alleged that council voted on the appointment of a new clerk-treasurer in closed session. As noted above, it was not possible to determine what occurred at the earlier closed sessions. However, the minutes of the January 7, 2014 meeting confirm that the appointment of the new clerk-treasurer was made in open session.

¹ See, for example, my Office’s January 28, 2013 letter to the Municipality of Lambton Shores ([https://ombudsman.on.ca/Resources/Reports/Municipality-of-Lambton-Shores-\(1\).aspx](https://ombudsman.on.ca/Resources/Reports/Municipality-of-Lambton-Shores-(1).aspx)) and my November 2014 report with respect to the Town of Amherstburg ([https://ombudsman.on.ca/Resources/Reports/Town-of-Amherstburg-\(5\).aspx](https://ombudsman.on.ca/Resources/Reports/Town-of-Amherstburg-(5).aspx)).

The June 3, 2014 council meeting

- 32** The June 3 meeting was a regular council meeting that began at 7:30 p.m. According to the open session minutes, council resolved to proceed in camera at 9:00 p.m. to discuss a personnel issue. No further information was provided.
- 33** The closed session minutes indicate that the clerk advised council he would be resigning from the municipality. A letter of resignation was attached for council's review.
- 34** The open session resumed at 9:08 p.m.
- 35** As council was discussing the resignation of an identified employee, this discussion could fit within both the personal matters (s. 239(2)(b)) and labour relations (s. 239(2)(d)) exceptions in the Act.

The February 3, 2015 council meeting

- 36** The February 3 meeting was a regular meeting that began at 7:30 p.m. The minutes indicate that council passed a resolution to proceed in camera at 8:50 p.m. to consider personal matters about an identifiable individual.
- 37** While in camera, council considered four matters:
- Ongoing discussions with OMERS (the Ontario Municipal Employees Retirement System)
 - The new pay grid
 - Re-organization of the office administration structure
 - The appointment of a new clerk-treasurer
- 38** There was no information in the closed session minutes about the substance of any of these discussions.

The OMERS discussion

- 39** During interviews, my Office was advised that a former staff member had made an error relating to the collection of OMERS deductions, which had ongoing repercussions for the municipality. During this closed session council discussed the error, as well as whether specific employees had opted in to the program.

- 40** The Information and Privacy Commissioner has found that discussions about OMERS contributions and entitlements as they relate to specific employees fit within the “personal matters” exception to the open meeting rules.²

The pay grid discussion

- 41** My Office was told that this item involved discussion of changes to the salaries of identified employees, to reflect changes in administrative duties. Because the municipality only has four employees, it was not possible to discuss these salaries anonymously.
- 42** As I have noted in previous reports,³ discussion of an identified or identifiable individual’s salary, as opposed to a salary range for a position, fits within the “personal matters” exception.

The re-organization discussion

- 43** We were advised that this item pertained to changes in the reporting structure of an individual’s job, including discussion of personality conflicts that had arisen as a result.
- 44** This discussion pertained to a personal conflict between two identified staff members and therefore fit within the “personal matters” exception. In addition, as stated in a December 9, 2013 letter from my Office to the Town of Amherstburg, discussion related to staff reorganization also fits within the labour relations exception.⁴

The clerk-treasurer discussion

- 45** During interviews, we were told that this discussion pertained to the conditions of employment of the new clerk-treasurer. Council did not vote on the matter in camera, but voted on the appointment in the open session following the closed session.
- 46** This discussion fit within the labour relations exception, as it pertained to specific employment conditions of an identified employee.

² IPC Order MO-2621 (May 11, 2011).

