Ombudsman Report

Investigation into whether Council for the City of London held an improper closed meeting at Harmony Grand Buffet on February 21, 2012

André Marin
Ombudsman of Ontario

August 2012

Complaint

1 Our Office received three complaints about a lunch gathering that took place on February 21, 2012, at the Harmony Grand Buffet restaurant in London, Ontario.

2 The complaints alleged that six members of council, including the Mayor, gathered at the restaurant for an improperly "closed" strategy meeting, prior to three committee meetings as well as a council meeting where the city's budget was finalized.

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* give 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 City of London appointed the Ontario Ombudsman as its investigator effective January 1, 2008.

6 In investigating closed meeting complaints, my Office considers whether the open meeting requirements of the *Municipal Act* and the relevant municipal procedure by-law have been observed.

Investigative Process

7 After conducting an initial review, on March 8, 2012, my Office notified the City of London that we would be investigating whether council and committee members improperly held an *in camera* meeting over lunch on February 21, 2012.

8 The city provided us with relevant committee and council meeting minutes and related documents.

9 A two-person team conducted in-person interviews with the six members of council, who attended the lunch gathering, including the Mayor. The City Clerk also provided information on the budget process by telephone and forwarded relevant municipal documents.

10 We received full co-operation from witnesses during interviews, and from city staff.

Lawyering up

11 Under the *Ombudsman Act,* my investigations are carried out in private (s. 18(2)). Consistent with our Act, and in order to protect the integrity of our process, we do not permit municipal representatives, including legal counsel acting on behalf of a municipality, to be present during our witness interviews. Our interview practice encourages witnesses, including those wishing to "blow the whistle" on questionable closed meetings, to be candid and open with our investigators, and also minimizes the potential for outside influence on testimony, whether consciously or unconsciously, through sharing of information.

12 During the course of our investigation, a number of council members raised concerns publicly about having legal representation at their interviews, and on April 11, 2012, council voted to cover the costs of outside legal representation for any council members who wanted it.

13 In my view, it is completely unnecessary for witnesses to be represented by lawyers during Ombudsman investigations. My investigations are not adversarial in nature; they are fact-finding exercises. My Office's authority does not extend to finding individuals personally at fault or issuing sanctions for any procedural or substantive violations. I can only issue recommendations, and in the closed meeting context, my recommendations normally address future best practices for holding closed meetings. Typically, there is no individual interest at stake in an Ombudsman investigation that would warrant legal representation.

14 In the end, no London city council members attended with legal counsel at the interviews conducted in this investigation.

Preliminary Report

15 In accordance with our procedures, the City 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 councillors were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. Other than one brief remark by email, we did not receive any written comments on the preliminary report.

Investigative Findings

Backdrop to the February 21 luncheon

14 The City of London's Investment and Economic Prosperity Committee, the Planning and Environment Committee, and Finance and Administrative Services Committee were scheduled to meet in the afternoon of February 21, 2012.

15 In addition, council was scheduled to meet at 3 p.m. to finalize the city's budget. The budget had been the subject of considerable discussion in the preceding months. The Mayor and a number of councillors had campaigned with a promise of a "0%" municipal tax increase. The initial budget, prepared by city staff, was tabled on December 5, 2011, and then followed by a period of public consultation.

16 As a result of public comment, council requests and additional considerations, city staff recommended a number of changes to the budget in an "A" list, and generated a "B" list of changes that they did not recommend. One of the items on the "B" list was a $1-million reduction to the affordable housing reserve fund.

17 In January and early February 2012, the Strategic Priorities and Policy Committee (comprised of all of council) met four times in open session to consider the proposed changes to the budget, including the reduction to the affordable housing reserve. At two of its meetings, this committee conducted a portion of the proceedings *in camera*. While not recommended by city staff, the reduction to the affordable housing reserve was passed in committee by an 8-7 margin in open session. It was one of the items the committee recommended that council adopt at its meeting on February 21.

18 Prior to the February 21 council meeting, Councillor Dale Henderson, who had voted in favour of the reduction, publicly stated that he might consider changing his vote on that issue. The morning of February 21, there was also a news article referring to an online survey that Councillor Paul Hubert had recently conducted relating to the proposed budget.[1]

The February 21 luncheon

19 On February 21, Mayor Joe Fontana and councillors Bud Polhill, Stephen Orser, Dale Henderson, Paul Van Meerbergen and Denise Brown, went for lunch at the Harmony Grand Buffet, which offers "all you can eat" Canadian, Italian and Chinese fare.

20 It is not clear who planned the lunch gathering, but we were advised that Councillor Denise Brown[2] initially invited two of her colleagues, and Councillor Orser asked additional council members to attend. Councillor Orser suggested the venue, as it is in his ward.

21 All of the members of council we interviewed explained that the lunch was intended to be a social get-together before a long budget meeting.

22 The various attendees stayed for different lengths of time over a period of about an hour, commencing around noon. One councillor said there was never a point when all six were at the restaurant at the same time, but the other attendees indicated they were all in attendance together for at least a short period of time. Councillor Denise Brown appears to have been the last to arrive and first to leave, attending for about 20-30 minutes, while Mayor Fontana was there approximately 30-40 minutes.

23 While witnesses explained that the intended purpose of the lunch was to socialize, and most of the conversation appears to have been social in nature, there was some brief discussion touching on city-related matters. All of the luncheon participants recalled discussion of Councillor Hubert's survey, in particular the methodology used.

24 Four attendees also recalled that Councillor Henderson asked Mayor Fontana about how the proposed reduction of the affordable housing reserve would work.

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[1] "City councillor may change vote for controversial budget cut," AM980.ca, February 18, 2012. http://www.am980.ca/channels/news/local/story.aspx?ID=1657008 .

[2] As there are two members of London council with the surname "Brown," Denise Brown is referred to in this report by her full name for clarity.

Mayor Fontana advised that he responded to Councillor Henderson with a general explanation of how affordable housing worked.

25 One councillor also recalled Councillor Denise Brown mentioned she had received calls about city wading pools. Councillor Brown advised our Office she did not discuss this issue during lunch.

26 Those in attendance explained there were no issues discussed at the lunch relating to matters before any committees of council, nor was there any further consideration of matters connected indirectly or directly to council business.

February 21 committee meetings

27 Mayor Fontana, and councillors Polhill, Orser, Van Meerbergen and Denise Brown are members of the seven-person Investment and Economic Prosperity Committee. All five attended the committee meeting after the luncheon.

28 According to the city's minutes, this committee met in open session on February 21 at 1:01 p.m. to consider the third report of the London Diversity and Race Relations Advisory Committee relating to nominations for the London Race Relations Recognition Awards. Six of the seven committee members were in attendance together with four other individuals. The meeting adjourned at 1:16 p.m. after the committee gave two directions to staff.

29 Of those who attended the luncheon, Mayor Fontana and councillors Polhill and Henderson also met in open session as part of the six-person Planning and Environment Committee. According to the committee minutes, there were four committee members in attendance that day, joined by six other people.

30 This committee meeting began at 1:22 p.m. and considered a report and recommendations from the Acting Executive Director, Planning, Environmental and Engineering Services and the City Engineer's 2012-2016 Growth Management Implementation Strategy. The committee made recommendations based on the report and the meeting was adjourned at 1:28 p.m.

31 Mayor Fontana and Councillor Denise Brown are also members of the five-person Finance and Administrative Services Committee. On February 21, this committee held a special meeting at 2 p.m. Three more councillors and four other people also attended the meeting. The session was closed to the public to discuss "A matter pertaining to personal information about identifiable individuals, including municipal employees, with respect to employment-related matters..." The closed session lasted approximately 25 minutes.

February 21 council meeting

32 The February 21 council meeting began at 3 p.m. in open session, approximately two hours after the luncheon concluded. There were many items on the meeting agenda, including reports from several committees.

33 Councillor Hubert also submitted his survey to council and it was received, although it had not been referenced on the meeting agenda.

34 Council voted on the final budget during this session, approving it by a vote of 9-6. The proposal to reduce the affordable housing reserve again passed by the same 8-7 margin and individual votes as it had in the earlier Strategic Priorities and Policy Committee meeting.

Aftermath of the February 21 luncheon

35 The gathering of councillors at the Harmony Grand Buffet so close to the final budget vote did not go unnoticed or unremarked. Word of the luncheon travelled rapidly through social media as well as the mainstream press.

36 On February 23, 2012, a blog account of the February 21 luncheon was posted (it was later revised February 25), questioning whether the gathering was really an offsite strategy meeting in breach of the open meeting rules.[3]

37 A number of councillors who had not attended the lunch also raised concerns about the optics associated with it. At the same time, the lunch attendees staunchly defended their participation and cast aspersions on the critics.

38 On February 28, the *London Community News* reported that Councillor Polhill felt criticism of the lunch was politically motivated. Mayor Fontana was quoted in the same article as calling a *Municipal Act* rule that limits what councillors can do together "ridiculous."[4]

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[3] "Meeting of six council members at Harmony Grand Buffet last Tuesday at noon raises questions about possible Municipal Act breach," AltLondon.org, February 23, 2012. http://www.altlondon.org/index.php?page=3.

[4] "Councillors split on appropriateness of pre-budget lunch," Sean Meyer, *London Community News*, February 28, 2012. http://www.londoncommunitynews.com/2012/02/councillors-split-on-appropriateness-of-pre-budget-lunch/

39 The next day, the local CTV news featured the comments of various councillors. For his part, Councillor Orser rejected any suggestion that the lunch was improper and chalked the ensuing criticism up to "sour grapes" and stated: "I'll have din-din with whoever I want."[5] Mayor Fontana said he didn't see what was wrong with going to lunch with members of council, and declared he would continue to conduct business in a way that he felt was best for the city.[6] That same day, Councillor Henderson was quoted in the *London Free Press* as suggesting that critics of the lunch were simply "sore losers."[7]

40 After news of my investigation became public, the controversy was further escalated when some of the lunch participants began to take aim at the undisclosed complainants as well as my investigative practices. For instance, on March 12, 2012, on AM 980 News, Councillor Orser challenged those who had complained to my Office to come forward and expressed the hope that I would exercise my authority to summon and examine the complainants under oath.[8]

41 A month later, on News/Talk 1290 CJBK, Councillor Henderson complained that a few people could get together and trigger an Ombudsman investigation resulting in legal fees, and that "accusers" are not named. He went on to characterize my investigation process as part of "a police state," implied that my investigations were undemocratic, and charged that councillors were being "muzzled."[9]

42 While the lunch on February 21 clearly generated considerable speculation, criticism and public perception of impropriety, the issue that I must consider is whether it was held in contravention of the open meeting requirements of the *Municipal Act*.

When is a Meeting a Meeting?

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[5] "Buffet dining sparks Ombudsman complaints," CTV London, February 29, 2012. http://www.youtube.com/watch?v=_7W--TGQtwo&feature=player_embedded.
[6] "Fontana has nothing to hide," CTV London, February 29, 2012. http://www.youtube.com/watch?v=6Gt_kyD7iQE&feature=player_embedded.

[7] "Henderson says complainers are 'sore losers,'" Jonathan Sher, *London Free Press*, February 29, 2012. http://www.lfpress.com/news/london/2012/02/28/19438451.html.
[8] "Ombudsman investigating pre-budget lunch," AM 980 News, March 12, 2012. http://www.am980.ca/channels/news/local/Story.aspx?ID=1668677

[9] "Steve with Coun. Dale Henderson talking about buffet-gate," *London in the Morning With Steve Garrison*, News/Talk 1290 CJBK, April 12, 2012. http://www.cjbk.com/Episodes.aspx?PID=1925 (at page 20).

43 The *Municipal Act* requires that council and committee meetings be held open to the public, unless the subject matter under consideration comes within one or more of the narrow exceptions to the open meeting rules.

44 The question of whether a gathering of council or committee members constitutes a "meeting" subject to the Act is not as straightforward as one would expect. The definition of "meeting" in the Act is singularly unhelpful. It states that:

> "meeting" means any regular, special or other meeting of a council, of a local board or of a committee of either of them. (s. 238(1))

45 The City of London's Procedural By-Law defines "meeting" as "a meeting of the Council, Committee of the Whole or standing committee."

46 In my report on my investigation into the City of Greater Sudbury Council closed meeting of February 20, 2008, I canvassed in some depth the law concerning what kind of gatherings come within the open meeting requirements.[10] As a result of my analysis of the relevant jurisprudence and the principles of openness, transparency and accountability underpinning the open meeting rules, I established the following working definition:

> To constitute a meeting covered by the *Municipal Act*:
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> **Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.**

47 In some jurisdictions, the concept of "quorum" is determinative. If sufficient members of a body are present to constitute quorum, then the body as a collective entity has the legal authority to act, and the gathering will be considered a meeting. While quorum is an important consideration, there are circumstances where I believe gatherings will constitute meetings subject to the open meeting rules, even though no quorum is technically present. For instance, in my report on my investigation into the Council of the Township of Nipissing's special meeting of April 25, 2008,[11] I found that an improper closed meeting had taken place when

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[10] *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal*, Report of André Marin, Ombudsman of Ontario, April 25, 2008. http://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-br--Don't-Let-the-Sun-Go-D.aspx.

[11] *Investigation into the Council of the Township of Nipissing Special Meeting of April 25, 2008*, Report of André Marin, Ombudsman of Ontario, February 6, 2009.

the Mayor initiated a series of individual telephone calls with councillors to approve an invoice. Although a quorum of council was never present, council clearly came together through serial contacts for the purpose of exercising its authority.

48 On the other hand, even if quorum is present, members of council can meet for purely social purposes without the gathering being considered a meeting that must be held subject to the open meetings rules.

49 In addition, as I noted in my 2008 report concerning the City of Greater Sudbury, the open meeting requirements do not act as an absolute ban on council members meeting informally to share information. In that report, I observed:

> It is a healthy thing in a democracy for elected officials to share information and to get the lay of the land through informal discussions with others before making policy decisions. As Justice Simonett of Minnesota observed, citing a proposed model law, "nothing … should make illegal informal discussions, either personally or telephonically, between members of public bodies for the purpose of obtaining facts and opinions…."
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> He remarked "[t]o say… that a board member may never talk to another board member outside of a duly called [public] meeting … is unrealistic and chills speech unnecessarily…"
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> … when elected politicians are not working together as a group, the democratic authority they are provided is not engaged.[12]

50 However, where councillors or committee members come together to work collectively towards the resolution of a matter that requires the exercise of their power, even if they do so only to secure the data necessary to make decisions, the open meeting provisions should apply.

51 My Office has considered a number of cases where concerns have been raised about gatherings of council or committee members over drinks and meals. While predominantly social events, even in these informal settings, some discussion relating to council or committee business has often taken place. For instance, in my investigation into the City of Hamilton and whether its NHL Proposal Sub-Committee had held an improperly closed meeting over breakfast, I found some

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http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf .

[12] *Supra* note 10 at page 24.

general discussion did occur relating to city business. In that instance, a quorum of the sub-committee was also present at the meal. Ultimately, I concluded that there was no evidence that sub-committee business was discussed in any material way, that any decisions were made, or that the groundwork was set for future decision-making during the breakfast,[13] and I did not find that an improper closed meeting had taken place.

52 However, with respect to the presence of "quorum" at a social gathering, I did caution that:

> … while social gatherings involving councillors may be permissible, they naturally attract speculation and suspicion. As this case illustrates, conjecture will be particularly acute when a quorum of a decision-making body takes part in a private discussion with third parties. Unlike formal meetings, when minutes are kept, it is difficult to accurately reconstruct the conversational record of informal gatherings. It is challenging in these circumstances to assure the public that no improper discussions have taken place. Under the circumstances, councillors should be cautious when meeting informally, especially when they represent a quorum of a decision-making body, to ensure that any discussions do not stray into areas that might constitute laying the groundwork for future decision-making.

Analysis

Was the February 21 lunch a meeting?

53 From all accounts, the luncheon on February 21 was not intended to be a council or committee meeting, but an informal gathering with a social purpose. However, inevitably when council members get together in such circumstances questions arise as to whether municipal business was discussed – and more importantly, whether it was improperly advanced outside of public view. It is not the intent of the attendees that is critical, but the proper characterization of the gathering when all of the surrounding circumstances are considered objectively.

54 Under article 8.1 of the city's Procedure By-law, a majority of council or committee members must be present to constitute "quorum," allowing the body to exercise the legal authority to conduct business. During our investigation, the

[13] *Investigation into whether the City of Hamilton's NHL Proposal Sub-Committee held an improperly closed meeting*, Report of André Marin, Ombudsman of Ontario, February 2012. http://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/HamiltonNHL-final-EN-for-web_1.pdf .

