

2012-2013



Annual Report

Let the sun shine in: Best practices for closed meetings

Municipal meetings should be open, with rare exceptions, as provided for in the *Municipal Act, 2001*, s. 239. In addition, here are best practices to follow when closing a meeting:

Give adequate advance notice

Clearly identify closed sessions on meeting agendas, and include the reason for closing them. Make the agenda available to the public in advance.

Pick the right exception

Make sure the exception used to justify closing the meeting is identified, and appropriate. Interpret the exceptions to the open meeting requirements narrowly. Consider: Would the community be better served by dealing with this publicly?

Add items to the agenda sparingly

Items should only be added to closed session agendas if they are urgent – and even then, as much public notice should be given as possible.

Make a clear resolution to go into closed session

Authorize the closed session by making a resolution during open session, and make sure it includes meaningful information about the issue to be discussed behind closed doors.

Record all meetings – open or closed

Records should include where the meeting took place, when it started and ended, who was in attendance, a description of all matters discussed, and any motions or votes. Making audio or video recordings of all sessions is a best practice because it ensures an incontrovertible meeting record and inspires community trust.

Report back publicly

After a closed session, report publicly in open session on what occurred, giving as much detail as possible.

If you have a concern about a closed meeting, contact the Open Meeting Law Enforcement Team at **1-800-263-1830** or info@ombudsman.on.ca.

We can provide general information on the open meeting requirements.

To make a complaint, complete a complaint form at www.ombudsman.on.ca or call **1-800-263-1830**.

Copies of this card can be obtained by phone or email as above, or at the **Office of the Ontario Ombudsman, 483 Bay Street, 10th Floor, South Tower, Toronto, Ontario, M5G 2C9**

December 11, 2013

The Honourable Dave Levac
Speaker
Legislative Assembly
Province of Ontario
Queen's Park

Dear Mr. Speaker,

I am pleased to submit my Annual Report on the work of my Open Meeting Law Enforcement Team (OMLET) for the period of September 1, 2012 to August 31, 2013, pursuant to section 11 of the *Ombudsman Act*, so that you may table it before the Legislative Assembly.

Yours truly,



André Marin
Ombudsman

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Ombudsman's Message

Forecast for Patchy Sunshine

PHOTO BY BRIAN WILLER



I am pleased to present my office's second annual report on the work of our **Open Meeting Law Enforcement Team (OMLET)**, which is solely devoted to upholding Ontario's municipal open meeting law, also known as the **Sunshine Law**.

While the bulk of our work under the *Ombudsman Act* for 38 years has involved resolving and investigating complaints about the provincial government – some **20,000** cases in the past year alone – our Sunshine Law cases have surged since we were given this additional responsibility in 2008.

That year, changes to the *Municipal Act, 2001* established a new system that allows the public to complain about closed meetings by municipal council members, and have those complaints investigated.

The Ombudsman's Office is the default investigator for these complaints – except in municipalities that have chosen to appoint someone else. As of the writing of this report, we are the investigator for **191** municipalities, but this report is aimed at all, no matter who their investigator is, in the interest of consistency. Sadly, consistency in such cases has eroded over the past five years.



October 30, 2012: Ombudsman André Marin releases his first OMLET Annual Report, featuring investigations of closed municipal meetings conducted by the Open Meeting Law Enforcement Team.

I created a separate annual report for OMLET cases last year for three important reasons:

1. There is strong and growing public interest in government transparency at the municipal level. The number of complaints in this report is **more than double** that of last year.
2. There is pervasive, persistent confusion about the open meeting rules and the investigation regime established by the province in 2008.
3. There is a serious need for education and discussion on this topic among all those concerned – officials and politicians at both the provincial and municipal levels, and the public who elect them and pay their salaries.

The first report, like this one, was sent to every municipality in the province last fall. It generated significant interest from council members, the public and the media. In the period since, we have seen public complaints and engagement rise steadily, to unprecedented levels.

Is this a sign of healthy democracy or disturbing secrecy at the local level? I believe it is both.

The intense public spotlight on open meetings in Ontario this past year threw the gaps and inconsistencies in the system into stark relief. The high and low points were etched for all to see.



We witnessed backdoor, backroom discussions and full-frontal attacks on this Office. We heard histrionics from some politicians and saw others embrace historic advancements in transparency technology. We were invited into some municipalities and “fired” by a few others where councils objected to our findings.

(I should note that “fired” is a media misnomer. In truth, we do this work at no cost to the municipality because we are the designated default investigator by law; we are never “hired” and thus cannot be “fired.” What really happens in these cases is that the municipal council, often after I have criticized its members’ conduct, chooses to pay someone else to replace the service we provide for free.)

These contrasts stem not just from the growing pains of the new complaint system, but from deep flaws in the *Municipal Act* that have been there from the start. I have raised these concerns with the Premier and hope they will be addressed so all Ontarians can see the open meetings law enforced consistently and properly.

By the Numbers

In the period covered by this report – September 1, 2012 to August 31, 2013 – we received **293** complaints about closed meetings. Of those, **246** fell within our jurisdiction, and were related to **59** different municipal councils, committees and local boards.

Sometimes there were multiple complaints about single meetings; sometimes a single complaint related to multiple meetings. Sometimes it turned out there was no meeting.

In all, the team reviewed **96** meetings. Of those, we determined **19** were illegal – that is, they violated the open meeting requirements of the *Municipal Act*, or Sunshine Law.

In other words, **20%** of the meetings we reviewed were illegal – or almost one in five. This is hardly good news for Ontarians concerned about transparency.

Of course, in the majority of cases, we found the meetings were NOT illegal; they followed the requirements of the *Municipal Act*. However, we did find **31** procedural violations – that is, municipalities violating procedural requirements in the Act or their own procedural by-laws (sometimes several times in one meeting). We also made **63** recommendations for best practices that municipalities should follow in the wake of our reviews – again, sometimes multiple recommendations were made in a single case. We have compiled a list of best practices on the front cover of this report, which we have also produced as a pocket-sized card for all municipal council members and clerks across the province.

What do these numbers mean? Certainly they tell us that Ontarians are becoming more aware of their right to complain, and more likely to blow the whistle when a closed meeting doesn’t pass the smell test. But are councils becoming more secretive? Yes – and no.

Some municipalities have been recidivist offenders. Repeated investigations by our office and the resulting media attention have understandably ramped up public engagement and complaints to our Office. In **London, Ont.**, a gathering of council members at a local restaurant in February 2013 just before a key budget vote generated **60** complaints in a matter of days. The public – and of course, the press – noted the similarities between this incident and one exactly a year earlier. In the 2012 case, I didn’t find enough evidence to call the meeting illegal; in the 2013 one, I found a clear violation. In both cases, I pointed out that these are exactly the type of meetings that cause citizens to suspect that councils are subverting the Sunshine Law.

Some municipalities have been keen on transparency from the start, while others have taken the lessons of our earlier investigations seriously and reformed their initially secretive ways, becoming “poster children” for open meetings. These municipalities may still be the subject of complaints to our Office, but, as a result of their officials’ careful observation of the rules and doing what is required – or more – to keep the public informed when they close meetings, these complaints can be resolved expeditiously. I commend these municipalities for helping light the way for others.



Front-page articles from Sudbury and London, Ont. demonstrate the high level of interest in closed meeting complaints in those communities.

Of course, I can only speak about the municipalities I oversee. The story is no doubt just as varied for the rest, but no one knows for sure. There is no comprehensive public record that can be easily accessed to compare and contrast the work of the various investigators in this patchwork system. Given this fundamental flaw, these numbers are enlightening, but they only shed light on about half the municipalities in Ontario.



Are you surprised by the Ombudsman's findings that some municipalities are still "shockingly secretive"?

96% NO – 4% YES

Toronto Sun online poll, October 31, 2012

There Oughta Be a Law

Now that it is nearly six years old, the gaps and tears in the fraying patchwork that makes up our closed meeting complaints regime have become obvious. But they were visible long before it came into effect.

In November 2006, I was invited to make a submission to the committee studying the amendments that would ultimately create this system. I said:

While purporting to introduce a degree of accountability into municipal administration, I believe these measures, as currently drafted, are fatally flawed and will result in an unfair, inequitable and unsustainable patchwork of procedures throughout Ontario.

There is a real danger that ... Ontario will be left with a system of municipal oversight plagued by inequity, inconsistency and ineffectiveness.¹

¹ Submissions to the Standing Committee on General Government respecting Bill 130, <http://www.ombudsman.on.ca/Resources/Speeches/2006/Submissions-to-the-Standing-Committee-on-General-G.aspx>

I take no satisfaction in noting the prescience of that statement. I only regret that my warning wasn't forceful enough at the time to be heeded.

Now, however, with more than five years of hands-on experience with the complaints system, I feel it is my duty to report back to the government on how this situation can and should be improved.

In **February 2013**, I met with new Premier Kathleen Wynne to propose four significant changes to the *Municipal Act*, to ensure it lives up to its promise of providing consistent public accountability of local governments across Ontario:

1. End “oversight shopping”
2. Penalize lawbreakers
3. Record all meetings
4. Invalidate illegal proceedings

The Premier thanked me for this input and indicated she would discuss these ideas with the Minister of Municipal Affairs and Housing. I have also made these suggestions public in various forms – including Twitter (see graphic at right), newspaper pieces and at municipal council meetings – and received strong public response. This report provides the ideal place to recap these arguments.

1. End “Oversight Shopping”

There is an inherent conflict in a system that enables municipalities to reject and replace an investigator if they are unhappy with his or her methods or findings. This is precisely what happened with the **City of Greater Sudbury** this past year.

In last year's OMLET report, I noted that in a case concluded in August 2012, Sudbury council was the least co-operative body we had ever investigated, municipal or provincial. Although we did not find a violation of the Sunshine Law in that case, I warned the council that, having chosen my Office as its investigator, it could not opt out of its obligation to co-operate with my investigations. In December 2012, I was invited to Sudbury to speak to this council in an effort to clear the air about my Office's procedures and investigations.

Some council members did not accept my difference of opinion with the city's solicitor and accused me of being “rude” at that meeting (I disagree, but the video of the evening is on our YouTube channel, so viewers may decide for themselves²). Two months later, councillors arranged – through a series of emails – to stage a last-minute vote to “fire” me as Sudbury's investigator. Although the vote passed, a local taxpayers' group reportedly gathered more than **9,000** signatures in protest against the decision.



² <http://www.youtube.com/watch?v=TQWOHEU2fMU>



December 11, 2012: Ombudsman André Marin speaks at a meeting of council for the City of Greater Sudbury.

Similarly, even as my latest investigation of an illegal backroom gathering of several **City of London** council members was under way, one council member publicly stated his intent to “fire” my Office once my report was issued.

And in August 2013, immediately after our office completed a report there, council for the **Township of Tiny** also informed us it would be replacing us – even though in that case we did not find a violation of the law; we only recommended best practices. The **Town of Huntsville** and **Municipality of Shuniah** also moved to other investigators in the past year.

“He’s not there to treat these guys with kid gloves. He’s there to say the facts, and he’s put the facts out there. Whether you agree with his methods or not is another story, but he’s definitely done his job.”

Dan Melanson, president, Sudbury Taxpayers Association, quoted in *Sudbury Star*, February 19, 2013

Media fanfare notwithstanding, such “firings” have little impact on our office’s workload, the bulk of which involves the oversight of 500-plus provincial government organizations. They are also more than balanced by the municipalities that have gone the other way – replacing their paid investigators with the services of my Office (this past year, for instance, the townships of **North Frontenac** and **Melancthon** and the municipality of **Pelee Island** all switched to us as their investigator).

However, this blatant oversight “shopping” is detrimental to the spirit and promise of the Sunshine Law, which is that all Ontarians deserve to have their local representatives held to uniform standards of openness.

Instead, we have a garbled system that looks like a free-for-all – or rather, the opposite, since only the Ombudsman’s services are free. All others charge retainers and hourly fees to the councils that hire them. Some municipalities even charge fees to complainants, too.³

Anyone can be a closed meeting investigator, and several municipalities have hired former municipal officials to do it. According to a February 2013 report, some **134** use the company Amberley Gavel, contracted by Local Authority Services (LAS). LAS is a wholly owned subsidiary of the Association of Municipalities of Ontario, an organization that promotes municipal interests in the province.

³ Local Authority Services investigators charge \$330 a year for a retainer and \$225/hour for an investigation; average investigation time is 18 hours, or \$4,000 cost. The City of Brampton is one example of a municipality that charges fees to complainants; the fee for filing a closed meeting complaint is \$250.

“

Six of the eight board members [of LAS] are municipal officials... The other five are senior managers at other municipalities... Seven of the 10 investigators are former municipal politicians and managers. Another is a lawyer who acts exclusively for municipalities and municipal associations. How willing are all of these people to side with the upstart constituents who rock the boat? ”

Anne Jarvis, *Windsor Star*, April 30, 2013

There are almost as many interpretations of the law and processes as there are investigators, and there is no central public repository for all decisions; no database that can enlighten curious citizens on where their hometown sits on the transparency scale.

If open meetings are the law, then interpretation and enforcement of that law should not vary according to where you live and the predilections and peevs of your local politicians – or whoever they appoint to conduct their investigations.

There should be one investigator, not a patchwork. To be clear, I am not saying it should be the Ombudsman’s Office, just as I never requested this responsibility before it was given to us in 2008. The province is free to assign it elsewhere, but it should be to a single, credible, independent investigative body.



2. Penalize Lawbreakers

Neither I nor any of the hired investigators for closed meetings has any power to enforce the recommendations we make to municipalities. Aside from having to make our reports public, there are no consequences in the *Municipal Act* for municipal officials who meet in secret and violate the law.

This is in contrast to many other jurisdictions that have had Sunshine Laws for decades, including Arizona, Iowa, Illinois and Michigan, all of which impose fines on officials who hold illegal closed meetings. In Michigan, repeat offenders face escalating fines of up to **\$2,000** – and a possible year of jail time.

The only consequence in Ontario's law is a non-binding report from the investigator – who can be handpicked by the municipality. With seemingly so little at stake, it's not surprising that a few councils continue to flout the law. I feel strongly that the Act should be amended to ensure they face appropriate penalties, and I am far from alone in this view. The Mayor of **Sarnia**, Mike Bradley, has been a longtime proponent of adding consequences to the Sunshine Law, and he reiterated the case this past spring in a letter to the Premier.



Despite the fears of municipal leaders when the [Sunshine] Law was implemented in 2008, the law and investigations have worked in the public interest; however, the lack of penalties for elected people who violate the Act is a serious gap in the legislation.

I would like to add my voice to support the Ontario Ombudsman, Mr. André Marin, who has been calling for appropriate penalties to be in place beyond 'embarrassment' for municipal councillors who violate the open meeting provisions of the Act. I would urge you to have a thorough review of the legislation as it relates to penalties and bring about the implementation of safeguards, modeled on other jurisdictions, that can be enacted at no cost to the province and which would greatly serve the public interest across Ontario. ”

Letter from Sarnia Mayor Mike Bradley to Premier Kathleen Wynne, March 27, 2013

3. Record All Meetings

Our neighbours to the south are also outdoing us in record-keeping. In states such as Illinois, Iowa and Nevada, all public bodies must keep verbatim audio or video records of meetings, whether they are open or closed.