³ See, for example, my 2010 report regarding the Town of Mattawa. Available online:

<https://ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/mattawafinal.pdf>

⁴ [https://ombudsman.on.ca/Resources/Reports/Town-of-Amherstburg-\(4\).aspx](https://ombudsman.on.ca/Resources/Reports/Town-of-Amherstburg-(4).aspx)

The February 6, 2015 council meeting

- 47** This was a special meeting, held at 7:00 p.m. At 7:03 p.m., council passed a resolution to proceed in camera under the “personal matters” exception.
- 48** The closed session minutes indicate that council reviewed a letter of resignation from an identified employee. There were discussions about the individual’s salary and conflicts between staff members, as well as a review of the employee’s performance and conduct. Council directed staff to advertise for the position as soon as possible.
- 49** This discussion fit within the personal matters exception. Council was addressing personal information about an identified employee, including the fact that this person was resigning and reasons for doing so. They also discussed personal information about this employee, including salary. The labour relations exception could also have applied to this discussion.

Procedural matters

- 50** My investigation revealed some issues with council’s closed meeting procedures.

Resolution to proceed in camera

- 51** 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. This wording is also reflected in s. 6 of the municipality’s procedure by-law.
- 52** As noted by the Ontario Court of Appeal in *Farber v. Kingston City*⁵, “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.”
- 53** The resolution that was passed at the December 3, 2013 meeting stated that council was proceeding in camera, but did not cite an exception authorizing the discussion, or any other information. The resolutions passed at more recent meetings cite an exception, but do not give a general description of the subject matter to be considered.

⁵ [2007] O.J. No. 919, at page 151.

- 54** In order to meet its obligations under both the Act and its own procedure by-law, council should ensure that its resolutions to proceed in camera provide not only the exception authorizing the discussion, but as much detail as possible about the subject matter to be considered.

The meeting record

- 55** As noted, meeting records for the 2013 meetings were largely unavailable. The minutes we received for the more recent meetings were lacking in detail and did not reflect the actual substance of the discussions that took place.
- 56** 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 its meetings.
- 57** 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 referred to. All substantive and procedural items discussed at a closed meeting should be recorded.
- 58** As noted in my July 7, 2010 report regarding the Town of South Bruce Peninsula⁶, 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.
- 59** I also strongly encourage municipalities to make audio or video recordings of both open and closed 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.

⁶ Available online:

<https://ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/omletsouthbrucefinalju ly5.pdf>

- 60** More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include: the Townships of Tiny, Adelaide-Metcalfe, McMurrich-Monteith, and Brudenell, Lyndoch and Raglan, the Town of Midland, the Municipalities of Lambton Shores and Brighton, and the Cities of, Oshawa, Sault Ste. Marie and Welland.

Reporting back

- 61** 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.

Opinion

- 62** I am unable to confirm that the closed meetings held in November and December 2013 were justified under the *Municipal Act*, due to the lack of meeting records and available witness information.
- 63** My investigation found that council did not violate the Act when it closed part of its June 3, 2014, February 3, 2015, and February 6, 2015 meetings to the public.

Recommendations

- 64** I am making the following recommendations to assist council for the Township of Chamberlain to improve its practices with respect to open meetings.

Recommendation 1

The Township of Chamberlain should amend its procedure by-law, as outlined in paragraph 12 of this report, to ensure that the by-law:

- reflects council's current practice of holding meetings the first Tuesday of the month;
- specifies how and when notice of both regular and special meetings is provided to the public, as required by s. 238(2.1) of the Act; and
- reflects the actual wording of all of the open meeting exceptions of the Act.

Recommendation 2

The Township of Chamberlain should ensure that its resolutions to proceed in camera provide a description of the issue to be discussed, as well as the exception authorizing the discussion.

Recommendation 3

The Township of Chamberlain should ensure that complete and accurate records are kept of all meetings and that the records reflect all of the substantive and procedural items that were discussed.

Recommendation 4

The Township of Chamberlain should implement a practice of audio or video recording closed sessions.

Recommendation 5

The Township of Chamberlain should follow a practice of reporting back publicly after closed sessions.

Report

- 65** OMLET staff spoke with the Reeve and the Clerk-Treasurer-CAO on June 11, 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.
- 66** My report should be shared with council for the Township of Chamberlain and made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario