



Ombudsman Report

**Investigation into closed meetings by
Town of Amherstburg Council
on January 9 and February 13, 2012**

**André Marin
Ombudsman of Ontario
July 2012**

Complaints

- 1 Our Office received two complaints that on January 9, 2012, Council for the Town of Amherstburg went *in camera* to discuss my report on a previous investigation, released in December 2011 (*Behind Closed Doors*).
- 2 On February 14, 2012, our Office received another complaint that Council for the Town of Amherstburg had proceeded *in camera* at a budget meeting the previous day, without providing prior notice to the public that a closed session would take place.

Ombudsman jurisdiction

- 3 Under the *Municipal Act, 2001*, 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.
- 4 As of January 1, 2008, changes to the *Municipal Act, 2001* 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.
- 5 The Town of Amherstburg appointed the Ontario Ombudsman as its investigator on August 24, 2009.
- 6 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.

Council meeting procedures

- 7 The town's procedure by-law (2008-28) states that regular council meetings will be held on the second and fourth Monday of every month at 7 p.m. Notice is to be given to the public at least five days prior to a scheduled meeting, except for an "emergency" meeting, in which case as much notice as possible is to be provided. Meeting agendas, along with supporting materials, are to be prepared and made

available to council members by 4:30 p.m. the Thursday prior to a meeting. Agenda materials that are not considered “confidential” are to be made available to the public at that time as well.

- 8 The by-law states that all meetings are to be open to the public, unless the matter being considered relates to one of the exceptions outlined in section 239 of the *Municipal Act*.

Investigative process

- 9 On March 2, 2012, after a preliminary review of the complaints, our Office notified the town that we would be conducting an investigation.
- 10 During the course of our investigation, we obtained and reviewed relevant municipal documents, including minutes, agendas, emails and other municipal records, as well as copies of slide presentations and other materials prepared by consultants and considered by council *in camera*. We also considered the town’s procedure by-law and applicable legislation and case law.
- 11 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 in our investigations. Council members and town staff co-operated fully with the investigation.
- 12 Two members of our Office’s Open Meeting Law Enforcement Team conducted face-to-face interviews with all members of council, the Clerk and the town’s solicitor.

Preliminary report

- 13 In accordance with our 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.
- 14 Two councillors and the Clerk were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. They did not have any comments on the preliminary report.

Investigative findings

January 9, 2012 council meeting

- 15** On December 20, 2011, our Office sent my report, entitled *Behind Closed Doors*, to the town of Amherstburg. The report outlined our investigation and findings about a number of closed meetings in January and March of 2011.
- 16** On January 5, 2012, the report was published on the town's website as an attachment to the confidential *in camera* agenda, along with two memoranda from the town's solicitor, one concerning our report. Municipalities are required to make our closed meeting complaint reports available to the public. It is also our Office's practice to publish a closed meeting report once we have confirmed that the municipality in question has made it available to the public. Accordingly, on January 6, we made the report available on our website.¹
- 17** The regular agenda for the January 9 meeting stated that council would hold a closed session to discuss one acquisition/disposition of land matter, and two solicitor/client matters.
- 18** According to the open session minutes, at the meeting council passed the following resolution:
- That Council moves into an In-Camera meeting of Council at 5:30 p.m., pursuant to Section 239 of the Municipal Act, 2001, for the following reasons:
- Land Acquisition/Disposition Matters [239 (2c)]
 - Solicitor/Client Privilege [239 (2f)] (2 matters will be discussed)
- 19** Provided the procedural requirements have been met, council is entitled under the town's procedure by-law and the Act to hold closed meetings for the purpose of discussing acquisition/disposition of land matters, or information that is subject to solicitor-client privilege. The complaint to our Office alleged that, because the report and solicitor's memoranda had already been made available on the town's website, and therefore were available to the public, there was no reason for the matter to subsequently be discussed *in camera*.
- 20** According to the information provided to our Office, the closed session lasted

¹ The report is available here: <http://www.ombudsman.on.ca/Resources/Reports/Town-of-Amherstburg.aspx>

approximately an hour, and was held in council chambers. In attendance at the meeting were all members of council but one, as well as the Clerk, the CAO, and the town's solicitor. Two councillors disagreed with the discussions pertaining to my report taking place in closed session, and left the closed portion of the meeting after approximately five minutes. They did not return.