Meanwhile in Ontario, our investigators routinely find minutes of municipal meetings are incomplete and conflict with the recollections of those who were present – some of whom still seem to believe that a closed meeting means they shouldn't keep any record at all. As for making digital recordings, although a few forward-thinking councils have adopted this sensible practice, most have balked, some citing fears of being sued.

The *Municipal Act* requires that records be kept of all meetings, including closed ones. Electronic recordings – audio or video – provide the most faithful, thorough record possible and serve the best interests of the public. Not only do they ensure that a complete and accurate record of the meeting is kept, they allow for expeditious investigation of closed meeting complaints.

I am happy to report that the councils of **Tiny, Madawaska Valley, Midland and Lambton Shores** have joined the **City of Oshawa** in keeping electronic records. We were able to complete investigations in the latter two municipalities quickly (in less than two months), thanks to this practice.

In this report last year, I recommended all municipalities make such recordings of all meetings. Recently, the **City of Hamilton** considered adopting the practice of recording its closed meetings. However, council rejected the idea, citing concerns that councillors could be sued for statements made behind closed doors. (In fact, they are legally protected from claims of libel if their comments are made in good faith.)

I remain hopeful that more municipalities will embrace technology to record their meetings in the year ahead – and that ultimately it will become law.



Marin's suggestion that in-camera meetings be recorded is valid. It would make investigations easier, and might discourage politicians from straying into territory in closed meetings that should be held in public. ”

Brian MacLeod, *Sudbury Star*, November 1, 2012

4. Invalidate Illegal Proceedings

Along with the need to have personal consequences for those who break the open meeting rules, I believe there should be substantive consequences as well. It means very little to deem a meeting illegal if the city business that was conducted in the meeting is unaffected.

As part of giving true teeth to the Sunshine Law, it should be amended so that the outcome of illegal meetings is invalidated, and the offending municipal body has to return to square one and do its business publicly.



This should be a no-brainer – municipal councils are required by law to work in an open and above-board way. But too many remain out of touch, still conducting the people's business behind closed doors, where the people can't see....

To end the current patchwork system of accountability, on whether meetings are being properly held in secret, Queen's Park should consider making all Ontario municipalities subject to Marin's oversight on this narrow question. That would bring consistency...

The introduction of some penalties would surely help politicians take required transparency more seriously... And municipalities should be required to videotape, or at least make an audiotape of, all closed-door meetings...

With some modest improvements, the system can be made to work better. A provincial government truly committed to public accountability would make these changes happen. ”

Toronto Star editorial, November 2, 2012

Confusion City

Between the patchwork enforcement and the sheer number of municipalities across this vast province, there is still a great deal of confusion among municipal officials about the open meeting rules, even though they are relatively simple, contained in one concise section of the *Municipal Act*.

Many municipalities, often with the best of intentions, make procedural errors when they close meetings, or cite the wrong reasons for closing them (these issues are detailed in the next section of this report, **Themes in Cases**).

