



“Municipal Government By Stealth”

**Investigation into
Council of the Township of Emo
Closed Meeting of April 8, 2008**

**André Marin
Ombudsman of Ontario
January 30, 2009**

Table of Contents

The Complaint	1
Ombudsman Jurisdiction	1
Investigative Process	1
Open Meeting Requirements	1
Investigative Findings	2
<u>The April 8, 2008 meeting of Emo Council</u>	2
<u>Abattoir Inc. attendance at the April 8, 2008 closed meeting</u>	4
<u>Alteration of the April 8, 2008 minutes on April 22, 2008</u>	5
<u>July 8, 2008 Meeting of Council</u>	6
Analysis of Issues Relating to Open Meeting Requirements	7
<u>Notice of April 8, 2008 meeting</u>	7
<u>Resolution to go into closed session on April 8, 2008</u>	8
<u>Original minutes of the April 8, 2008 meeting</u>	10
<u>Retroactive correction of errors</u>	10
<u>Fee for complaining to the Ombudsman</u>	12
Opinion	14
Recommendations	15
Emo’s \$500 Complaint Fee	16
Response of the Council of Emo	17
Report	18
Appendix 1	19
Appendix 2	20

The Complaint

- 1 On April 21, 2008, my Office received a complaint about a closed meeting held by the council of the Township of Emo on April 8, 2008. The complainant alleged that after the adjournment of the regular meeting of council on that date, council held an unauthorized in-camera meeting with members of the Rainy River District Regional Abattoir Inc. (Abattoir Inc.) to discuss matters related to the abattoir project planned for the Township.

Ombudsman Jurisdiction

- 2 As of January 1, 2008, changes to the *Municipal Act, 2001* (the Act) gave citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. On November 14, 2007, the Township of Emo passed a resolution (No.22) appointing the Ombudsman as its Closed Meeting Investigator. Under the *Ombudsman Act*, the Ombudsman is charged with investigating closed meeting complaints whenever a municipality has not appointed someone else to carry out this task.
- 3 In investigating closed meeting complaints, my Office considers whether the meeting was closed in accordance with the provisions of the Act, and the relevant municipal procedure by-law.

Investigative Process

- 4 During the course of our investigation, we conducted interviews with four of the five members of council, the township's Chief Administrative Officer/Clerk, the Economic Development Officer for the district, three residents of Emo, and with the president and another member of Abattoir Inc. We also reviewed relevant documents including minutes, agendas, e-mails, letters and memoranda related to the abattoir project, and the relevant municipal by-laws and legislation.

Open Meeting Requirements

- 5 The *Municipal Act, 2001* provides that all meetings of council shall be open to the public, subject to limited exceptions (s. 239). The Act also requires municipalities to pass a procedure by-law governing the calling, place and proceedings of meetings, which must include provision for public notice of meetings. (s.238)(2.1)) A meeting or part of a council meeting cannot be closed to

the public unless council passes a resolution in the form specified by the Act. (s.239(4))

- 6** Emo's Procedure By-law #2007-42 sets out the procedure to be followed with respect to the Township's regular and special meetings of council, including public notice requirements. In the case of regular meetings of council, a schedule of dates, times and places of regularly scheduled council meetings is to be posted in a conspicuous place in the municipal office.
- 7** The By-law also reflects the *Municipal Act, 2001* requirement that council meetings are generally to be open to the public and sets out the circumstances when closed meetings are permitted under the Act.

Investigative Findings

The April 8, 2008 meeting of Emo Council

- 8** Notice of the April 8, 2008 regular meeting of council, setting out the date, time (7 p.m.) and location (Emo Municipal Council Chambers), was posted on the door of the municipal office and the local post office. According to the Clerk, the notice would have been posted a week to 10 days before the meeting.
- 9** An agenda for the meeting was prepared three days before the meeting and available to council members in advance. Most council members picked up the agenda the day before the meeting. Although the agenda is available to the public on request before the meeting, the public has never been made aware of this, so typically those who attend see the agenda for the first time on the night of the council meeting.
- 10** While at times a meeting agenda will reflect that a matter will be considered in closed session, the April 8, 2008 agenda did not indicate that any items would be discussed in camera. The Clerk advised that although she had been aware in advance of the meeting that there was a municipal personnel issue, which would likely require consideration in closed session, she forgot to refer to this on a formal agenda. She did, however, have on hand a generic agenda for an April 8, 2008 closed session listing "personnel issues" for discussion. She explained that this was because in her experience council often has to deal with such issues as part of its regularly scheduled meetings. However, this "in-camera meeting agenda" was never distributed either to council members or to the public.
- 11** In addition to members of the council, the Clerk, and two municipal

superintendents, 10 members of the public also attended the open portion of the meeting on April 8, 2008.

- 12** The evidence of the Clerk and the council members we interviewed was that one of the superintendents raised a matter relating to a municipal employee during the open session. These witnesses indicate that as this was a “personnel” matter, it was decided that discussion of this issue would take place in closed session.
- 13** The Mayor (who held the title of Reeve at the relevant time) and the Clerk explained that the municipality has a standard resolution it uses to move into closed session. This resolution contains a list that essentially recites most of the statutory exceptions to the requirement that a meeting be held open to the public, with boxes that can be checked off to indicate the applicable exception. The municipality’s practice is for the Mayor to only read out the specific exception council is relying on to justify going into closed session.
- 14** In the case of the April 8 in-camera meeting, the evidence of the council members and the Clerk was that after other business on the agenda had been addressed, the Mayor read out the standard resolution publicly, identifying that council would be proceeding behind closed doors to discuss “personal matters regarding an identifiable individual, including employees”. The Mayor advised that he usually also explains in open session that the public can return when the closed portion of the meeting concludes, and open session resumes. However, he could not recall whether he did so on April 8. He explained that, in any event, the same members of the public always attend the council meetings, and typically they leave and do not wait around for council to come back into open session.
- 15** The members of council we interviewed, as well as the Clerk, said that the resolution to go into closed session was passed while the public was still in attendance during the open portion of the April 8, 2008 meeting. However, the three residents we interviewed, who were also present during the open portion of the meeting, claimed that they had never heard the Mayor read the resolution and were unaware that the council would be going in camera. They explained that the meeting concluded as in their experience it usually does, after members of the public were given an opportunity to ask questions of council.
- 16** Unfortunately, the Clerk’s original minutes of both the open and closed portion of the April 8, 2008 meeting were not maintained in chronological order. Accordingly, they did not indicate when the resolution was actually passed. The minutes were subsequently amended on April 22, 2008, to reflect that the resolution had been made during the open portion of the meeting.

- 17** The minutes of the April 8, 2008 meeting do note that council met in closed session commencing at 9:05 p.m., after the public had left the council chambers. The evidence of the Clerk and the council members we interviewed was that during the closed session, the superintendent who had raised the personnel matter returned, and council proceeded to discuss this issue. The superintendent then left the meeting. At that point, the Mayor told council that he had received a request that council consider buying a plot of land from Abattoir Inc., should the company's plans to construct an abattoir fail.
- 18** The council members, other than the Mayor, advised that they were not aware that the issue of the potential purchase of land from Abattoir Inc. would be discussed, until the Mayor raised it during the closed session. The Mayor told us that he had been approached about the possibility of the Township acquiring the land by the District's Economic Development Officer a day or two before the meeting. The Mayor advised that, while this was not an urgent matter, council had been discussing the benefits of the township owning property for future development opportunities for some time. He explained that council felt that it would be prudent to discuss and deal with the matter immediately, rather than wait. The Mayor said that council was concerned that if it delayed in coming to a decision on the matter, it might lose the opportunity to buy the land.
- 19** The Mayor explained that, while it is not a common practice, at times council does discuss matters in camera that have not been specifically identified in the resolution authorizing in-camera discussions. However, he stated that this only happens where the issue raised would otherwise fall under the closed meeting exceptions in the Act. The Mayor acknowledged that the public would only know about such discussions if they were followed by a resolution or otherwise referred to later in open session.
- 20** The minutes of the April 8, 2008 meeting indicate that at 9:40 p.m. council came back into open session, and then passed a resolution agreeing to conditionally buy the land from Abattoir Inc. After the resolution passed, council began to discuss the possible uses of the land in the event that the Township ended up owning it. The meeting adjourned at 10:45 p.m. No members of the public were present to hear the resolution concerning the Abattoir Inc. land purchase or the ensuing discussion.

Abattoir Inc. attendance at the April 8, 2008 closed meeting

- 21** The three members of the public we interviewed have indicated that the issue of the development of a local abattoir was a source of considerable contention in

Emo. Two of these witnesses claimed that shortly after the open session of council ended on April 8, 2008, they had seen two members of Abattoir Inc. approach the municipal offices. One of these witnesses indicated that these individuals were seen actually entering the council chambers.

- 22** The minutes of the April 8, 2008 meeting, which list attendees, do not indicate that members of Abattoir Inc. attended the open portion of the meeting. There is no separate listing of attendees at the closed session. The Mayor, the Clerk and all members of council interviewed, advised that no members of Abattoir Inc. attended at the closed session on April 8, 2008. They also confirmed that, to their recollection, no members of the company were present at the open session of council that evening.
- 23** The members of Abattoir Inc. that we interviewed also confirmed that, at no time on April 8 did any of Abattoir Inc.'s members attend any meetings of the Emo council. One of these individuals had been specifically named as one of the two Abattoir Inc. members who had been seen entering the council chambers after the open meeting had concluded. There was no record of the other individual who had been identified as entering the council chambers being a member of Abattoir Inc., nor were we able to locate this individual.

Alteration of the April 8, 2008 minutes on April 22, 2008

- 24** The minutes of the closed portion of the meeting of April 8 indicated that the in-camera session was held to discuss a personnel issue. There was no reference to the issue of the purchase of Abattoir Inc.'s land. As indicated previously, the minutes of the open session also failed to refer to the fact that the resolution authorizing entering into a closed session had occurred in open session. The Clerk advised that these oversights were discussed at the regular meeting of council on April 22, 2008. During the open portion of that meeting, it was noted that the minutes should have reflected that the resolution occurred prior to the closed session and that the resolution should have included reference to three subject areas: personal matters regarding an identifiable individual, including employees; proposed or pending acquisitions or disposition of real property; as well as advice subject to solicitor-client privilege, including communications necessary for that purpose. No further specifics were discussed in open session.
- 25** Initially, the Clerk and council members confirmed during their interviews with our investigators that only the personnel issue and the acquisition of Abattoir Inc.'s land had been discussed in closed session on April 8, 2008. The Clerk later explained that while no legal advice was discussed at the meeting, she had asked

for direction on how to prepare meeting minutes, and the council had suggested that she consult with the Township's lawyer. This information was not reflected in the minutes for the closed session. On April 22, 2008, council decided that this additional justification for meeting in camera on April 8 should be retroactively added to the resolution.

- 26** The Clerk also told us that in order to formally correct the minutes, council resolved on April 22, 2008 to go in camera to consider altering the minutes on the basis of the exception allowing closed discussion of "any matter with respect to which a council, local board or committee or other body may hold a closed meeting under any other statute." The Clerk advised that at one point when discussing how to phrase the resolution to move in camera on April 22, it was suggested that to "be safe," the council should simply rely on all of the exceptions in the *Municipal Act, 2001*. However, ultimately council chose to rely on an exception that appeared to best fit the circumstances. While the Clerk was unable to identify any statute that specifically covered the situation, she explained that this exception was the only one that council could identify that might apply. Council also resolved to discuss a personal matter in closed session.
- 27** During the closed session on April 22, 2008, the errors in the minutes were discussed, and council was satisfied that this type of error would not be repeated. Council also considered the subject of an employee's holidays.
- 28** After the April 22 meeting, the April 8 minutes were amended retroactively to expand council's reasons for having resolved to go into closed session and to indicate that the resolution had been made in open session.

July 8, 2008 Meeting of Council

- 29** After my Office served Emo council with notice of my intent to investigate this complaint, in a July 8, 2008 regular council meeting, council resolved to set a fee of \$500 for complaints to the Ombudsman. This fee is to be reimbursed to the complainant if the request is determined to be valid, but retained if the request is found to be frivolous. (A copy of this resolution is attached to this report as Appendix 1.) My Office has received a separate complaint from a resident of Emo regarding council's decision to impose this fee.

Analysis of Issues Relating to Open Meeting Requirements

Notice of April 8, 2008 meeting

- 30** The council did post notice of the April 8, 2008 meeting in accordance with its procedure by-law. This notice contained the minimum information required, the date, time and place of the meeting.
- 31** The *Municipal Act, 2001* does not specify the content of the notice to be given to the public. However, many municipalities require that an agenda listing the matters to be discussed be publicly posted in advance of a meeting. Some municipalities also provide that items arising after an agenda has been posted are to be included in an addendum, which must also be publicly posted. Additions to the agenda are generally reserved for matters of an urgent nature.
- 32** In the case of items that arise without advance public notice, many procedure by-laws require approval of all members in attendance, or a resolution suspending the normal meeting rules, before they can be considered.
- 33** These practices are consistent with the intent of the open meeting requirements. They allow citizens to make an informed choice as to whether to attend a particular meeting. They also limit the potential for surprise last-minute items to surface.
- 34** In accordance with the principle of transparency that underscores the open meetings law, advance public notice of a meeting should include all items to be considered at a meeting, including a general description of subjects to be considered in closed session. Items that have not been the subject of advance notice should only be considered in rare circumstances where urgency doesn't permit the normal notice requirements to be met, and after additional procedural requirements have been satisfied.
- 35** As is demonstrated in this case, it is also important for citizens to be aware that open session will resume after council has adjourned to discuss matters in camera. Any notice of a council meeting should make this clear. It should not be left up to the Mayor to remember to mention this in passing during the open proceedings or assumed that members of the public are familiar with council practice and would not be interested in attending the open session when it resumes.

Resolution to go into closed session on April 8, 2008

- 36** The *Municipal Act, 2001* requires that before holding a meeting or part of a meeting that is to be closed to the public a municipality must state by resolution the fact that a closed meeting will be held, as well as the general nature of the subject matter to be considered. (s.239(4)). The resolution must occur before the closed meeting takes place. Even if council is given the benefit of the doubt, and I accept that it did resolve to go into closed session during the open portion of the April 8, 2008 meeting, I do not believe that its pro forma “check-box” approach satisfies the intent of the Act.
- 37** Under s. 239(2)(b) of the *Municipal Act, 2001*, a meeting or part of a meeting may be closed if it involves consideration of “personal matters about an identifiable individual, including municipal or local board employees.” However, simply reciting the wording of the exception doesn’t provide very meaningful information. The information should be as specific as possible. A preprinted recitation of exceptions is insufficient to achieve this purpose. As noted by the Ontario Court of Appeal in *Farber v. Kingston (City)*¹, “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.” In this case, the council should have been more precise when describing that it would be considering a personal matter relating to a municipal employee.
- 38** While discussion of the “personnel” issue appears to have been loosely authorized by the resolution, the discussion of the possible purchase of Abattoir Inc.’s property was clearly not. There is an exception in the *Municipal Act, 2001* allowing councils to consider a “proposed or pending acquisition or disposition of land” (s. 239(2)(c)) in closed session. However, a council must strictly follow the legislative requirements and issue a public resolution permitting discussion of a specific acquisition or disposition of land, before it can be discussed behind closed doors. Since the April 8, 2008 resolution was silent regarding the abattoir land issue, council was prohibited from discussing it. Accordingly, its ensuing consideration of this topic contravened the *Municipal Act, 2001*. Given the Mayor’s remarks regarding the council’s past practice, it appears that Emo council is in the habit of breaching this aspect of the law at times when it is convenient.

¹ [2007] O.J. No. 919, at page 151.

- 39** The requirement to publicly identify what issues will be discussed in closed session is not merely a procedural technicality. It is of fundamental importance in ensuring the transparency of local democracy. It is a significant accountability measure to ensure that council only engages in discussions of permitted subjects in closed session. Failure to comply with the requirements for council resolutions can lead to loss of public confidence in municipal governance, and allegations of local government by “ambush.” This case illustrates this point dramatically.
- 40** After it met in closed session, council spent over an hour discussing the purchase of the abattoir land in open session. However, this discussion might as well have taken place behind closed doors, since no members of the public were aware it was taking place. Certainly those we spoke to would have been very keen to view the proceedings, had they known the abattoir lands were up for discussion. The first notice that the public had that purchase of the abattoir property was an issue was after the formal minutes of the April 8, 2008 meeting disclosed that the council had resolved to conditionally purchase the land.
- 41** There was no particular urgency requiring council to discuss the abattoir land when it did. Even in the case of urgency, basic procedural requirements must still be observed. Emo council appears to take a rather cavalier attitude to the open meetings requirement. Unfortunately, its practices are reminiscent of the clandestine governance model that the open meeting provisions were designed to remedy.
- 42** Council’s neglect to identify the abattoir land issue in its resolution, combined with its failure to ensure that the public was aware that council would be resuming open session after its in-camera discussions closed, frustrated the intent of the open meetings law, and left interested members of the public in the dark.
- 43** It is no surprise that the council’s actions gave rise to a complaint to my Office. When local government considers a controversial topic, without advance notice and outside of public view, it is only natural that the public will be suspicious of its conduct and motives.
- 44** In addition, while s.239(2)(f) of the *Municipal Act, 2001* provides that councils may discuss advice that is subject to solicitor-client privilege – including communications necessary for that purpose – in closed session, such discussion can only take place if it has been authorized in advance by a proper public resolution. In this case, the discussion was not authorized by a prior resolution. It is also difficult to see how this particular exception would apply in the circumstances.