- 21** While *in camera*, council discussed advice subject to solicitor-client privilege (239(2)(f)) regarding two issues:
- the Ombudsman's report
 - the heritage designation of a local building
- 22** A third "acquisition of land" item was not discussed, and was put over to the next meeting. During interviews we were advised that this was because two councillors left the *in camera* meeting and one councillor was absent. Council wanted to wait until all members were present to deal with the acquisition of land issue.
- 23** With respect to the discussion about our report, council considered a memorandum from the town's solicitor, dated January 4, 2012. This memorandum and another pertaining to the heritage designation issue were posted on the town's website late on January 5, the Thursday prior to the meeting. In our interviews for this investigation, we were advised that the town did not intend for these memoranda and my report to be posted on the public website. Rather, this posting was an error on the part of the third-party company that the town was using at the time to manage its website.
- 24** The two council members who left the meeting advised our investigators that they voted against proceeding *in camera* at this meeting, because the information being considered was already available to the public.
- 25** The councillors who were present for the *in camera* session told us they were comfortable discussing this information in closed session even though the memoranda had been made public, because the town's solicitor had additional legal advice to provide, over and above what was included in the memoranda. They advised that this did occur during the closed session.
- 26** According to the closed session minutes, the town's solicitor was present for the closed session to provide "advice and comments." He confirmed to our investigators that this was accurate. The solicitor was present the entire time council was *in camera*. Those present during the closed session explained that nothing was discussed other than legal advice.

- 27** Council returned to open session and the meeting continued. At the end of the meeting, the Mayor reported back on the closed session. The Mayor explained that council had received advice that is subject to solicitor-client privilege relating to the Ombudsman's report. He also noted that the report had been received in accordance with the Act, and that the Town must make it public. The Mayor commented that council took the findings outlined in the report "very seriously," and that it intended to take steps to address them. Those we interviewed told us it is now council's regular practice to provide a report from *in camera* sessions at the end of council meetings.
- 28** In my view, it does appear that council was considering legal advice from the Town's solicitor while *in camera*. There is no indication that any other matters were discussed.
- 29** The memoranda from the town's solicitor, and my report, were made available to the public on the town's website prior to the meeting. In many cases, the fact that information is already publicly available could be a factor weighing in favour of discussing that information in the open, rather than behind closed doors. If the public is already fully aware of the subject matter of a discussion, holding the discussion *in camera* often becomes unnecessary.
- 30** In this case, however, the information provided during our investigation indicates that the "confidential" closed session agenda, including the attached solicitor's memoranda and my report, was posted on the town's website in error. It does not appear that council intended to waive solicitor-client privilege. Furthermore, it appears that the town's solicitor provided additional information – beyond the legal advice available in the memoranda – during the closed portion of the meeting. As such, these discussions came within the realm of s. 239(2)(f).

The February 13, 2012 council meeting

- 31** According to the agenda for the February 13 meeting, council planned to hold an open budget meeting at 9 a.m. Two items were included on the agenda:
- Revised Tax Rate calculation
 - A report by Dean Collver General Assessment of Centennial Park with respect to renovations
- 32** This was one of a series of budget meetings that was set far in advance. Notice of the meetings was posted on the website and in the local newspaper.

- 33** According to the open session minutes for the February 13 budget meeting, it was called to order at 9:10 a.m. The town’s solicitor was present during the open portion of the meeting to provide “solicitor-client information on matters relating to Centennial Park.” During the open portion of the meeting, council members discussed whether they should move into closed session to receive this legal advice. At 9:12 a.m., they voted to move into an *in camera* meeting to receive advice “subject to solicitor-client privilege, pertaining to Centennial Park.” Two councillors voted against the motion to proceed *in camera*.
- 34** According to those we interviewed, there was no notice to the public or to council members that this closed session would occur. There was no agenda for the closed portion of the meeting.
- 35** According to the closed session minutes, while *in camera*, the solicitor provided a confidential memorandum to council regarding a legal agreement that might affect the town’s financial obligations with respect to maintenance of the park. The information provided to our investigators indicated that, on the Friday prior to the meeting, a member of staff asked the town’s solicitor to prepare this memorandum. The Clerk advised that she was not aware that this memorandum had been prepared until the morning of the meeting.
- 36** According to the minutes, while *in camera*, the solicitor reviewed the memorandum and provided legal advice. He confirmed in his interview for our investigation that this description was accurate. All members of council and the Clerk concurred. The *in camera* minutes note that the Clerk cautioned council that the closed session discussions were only for the purpose of receiving solicitor-client advice, and that any discussions of the Centennial Park report included on the agenda would have to take place in open session.
- 37** The Clerk advised our investigators that the *in camera* discussion was urgent, because the Centennial Park matter was on the agenda to be discussed later in the meeting, and council needed to understand the Town’s obligations before it could determine what money to set aside for the park, and finalize the budget. A meeting had been scheduled for February 21 for final adoption of the budget; there would not have been time to give notice and have another meeting between February 13 and February 20, to discuss the Centennial Park matter. According to the Clerk, it would have been disruptive to try to move the February 21 budget meeting, since members of the public had been told for over a month that the budget would be adopted at that meeting. Five other council members agreed that the discussion was “urgent.” One member of council did not agree, and felt the matter could have been put over to another meeting.