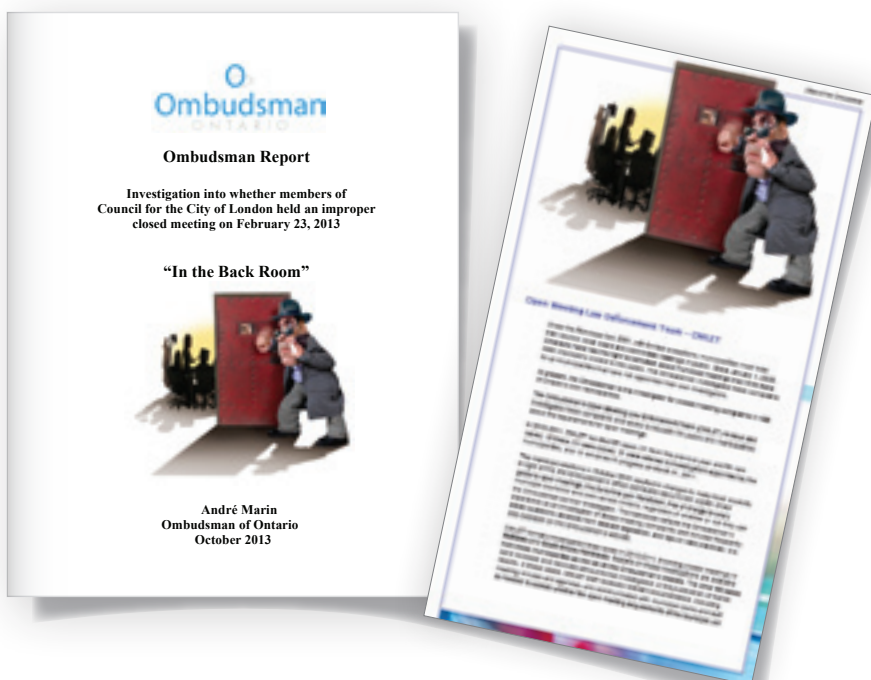
But the most basic source of confusion remains the definition of a “meeting,” particularly if it happens outside of the normal meeting room, without the usual official trappings.

Back Rooms and Emails

There are still some in this province who think the Sunshine Law is only designed to apply to meetings of council, local board or committee members in their normal chambers, with agendas, minutes and the like. By that logic, any other attempt by these officials to do business in other situations would be exempt.

But the Ontario public thinks differently, judging by the groundswell of complaints we saw this year in **London, Sudbury** and other places where suspicions were raised that councillors were finding unorthodox ways to gather and conduct business – including literally by the back door.

In London, a purportedly impromptu gathering in a back room of a restaurant (that was actually the result of a flurry of phone calls and backdoor entrances by some participants) resulted in a quorum of several city committees on the Saturday before a key budget vote. In Sudbury, councillors unhappy with being investigated by my Office hatched a plan via email to replace me via a surprise “emergency” vote. Although I did not investigate the latter incident (having been “fired” in the vote in question), from what I understand through media reports and the LAS account of the case, the series of emails between councillors could have been deemed an illegal meeting. The paid LAS investigators, however, let them off the hook.



The cover of the Ombudsman’s report *In the Back Room* features an illustration first used in our 2010-2011 Annual Report.



October 22, 2013: Ombudsman André Marin holds a press conference in London, Ont. to discuss his report, *In the Back Room*. Video of the press conference can also be found on our YouTube channel, www.youtube.com/ontarioombudsman.

This is not a new issue. In the very first year the new complaints system came into effect – 2008 – I not only investigated and reported on informal gatherings and “serial” meetings (by phone rather than email⁴), I developed a definition to determine when a “meeting” is subject to the *Municipal Act* rules.

As it happened, that report also involved Sudbury council. Here is how it defined a meeting, a definition we have applied ever since:

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 authority.

But to this day, debate still rages about whether or not councillors are allowed to talk to one another if they meet on the street, and critics howl that I am somehow forbidding local politicians from socializing or seeking one another’s views on issues.

Such hyperbole is easily debunked by years of decisions by this Office in such cases, most of which have concluded that informal gatherings of councillors, while sometimes ill-advised, were within the law. This past year, in a case in **Leamington**, we found that emails from councillors to constituents did not advance council business and did not violate the *Municipal Act*. Likewise, informal gatherings between councillors and residents in **Tiny** in January 2013 were permissible. Still, the complaints generated by these incidents served to remind councillors to be mindful of the high expectations of their electors.

No doubt there are those who yearn to return to an era of old-school backroom politics, but in the modern age of transparency and accountability, the citizens demand better. That is why we have a Sunshine Law, as flawed as it may be.

Debate on this topic is healthy and welcome. But academic absurdities and political posturing cannot be allowed to detract from the intent and spirit of the law, which is to ensure that local governments conduct business in public.