Clerk advised us that 50% of committee or council members is considered quorum.

55 Six members of the 15-member council attended the lunch on February 21. While a quorum of council was not present, the participants represented a quorum of the members on two of the committees, the Investment and Economic Prosperity and Planning and Environment Committees, scheduled to meet later that day. Some of the attendees also represented a quorum of members of other city committees, although these other bodies were not scheduled to meet again until March 2012.

56 Had the luncheon participants discussed committee business, it is quite possible that I would conclude that an improper closed meeting had taken place. However, based on the evidence we collected, it does not appear that any committee exercised its collective legal authority during the lunch. In fact, it doesn't appear that any committee business was considered during the gathering.

57 I am more disturbed by the fact that a number of council members gathered in the manner they did shortly before an important council meeting on the city budget. While these council members did not have the legal authority to exercise the collective will of council, the public impression left is still unsavoury.

58 The open meeting requirements were never meant to prevent council members from associating with each other on a social basis. I recognize this and indeed see the need for councillors to network and liaise so they may be able to better foster an environment to conduct city business. However, whenever council members meet socially, there may well be temptation to stray from what was originally conceived as a social meeting. More and more, citizens follow closely the activities of municipal council. And they are prepared to scrutinize any meeting occurring outside the public spotlight. Indeed, in this case community eyebrows were raised by the appearance that council might have used the backdrop of a buffet lunch to do more than exchange pleasantries, practice their chopstick skills, read each other their fortune cookie messages or indulge in an all-you-can-eat feast.

59 At a minimum, the decision on the part of six members of council to meet publicly for lunch in a local restaurant just before a critical and controversial vote on the budget was ill-conceived. The attendees do not appear to have given any thought to public perception or the potential for questions to arise around the fairness of the subsequent committee and council proceedings.

60 Even after concerns were raised publicly about the luncheon meeting from various sources, a number of the lunch participants dismissed them out of hand, and

further inflamed the situation by labeling critics as politically motivated "sore losers."

61 The histrionics and criticism by some councillors of my investigative process also muddied the waters, was singularly unhelpful, and demonstrated an ignorance of the nature of the closed meeting investigations carried out by my Office.

62 The Ombudsman of Ontario is an independent officer of the Legislative Assembly. My role is to carry out impartial and objective investigations mandated under the *Ombudsman Act*. In the case of closed meeting complaints, municipalities have a choice of appointing their own investigator or using my services free of charge. However, when my Office is the closed meeting investigator, investigations are conducted in accordance with the *Ombudsman Act.*

63 There are confidentiality provisions in my Act that enable and encourage people to come forward with their concerns without fear of reprisal. Given the nature of closed meeting complaints, which affect the public as a whole rather than the interests of individual citizens, there is no reason to disclose the name of complainants, and to do so would arguably contravene the legislation.

64 As with all complaints that my Office receives, closed meeting complaints are reviewed to determine whether they can be resolved informally or whether it is necessary to launch a full investigation. In this case, my Office received three complaints, suggesting that an improper meeting of six council members had taken place before a number of committee meetings and a significant budget meeting. These circumstances raised a serious issue that generated considerable public attention. I determined that the public interest would be best served by finding out what actually happened and clearing the air around the allegations of impropriety.

Conclusion

65 After reviewing all of the evidence obtained during my investigation, I believe that the February 21 lunch attended by six members of council was not a meeting requiring procedural compliance with the open meeting requirements. However, the controversy generated in this case demonstrates the need for members of council to be mindful of the fact that while in public office, their conduct is subject to public scrutiny.

66 I urge council members, individually and collectively, to adopt practices that serve to instill public confidence in the transparency, openness and accountability of their processes. Although in this case I did not find that an improper closed

meeting occurred, I would like to take the opportunity to encourage the council to move beyond historical traditions and embrace modern approaches to closed meetings. For instance, in the United States, a number of jurisdictions require electronic recording of *in camera* sessions. Having audio and/or video recordings of closed meetings would significantly reduce the time and resources necessary to respond to a closed meeting complaint investigation, and would also provide the citizens of London with a measure of assurance that there is a complete record of what transpires behind closed doors.

Report

67 My report should be shared with Council for the City of London and made available to the public as soon as possible, and no later than the next council meeting.

André Marin
Ontario Ombudsman