- 38** Council reconvened into open session at 10 a.m. There is no indication in the minutes that council reported back about what was discussed in closed session, although two members told our investigators that this occurred.
- 39** In open session, council voted to direct staff (referred to as “administration”) to proceed with a “full investigation into the state of repair of all facilities in Centennial Park and provide a report back prior to the 2013 budget deliberations recommending a course of action based on prudence, costs and best practices,” and also to “identify ... all immediate public safety concerns and provide a report outlining appropriate remedial actions necessary to mitigate these concerns and potential liability.”
- 40** In my view, the evidence does indicate that council proceeded *in camera* to discuss legal advice at the February 13 morning budget meeting, as permitted by section 239(2)(f) of the Act. It is not in dispute that prior notice of this closed session was not provided, although notice of the meeting itself was provided well in advance.
- 41** Although it is not a statutory requirement that municipalities provide detailed agendas in advance of meetings, our Office suggests that municipalities should do so, as a best practice. As noted in my earlier report regarding the Town of Amherstburg, *Behind Closed Doors*, we also recommend that councils avoid discussing items that have not been the subject of prior notice unless they are clearly urgent, or there are compelling reasons to justify suspension of the town’s normal notice practices (see Recommendation 5 in that report). This helps to ensure that the public is fully informed about what subjects will be discussed at a given council meeting.
- 42** In this case, we were advised during our investigation that the solicitor’s memorandum, which was the subject of the *in camera* discussion, was prepared in close proximity to the meeting date. The Clerk was not even aware the memorandum existed until the morning of the meeting. Most members of council and the Clerk considered discussion of this matter to be urgent or time-sensitive, due to the fact that the Centennial Park matter was on the agenda to be considered in open session that day, and because final adoption of the budget (which might involve funds set aside for Centennial Park) would take place on February 21.

Conclusion

- 43** In my opinion, based on the evidence obtained in my investigation, the Town of Amherstburg did not contravene the *Municipal Act*, or its Procedure By-law, during the *in camera* sessions held on January 9 and February 13, 2012.

Recent changes to council's procedures

- 44** In my December 2011 report, *Behind Closed Doors*, I made several recommendations to assist Amherstburg council in meeting its legal obligations with respect to the open meeting requirements. My Office also offered to provide training to council and staff.

- 45** At the council meeting held on January 23, 2012, council passed the following motion:

That respecting all applicable privacy legislation, administration be directed to bring forward a public report outlining the specific nature of in-camera meetings discussed in the Ombudsman's report "Behind Closed Doors";

The report will include the nature of the discussion, the opinion of the Ombudsman and the remedy, whether current or proposed, implemented by Council and Administration;

And that Council take advantage of the training from the Ombudsman;

And that Administration send a letter thanking Mr. Marin for his report and that the Town plans to implement the recommendations.

- 46** In February 2012, members of our Office's Open Meeting Law Enforcement Team – our staff who specialize in investigations involving closed meetings – attended an open meeting of Amherstburg council to provide training on the open meeting requirements. Council and municipal staff have also kept our Office informed about changes to the town's closed meeting procedures.

- 47** At the March 19, 2012 meeting, council considered a staff report that outlined several changes to procedures that had taken place as a result of our investigation. These changes included:

- Agenda items will be carefully reviewed to ensure matter(s) fall within an exception provided for in the Act;
- The Chair will prohibit discussion on any matter that was not disclosed in the resolution;
- Agendas and resolutions to move into closed session will voluntarily disclose as much information about the general nature of the subject matter without undermining the reason for going in to closed session;
- Only those votes permitted within the Act will be taken in closed session (votes for procedural matters or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them, or persons retained by or under a contract with the municipality or local board).
- The Chair or Clerk will report on matters discussed in closed session; and
- Copies of Section 239 and its list of exceptions will be provided to council and kept at each member's desk in chambers.

48 Staff recommended that these changes be formalized in a new policy. We were told that this policy was adopted at the April 23, 2012 council meeting.

49 I congratulate the Town of Amherstburg for taking these steps to improve the transparency of its meetings. I encourage council to continue to be attentive to its legal obligations, as outlined in the *Municipal Act, 2001* and its own procedure by-law.

Report

50 This final report should be shared with Council and made available to the public.



André Marin
Ombudsman of Ontario