The intent of the law is not to prevent councillors from talking to one another. It is to prevent them from subverting the rules and conducting clandestine business.

I have always said councillors are free to socialize and gather informally without fear. What they must not do is undermine the law by using informal gatherings – or email, or phone calls or any other ruse – to hide business from the public.

⁴ The case involved a “meeting” conducted via serial phone calls in the Town of Nipissing. Read the report here: <http://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>

How Does it Work Again?

The Office of the Ontario Ombudsman has been here since 1975, and the principles on which it operates stem from those of the world's first ombudsman, established in Sweden more than 200 years ago. Ombudsmen safeguard the identities of complainants, conduct investigations in strict confidence and resolve cases wherever possible. We have strong powers of investigation but no power to enforce our recommendations, and we rely on moral suasion to effect change.

Still, there are many, particularly in the municipal sphere, who remain unfamiliar with how we work. Since 2008, we have done our best to educate municipal officials about our process.

Last year, there was considerable confusion about the role of lawyers in our investigations. Our position is that witnesses in Ombudsman investigations do not require lawyers; they are in no legal jeopardy. Indeed, in our thousands of provincial cases, this is widely understood and not an issue. That said, in some OMLET cases we have allowed those who felt strongly that they needed legal representation to have a lawyer present. But we cannot permit a city solicitor to represent several council members in an investigation for obvious reasons: The solicitor's job is to represent the city's interest; he or she cannot also represent multiple councillors.

By contrast, in the LAS investigation on the **Sudbury** councillors' meetings by email, the hired investigators saw no problem with letting the city solicitor represent all witnesses upon request. Once again, this inconsistency in practice only serves to fuel confusion.

Through this report, our website and the various guides we have produced (see the **Communications and Outreach** section for more), my Office has dedicated resources to furthering awareness of our process and the open meeting principles. The infographic on page 17 shows the basic process by which OMLET staff assess and resolve complaints, launch an investigation if warranted, and, where there is a report, send a confidential draft version for a response before it is finalized and published.

Going Public

The Sunshine Law can only benefit Ontarians if they are aware of it. This is why the news media and other tools like social media are so important – they serve as the windows by which people are enlightened about the actions of their local government.

Just as complaints to OMLET have increased to record numbers in the past year, so have related calls and stories from local media. I have also noticed remarkable engagement on Twitter (and other social media platforms) by local citizens, journalists and politicians, all of which helps raise awareness of the importance of open meetings. Bloggers and “citizen journalists” in many communities have also done commendable work in holding their elected officials to account, acting as watchdogs in their own way.

Twitter – where all messages sent on the @Ont_Ombudsman account are written by me, unless otherwise noted – has been particularly useful for keeping communities informed and engaging in discussion about OMLET cases. While I continue to hear criticism about my use of Twitter from some who feel it is somehow frivolous or disrespectful, this has been far outweighed by the positive engagement I have seen from those who recognize social media as useful tools to promote open government.

In the face of a flawed law, a patchwork enforcement system and petulant politicians, the grassroots enthusiasm for open meetings that shines through local media and Twitter on a daily basis is a bright spot that keeps me optimistic for the Sunshine Law's future.

OMLET's Recipe: How Complaints are Handled

Through the Open Meeting Law Enforcement Team (OMLET), the Ontario Ombudsman investigates closed municipal meetings in Ontario under the *Municipal Act*. Here are the steps we follow in municipalities where the Ombudsman is the investigator.

OMBUDSMAN RECEIVES CLOSED MEETING COMPLAINT

REVIEW



OMLET staff obtain meeting documents and gather information relevant to the complaint. A formal investigation could be launched if additional information is required.

FINDINGS



OMLET staff advise municipal officials of their findings and give them a chance to respond.

LETTER



OMLET staff provide a letter to municipal officials with findings, including any illegal closed meetings, procedural violations and/or recommendations for best practices.