- 45** The exception concerning privileged advice can only be used when some advice from a solicitor or related communication actually exists for council's consideration. The Clerk's request for direction from council about preparing minutes would not fall within the generally accepted scope of advice subject to solicitor-client privilege. It also does not appear to come within any of the other exceptions permitting in-camera discussion. Accordingly, even if there had been a prior authorizing resolution in proper form, discussion of this topic in closed session would have been unlawful.

Original minutes of the April 8, 2008 meeting

- 46** The *Municipal Act, 2001* requires that a municipality record without note or comment all resolutions, decisions or other proceedings at a meeting (s.239(7)). The original minutes of the closed session of April 8 omitted any reference to the potential purchase of Abattoir Inc.'s land. This is a violation of the *Municipal Act, 2001*. Leaving aside the issue of whether council had the authority to discuss the proper preparation of minutes in closed session, the fact that this discussion took place, as alleged by the Clerk, is also absent from the minutes – once again in contravention of the Act. In addition, Emo's meeting minutes were not chronological, which contributed to the uncertainty around whether the resolution occurred during open or closed session.
- 47** While the minutes recorded the names of those in attendance for the open session, they neglect to indicate who attended the closed session of council on April 8, 2008. If the council were to adopt a practice of separately listing those attending open and closed sessions, it might assist to diminish speculation regarding council meeting in secret with special interest groups.

Retroactive correction of errors

- 48** At some point after the April 8 meeting, council recognized that it had erred in considering the abattoir issue and the preparation of minutes without first authorizing the discussion by resolution. It was also aware that there was concern that the resolution had not been recorded as occurring in advance of the closed session. In an attempt to remedy these "oversights," council appears to have only compounded them by trying to retroactively change past events. Unfortunately for council, by the April 22, 2008 meeting it was simply too late to "unring the bell."
- 49** On April 8, when the resolution authorizing entry into closed session was made, the Mayor was the only member of council who knew that he wished to discuss

the abattoir land in camera. Council could not somehow rewrite history two weeks later and declare that it had intended all along to consider this issue when it resolved to adjourn to closed session. In addition, the resolution required by the *Municipal Act, 2001* must be made in open session in advance of the closed session it authorizes. Council could not turn back the clock and declare that it had resolved to do something, when it clearly had not.

- 50** While it may have been well intentioned, council's attempt to correct the official record of the April 8, 2008 meeting has only resulted in it being falsified. Correction of the record of the timing of a resolution, provided that the amendment is accurate, may well be permissible. However, wholesale retroactive amendment of the substance of the resolution is another matter entirely. This did not represent a mere correction of a minor clerical mistake, but rather a misguided attempt on the part of council to expunge the evidence of a serious contravention of the law.
- 51** To its credit, council did at least try to address the errors first in the open on the public record on April 22. However, once again, its resort to the forum of a closed meeting to formally correct its mistake regarding the content of the resolution was hopelessly flawed.
- 52** The open meeting provisions of the *Municipal Act, 2001* are remedial provisions addressed at enhancing the public interest in open and transparent government at the local level. Any exceptions to the general rule that meetings should be held in public must be narrowly construed. In the case of the April 22, 2008 resolution authorizing discussion of the April 8 minutes in closed session, council relied on the exception for allowing discussion of a matter authorized by another statute to be considered in closed session.
- 53** It is apparent that council lacks a basic understanding that closed meetings are only to occur in limited circumstances clearly authorized by the statutory exceptions. It is difficult to imagine how discussion of the correction of a resolution in the official record to reflect circumstances that never occurred could be shoehorned to fit the exemption that council relied on. There is no statute authorizing retroactive correction of minutes in this manner. It is also clear that this subject would not otherwise fit within any of the *Municipal Act, 2001* exceptions. For instance, although council had referred to consideration of a personal matter regarding an identifiable individual, this error was not the error of any one individual, but the error of council acting as a whole.
- 54** When matters are introduced in closed session for discussion, which have not

been identified in the resolution authorizing the session, each individual member of council has an obligation to ensure that no discussion of the issue takes place. Continuing to discuss a topic that is not authorized is a fundamental error of law, which every member who takes part in the discussion or even sits back and allows to occur is complicit in.

- 55** The subject matter actually considered in a closed session must specifically come within an exception to the open meeting requirement. Exceptions cannot simply be plucked from a list to justify discussions council wishes to hold in private. The circumstances must fit within the exception without any distortion of the plain meaning of the statutory words. If a topic for discussion does not come within the exceptions, it cannot lawfully be discussed in closed session.
- 56** Taken in its best light, the conduct of Emo council surrounding the April 8, 2008 closed meeting reflects basic ignorance of the purpose behind the open meeting requirements and how they are intended to work in practice. The requirement for municipal councils to hold meetings open to the public has been in existence in Ontario since 1866. Exceptions to the open meeting requirements have been in existence since 1995. However, based on my 12 months of experience in investigating closed meeting complaints, it is clear that local governments throughout the province continue to differ dramatically with respect to their practices and compliance with open meeting requirements.
- 57** In the case of Emo's council, it has continued to operate within a culture of secrecy and entitlement. The conduct of Emo's council is an unfortunate example of why enforcement of the open meeting requirements through investigation is necessary to safeguard the right of citizens to transparent local government.

Fee for complaining to the Ombudsman

- 58** While I have stated that taken in its best light, Emo's conduct was occasioned by ignorance of the open meeting requirements, at its worst, it appears to be an ill-conceived and deliberate attempt to flout the law and manipulate it to serve its own ends.
- 59** One Emo councillor was openly unco-operative with our investigators, suggesting that he was available only between the hours of 10 p.m. and 6 a.m. for an interview. The Mayor was also clearly frustrated by the new complaint investigation procedure, which came into effect in January 2008. He expressed the view to one investigator that every time information was requested and municipal employees were diverted from their normal tasks and required to

devote time to responding to my Office, it represented a potential “waste of time,” since the complaint might ultimately be found to be frivolous and unfounded. He also provided prior warning that council would be taking steps to ward off baseless complaints by imposing a fee on individuals who sought out my Office to complain.

- 60** Council made good on this threat when it issued its resolution on July 8, 2008, purporting to require citizens to pay a \$500 fee for complaining to my Office. This substantial fee is only to be refundable if the complaint is eventually found to be valid.
- 61** Council’s resolution concerning the “complaint fee” was made in flagrant disregard of the law, and in my view is completely unenforceable. No provision in the *Municipal Act, 2001* provides for a fee to be charged before a person can make a complaint regarding a closed meeting. The whole open meeting enforcement scheme is premised on the public willingly coming forward to assist in ensuring that transparency is maintained at the municipal level.
- 62** There is no authority in the *Municipal Act, 2001*, the *Ombudsman Act* or elsewhere authorizing a municipal council to levy a fee (reversible or not) on someone bringing a complaint to the Ombudsman. In reality, such a fee is also impractical to enforce. Citizens do not have to go through their municipality to lodge a complaint with my Office. Complaints may be made to my Office directly. In addition, in accordance with the confidentiality requirements of the *Ombudsman Act*, the names of individuals complaining about closed meetings are not disclosed to the municipality that is the subject of the investigation. Complaints to my Office are strictly free of charge.
- 63** Some municipalities have chosen to implement a complaint fee, where they have appointed a closed meeting investigator other than my Office. This has been done under the general authority in the *Municipal Act, 2001* to charge a fee for services provided. As Ombudsman, I have publicly denounced this practice as it penalizes complainants for exercising their statutory rights, and may prevent legitimate complaints from being brought forward due to concerns about financial cost. Charging a fee for complaining is entirely inconsistent with the primary intent of the open meeting provisions to foster democratic legitimacy at the local level.
- 64** In the case of Emo’s council, the attempt to impose a fee is even more egregious, since unlike municipalities that have appointed private closed meeting complaint investigators, whom they typically must pay to conduct their investigations, my Office provides this service to Emo for free.

- 65** It is hard to escape the conclusion that Emo has attempted to impose a complaint fee in an effort to create a significant deterrent to its citizens from taking issue with its practices surrounding closed meetings. Given the timing of the resolution creating a complaint fee, in the midst of my investigation, it inevitably suggests that the fee was promulgated in retaliation for the complaint to my Office. Such action was undoubtedly intended to have a “chilling effect” on complainants. The message that Emo has sent to its residents, many of whom are probably unaware that the complaint fee is illegal, and that they can come to my Office directly and in confidence, is that they had better keep their complaints to themselves and save the Township the trouble of having to attempt to justify its actions.
- 66** While I can understand a municipality’s concern that its resources may be strained by having to respond to frivolous or vexatious complaints, currently there are more than adequate safeguards in place to ensure that municipal bodies are not subject to unwarranted scrutiny of their conduct. Under the *Ombudsman Act*, I have the discretionary authority not to investigate any complaint that I find to be frivolous, vexatious or not made in good faith. My Office does not enter into investigations lightly. Complaints are carefully screened, and an in-depth preliminary assessment is conducted to ensure that complaints are not frivolous or vexatious and that there are evidentiary grounds to go forward, before a formal investigation is launched.
- 67** What is particularly ironic about Emo council’s apparent indignation at being subject to investigation in this case is that my investigation has uncovered a litany of contraventions of the *Municipal Act, 2001*. While I was unable to establish that Emo actually met in secret to collaborate with Abattoir Inc. officials on April 8, 2008, there is ample evidence that the council operates within a culture of concealment and secrecy, which has led it to commit multiple breaches of the law.

Opinion

- 68** My investigation has revealed that Emo council engaged in a series of violations of the *Municipal Act, 2001* relating to its April 8, 2008 closed meeting.
- 69** Emo council first contravened the Act when it proceeded during the closed session on April 8 to discuss the Abattoir Inc. land purchase and preparation of council minutes without a proper authorizing public resolution. Consideration of the issue of the preparation of council minutes was doubly problematic, since it did not fall within any of the exceptions permitting in-camera discussion.

- 70** The original minutes of the April 8, 2008 closed session also failed to record discussion of the Abattoir Inc. land purchase and preparation of council minutes, as required by the law.
- 71** In attempting to remedy its statutory violations, Emo council contravened the *Municipal Act, 2001* again on April 22, when it resolved to go into closed session to discuss correction of the minutes, relying on an exception that did not apply.
- 72** It is clear that Emo council requires greater discipline to ensure that it complies with the open meeting law. Its current meeting practices and procedures lack the rigour necessary to ensure the integrity and transparency of its proceedings. Accordingly, I am making a number of recommendations, which I believe if implemented will both ensure that Emo’s actions are in accordance with the law and will assist Emo council in adopting best practices in order to provide the open, transparent and accessible local government to which Emo’s citizens are entitled.

Recommendations

Recommendation 1

Emo should immediately cease its practice of discussing subjects that have not been identified in an authorizing resolution in closed session, and its “check-box” approach to such resolutions, and should ensure that in future no subject is discussed in closed session unless:

- (a) It clearly comes within one of the statutory exceptions to the open meeting requirements;
- (b) There is a resolution made in open session in advance of the closed meeting, authorizing that the subject be discussed in closed session; and
- (c) The subject has been generally described with as much specificity as possible so as to maximize the information available to the public without undermining the reason why the matter is being dealt with in camera.

Recommendation 2

Emo council should amend its Procedure By-Law to provide that an agenda of all council meetings is to be posted in advance, and that items can only be added to the agenda in urgent situations, and provided that additional procedural requirements, such as consent of all council members in attendance at a meeting,

are met.

Recommendation 3

Emo council should ensure that its agendas include reference to the general description of subjects to be disclosed in closed session, and to the fact that council will resume open session, if that is the case, after closed session has ended.

Recommendation 4

Emo should also ensure that its minutes of council meetings, whether open or closed, are complete and accurately record all of the items considered during the proceedings.

Recommendation 5:

Emo council should ensure that its minutes are recorded in chronological order and that attendees at closed meetings are specifically and separately listed from attendees at open sessions.

Recommendation 6:

All members of Emo council should be vigilant in adhering to their individual obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own by-law.

Emo's \$500 Complaint Fee

- 73** I strongly urge Emo council to immediately revoke its resolution providing for a \$500 fee for complaining to my Office. Not only is this fee unenforceable in law and in practice, in my view this fee is retaliatory and generally a discredit to the citizens of Emo, who deserve better from their local government. In the meantime, citizens of Emo are free to bring their complaints about closed meetings directly to my Office, where they will be dealt with free of charge and investigated under the authority of the *Ombudsman Act*, should my Office determine that an investigation is warranted.

Response of the Council of Emo

- 74** Emo received my preliminary report on December 9, 2008, and the Mayor provided a response on behalf of the council on January 28, 2009.
- 75** Rather than address my specific investigative findings, analysis, opinion and recommendations, council chose to reply to my report in an entirely unresponsive manner. I am not persuaded by council's submissions and I have finalized my report without amendment. However, I would like to briefly address some misconceptions and misinterpretations evident in Emo's response, which is appended to this report (Appendix 2).
- 76** As the Mayor indicated, my Office does not disclose the identity of individuals who come forward with open meeting complaints. This practice preserves the integrity of the investigative process and is required by the *Ombudsman Act*, which provides that my investigations are to be carried out in private and that information received relating to a complaint cannot be disclosed except when permitted by the Act. Closed meeting investigations focus on whether a municipality has complied with the open meeting requirements and its own procedural by-law. All citizens are equally entitled to ensure that their municipal council has operated within the law and to exercise the right to complain. The identity of the individual coming forward to my Office to complain about an improperly closed meeting is not generally relevant in this context, and consonant with my obligations under the *Ombudsman Act*, this information is not disclosed. I would mention in passing that the *Ombudsman Act* in this respect is entirely consistent with the classical Ombudsman model prevalent in western democracies.
- 77** Emo council also appears to misapprehend the purpose of the preliminary investigative report. The preliminary report is provided to a municipality to enable it to review and respond to my investigative findings, analysis, opinion, and any recommendations I am considering making to address apparent concerns. The municipality is given an opportunity to comment before the report is finalized. The preliminary report is not a final report and does not have to be made available to the public under the *Ombudsman Act*. The presentation of the facts, analysis, opinions and the recommendations may all change based on the submissions received from the municipality. Given these circumstances, it is not in the public interest for a preliminary report to be disclosed publicly before the municipality's views have been taken into consideration. That is why measures have been developed to ensure that the preliminary document retains its

confidential nature. In contrast, once a final report is issued, it must be made public by the municipality in accordance with the *Ombudsman Act*.

- 78** In addition, Emo council placed considerable emphasis on the language used in describing its failure to comply with the open meeting requirements and the decision of *Farber v. Kingston (City)*, which primarily dealt with the issue of whether a by-law passed at an open council session could be quashed for illegality because of earlier non-compliance with requirements relating to open meetings. While I have referred to the *Farber* decision in this report to encourage council to adopt remedial practices regarding its closed meeting resolutions, it is otherwise distinguishable on its facts from the current circumstances. It should also be read in conjunction with the subsequent decision of the Supreme Court of Canada in *London (City) v. RSJ Holdings Inc.*², which found that the open meeting provisions of the *Municipal Act, 2001* had been breached, and that failure to comply with statutory procedural requirements relating to open meetings can provide sufficient grounds for quashing a by-law for illegality.

Report

- 79** Emo council is required to make this report public in accordance with s. 14 (2.6) of the *Ombudsman Act*.



André Marin
Ombudsman of Ontario

² [2002] S.C.J. No. 29.

Appendix 1

Resolution by Emo Council regarding fee for closed meeting complaints

EMO MUNICIPAL COUNCIL
REGULAR MEETING AGENDA

Tuesday, July 8, 2008

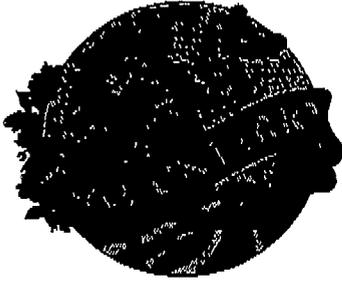
Regular Council Meeting scheduled for 7:00 p.m.

July 8, 2008 Regular Council Meeting Minutes Cont'd:

10. Judson - Fisher: BE IT RESOLVED that we hereby agree to set the following rate for complaints to the ombudsman: X
- \$500.00 - This fee will be reimbursed to the complainant if the request is valid; however, the fee will be retained if the request is found to be frivolous.
- CARRIED.
11. Sheloff - Judson: BE IT RESOLVED that we hereby authorize water shut-off on all accounts overdue four months or more scheduled on August 7, 2008.
- CARRIED.
12. Judson - Fisher: BE IT RESOLVED that we hereby agree to change the due date for 2008 final taxes to August 29, 2008.
- CARRIED.
13. Sheloff - Judson: BE IT RESOLVED the Council of the Corporation of the Township of Emo hereby agrees to set the following policy on water, sewer and garbage billings:
- "All water and sewer billings shall include garbage billings (every two months)."
- This policy shall be effective July 1, 2008.
- CARRIED.
14. Fisher - Judson: BE IT RESOLVED that we hereby forward letter from JTI Contracting (Emo) Ltd. stating they will present construction schedule and bill for bonds at the same time in the future, to the Township of Emo's municipal lawyer for their advice.
- CARRIED.
15. Sheloff - Judson: BE IT RESOLVED that the Township of Emo hereby agrees to participate in Local Government Week on October 19 -25, 2008, by participating in school activities and other municipal events relating to this special event.
- CARRIED.
16. Sheloff - Judson: BE IT RESOLVED that we hereby accept Livestock Valuer Report

Appendix 2

Letter from Mayor of Emo, January 28, 2009



The Corporation of the Township of Emo

P.O. Box 520, Emo, Ontario, P0W 1E0

Website: www.emo.ca
E-mail: township@emo.ca

Phone: 807-482-2378
Fax: 807-482-2741

SENT VIA FACSIMILE (416) 586-3506

Attention: André Marin, Ombudsman

Ombudsman Ontario
Bell Trinity Square
483 Bay Street, 10th Floor, South Tower
TORONTO, ON M5G 2C9

Dear Sir:

Re: Investigation into the April 8, 2008 Closed Meeting

I am authorized by Council to respond to your Report.

You should know that it is our view as elected representatives of the community that we consider your Report to be an exercise in excess.

The investigation was flawed and unduly delayed and your conclusions and recommendations bear little resemblance to the investigatory authority conferred on you by statute.

The danger of a functionary exceeding the authority given to him or her by the elected Legislature and purporting to exercise a condescending, supervisory

role over another elected body is the lesson most clearly provided in this whole exercise.

We provide some specific commentary on your investigation and your Report below.

THE COMPLAINT TO BE INVESTIGATED

1. The complaint is said to be that the Council met with members of Rainy River District Abattoir Inc. at an unauthorized in-camera meeting of Council on April 8, 2008.

YOUR LACK OF TRANSPARENCY

2. If there is a written complaint, we have not seen it. The identity and motivation of the complainants have not been made known to the Council.
3. The irony emanating from the secrecy espoused by your procedures in the context of this issue cannot be overstated.

4. This lack of openness and fairness included your sending us your signed Report dated November 28, 2008, which report bore your very fixed conclusions and your unfair criticisms on matters beyond the scope of the complaint.

5. Although the *Ombudsman Act* requires that Reports (plural) received by us are to be made available to the public, what you did was to reach your conclusions, sign your full Report, call it an Interim Report, and send one copy only to the Municipality with the expectation that this single copy:
 - (a) could not be marked or copied;
 - (b) must be returned to you;
 - (c) could not be publicly commented or acted upon.

To repeat, there was one copy to be shared among all Councillors, administration, witnesses and advisors.

6. Council saw this procedure as a clear and unacceptable attempt to limit its ability to effectively respond to you.

7. Given the obviousity that your zeal to condemn was such that you were beyond any persuasion, Council did not choose to comment on

this "Confidential" document, asking instead that you consider your mandate and obligation to be fair when issuing a public Report.

WAS THE COMPLAINT JUSTIFIED?

8. No, it was not. We respond without seeing any formal complaint and without having the right to face our accusers.
9. Since our accusers are secret, we cannot know their degree of sophistication or understanding of Council procedures or, indeed, what political or business interest or bias they may have.
10. The part of the complaint that provides the juiciest perception of scandal and which inspires your finely tuned arsenal of outrageous hyperbole, is that the Council met in secret with representatives of a private Company to discuss a planned project. According to this allegation, the "public" was excluded from the discussion and the favoured Company representatives were privy thereto.
11. Seems like dirty business indeed. Except that it did not happen.
12. It is patently apparent from your Report, however, that the Council's innocence of the core accusation in the complaint was a matter of bitter disappointment to you.

13. The relevant finding clearing the Council of this core accusation is buried at Paragraph 67 of the Report where you say (emphasis added)

“.... I was unable to establish that Emo actually collaborated in secret with Abattoir officials on April 8, 2008”

The reason you were unable to establish any such collaboration was that it did not occur.

14. Some of the key attributes required of a Municipal Investigator looking into issues relating to closed meetings are “independence”, “impartiality”, and “the credibility of the Investigator’s process” to quote the Act.

Regret arising from failure to discover substance to a complaint or indeed finding a complaint to be proveably unsubstantiated is hardly compatible with these attributes.

So, in the face of the fact that the evidence cleared the Council of the complaint as made, you use your skilled turn of phrase to lead those intrepid readers who have borne with you through the previous 66 lengthy paragraphs to suspect that Council actually did have this secret collaboration but that for reasons left to the readers’ imagination, the people’s Investigator has been thwarted because of the unfortunate lack of available evidence. Bad guys always get off.

WILD AND EXTRANEOUS ACCUSATIONS

15. Crowding out this reluctant conclusion of innocence, in the same Paragraph you convey to us that although you were frustrated in attempting to achieve your investigative goal, you were able to establish (emphasis added)

"a litany of contraventions of the Municipal Act, 2001";

"that the Council operates within a culture of concealment and secrecy "

"which has led it to commit multiple breaches of the law."

16. We have no doubt that the perceived right to defame provided to you under the *Ombudsman Act* emboldens you to make this kind of dramatic, wild and unfounded statement thereby causing the process to become the punishment.

ONTARIO COURT OF APPEAL

17. We find ourselves expected to answer to matters not within your mandate and, which do not involve the issue of compliance as very specifically stated in Section 239.1 of the *Municipal Act*. We will respond to some examples simply to demonstrate this fact.

18. One of the issues you raise (which was not stated in the complaint) was as to the steps to be taken under the *Act* before going into closed session, specifically as to announcing the reason for the closed session.
19. In this regard, your Report references the decision of the Ontario Court of Appeal in Farber v. Kingston City.
20. We are therefore comforted that you have had reference to the law in preparing your Report.
21. On the other hand, a recitation of selected parts of a Court decision is a dangerous and misleading thing.
22. The case you cited is right on point. In it, the Applicant had alleged that the Kingston City Council had gone into a closed meeting without following the requirements of the *Municipal Act* by providing a general description of the issue to be discussed, and further, that a vote was held at the closed meeting, (the latter being something our Council was never accused of).

The Applicant took the position before the Court that the Council had violated the *Act* and that a By-Law subsequently passed dealing with the subject of the closed meeting should be quashed as illegal.

Here is what the Court of Appeal said: (emphasis added)

"I would therefore conclude that the vote held in the closed meeting of April 5 was not authorized by S. 239(6)(b) of the *Act* and thus was of no effect. I would not, however, characterize this as the respondent (the Council) having violated the *Act*"

The Court further stated that not following the stated procedures were

"at most procedural irregularities unconnected to the real decision to pass the By-Law. They therefore do not taint its legality."

Compare that to your inflammatory accusations as quoted in Paragraph 15 above.

23. We are hard put, sir, to credit that, being sufficiently familiar with the case to cite it, you were unaware of the Court's findings as quoted above or that you inadvertently failed to include them in your Report. After all, the Court's Reasons are only five and one-half pages long.

"Impartiality"?

THE ADJOURNMENT ISSUE

24. Your adjournment issue is another matter not raised in the complaint.

25. Your Report makes much of the unproven suggestion that at the time Council went into closed session, the audience was not informed that Council would later resume in open session.

There is no requirement either in the *Municipal Act* or in our procedural By-Law that Council do so.

26. Councils often go into closed session mid way through an evening's proceedings. Inveterate Council meeting attendees should surely know that and so should someone investigating these things.
27. On the night in question, there is no suggestion that anyone indicated that Council proceedings were adjourned for the evening when Council went into closed session.
28. Persons in attendance that evening (who may or may not be the Complainants) were regular Council attendees. If they left before the meeting was formally adjourned, they presumably did so of their own volition or their own error. They were not misled.
29. Council contravened nothing.

REWRITING THE PROCEDURE BY-LAW

30. Your job was to investigate
"whether (Emo) has complied with
Section 239 or (Emo's) procedure
By-Law".

Instead of doing that, you opine as to the type of procedural By-Law you presumably would enact if you had the power to do so.

You do not have that power. You were elected by no one. You are an investigator, not a legislator.

THE NUB OF THE MATTER

31. Obviously, you intend this Report to be your Manifesto on a plethora of matters not relevant to the requirements of Emo's By-Law or the *Municipal Act* or to the allegation that Council met with the Abattoir people in closed session.
32. The nub of this whole issue, however, is as follows.
 1. The subject matter discussed at the closed session was one that is specifically authorized under Clause 239(2)(c) of the *Municipal Act*, something you fail to point out.
 2. The Abattoir people were not at the meeting. The complaint was False.
 3. No vote was taken at the closed session.
 4. A public discussion of the issue took place at the open session when Council reconvened.

5. No one in the audience was told that the public proceedings ended when Council went into closed session.
6. No final disposition of the issue has, even yet, been made. If Council does act on the subject matter, it will do so by the enactment of a By-Law passed and discussed in open session.
7. There were no violations of any legislation. Nothing illegal was done.
8. The accusation of a secret collaboration was at worst a fabrication, at best, a careless assumption, made by unknown persons with undisclosed motivations or interests. You save no criticism for these accusers.
9. Even if it had "actually" happened, which did not occur, there is nothing wrong with meeting someone in closed session when the subject matter is authorized under the *Municipal Act*.
10. Our invitation to come to Emo was spurned. Your investigation was conducted in Toronto. It was at this distance that your conclusions were reached and these conclusions were necessarily based on information related by unseen persons on all sides.

- 11. Judging credibility sight unseen flies in the face of the fundamental criterion laid down in the Act requiring investigators to have regard for:

"the credibility of the investigator's
investigative process.",

or, as ordinary people such as us Councillors would say,
common sense.

.....

The allegations made by you in these circumstances define imperfect generalizations.

Matters which Ontario's highest Court characterize as "at most procedural irregularities" are massaged by you in such a fashion as to stridently colour them in terms of illegality, breaches of law and government by stealth.

Ours is an honest and hardworking Council, made up of citizens who have taken time from their regular occupations and pursuits to further the interests of this community.

We have acted in good faith throughout and we have respect for the safeguards put in place by the Legislature relating to the affairs of municipalities in general and closed meetings in particular.

Respect for that legislation cannot be fostered and indeed is sadly diminished by the manner in which you have conducted your investigation and written your Report.

Yours very truly,



Ed Carlson
Mayor

cc: Ministry of Municipal Affairs & Housing
Premier of Ontario
Howard Hampton, MPP (Kenora-Rainy River)
Association of Municipalities of Ontario (AMO)
Northwestern Ontario Municipal Association (NOMA)
McKittricks (Barristers & Solicitors)
Ministry of Community Safety and Correctional Services