PUBLIC



The municipality is expected to make the letter public as soon as possible. It is then posted on the Ombudsman's website. Complainants are advised of the outcome.

MORE THAN HALF
of all complaints
are resolved
within 60 days.

IF A FORMAL INVESTIGATION IS LAUNCHED

NOTICE



The complainant and municipality are notified of the investigation.

INVESTIGATION



OMLET staff gather evidence as warranted, including reviewing more documents and interviewing witnesses (by phone, Skype or in person).

REPORT



The Ombudsman reports on his findings and recommendations. Municipal officials are given a chance to respond to a confidential draft of the report.

PUBLIC



The municipality is expected to make the report public as soon as possible. The Ombudsman then makes the report available on his website, and might comment publicly on the case. Complainants are also informed of the outcome.

Year in Review

Themes in Cases

As of August 31, 2013, the Office of the Ombudsman was the closed meeting investigator for **191** of Ontario's 444 municipalities.

This report covers the period from **September 1, 2012 to August 31, 2013**. In that time, the Open Meeting Law Enforcement Team (OMLET) handled **246** cases involving closed meetings in municipalities where the Ombudsman's Office is the investigator. At times, OMLET was assisted by staff from the Special Ombudsman Response Team, which handles major systemic investigations. In all, we reviewed **96** meetings by **59** municipal bodies – **53** municipal councils, **five** local boards and **one** joint committee.

The chart on page **42** lists the outcomes of all these cases, including where we found **illegal meetings** and/or **procedural violations**, and/or recommended **best practices**. We define these terms as follows:

Illegal meeting:

1. A closed formal or informal gathering of a municipal council, committee or local board, where members come together for the purpose of exercising the power or authority of the council, committee or local board, or for the purpose of doing the groundwork necessary to exercise that power or authority; AND
2. Notice to the public isn't provided, AND/OR the subject matter being discussed is not permitted under an exception listed under section 239(2), 239(3) or 239(3.1) of the *Municipal Act*.

Procedural violation:

When a council, committee or local board violates any of the procedural requirements for closing a meeting, as defined under various provisions of the *Municipal Act*, including:

- procedural by-law is improper or lacking;
- improper exception cited to close the meeting;
- no resolution made to close the meeting, or resolution fails to include the general nature of the topic to be considered;
- improper voting in closed session on a matter of substance;
- advance notice to the public is not given or is insufficient;
- records are not kept, or are improper;
- the applicable procedural by-law is not followed;
- the open meeting requirements generally are not followed.

Best practice:

A measure that our Office recommends to municipalities to improve overall transparency and accountability in their meeting practices, even if they have not violated the *Municipal Act* per se. We typically recommend that they:

- improve the notice to the public, agenda contents or resolution, to provide more detail of the items to be discussed in the closed session;
- avoid last minute additions to the agenda;
- keep better records, including by making and properly storing audio and video recordings of closed sessions;
- report back in open session.



The issue of local politicians meeting over meals was a key theme in our inaugural OMLET Annual Report last year.

The full reports and/or closing letters from all of these cases are available on our website, www.ombudsman.on.ca (see the **Communications and Outreach** section of this report for more information). Several cases are also highlighted in the “**Case Summaries**” section of this report.

When we see the same issues cropping up repeatedly in several municipalities, it signals a need for clarification of the law or better awareness of best practices. For this reason, we have summarized the most common problems presented in the cases we reviewed this year.

Making (Up) an Exception

The *Municipal Act, 2001* requires all meetings of councils, committees and local boards to hold open meetings. There are nine narrow, limited exceptions to this, listed in sections 239(2), 239(3) and 239(3.1).

Municipal officials **may** consider the following subjects behind closed doors (although closing the meeting is not mandatory):

1. The security of the property of the municipality or local board;
2. Personal matters about an identifiable individual, including municipal or local board employees;
3. A proposed or pending acquisition or disposition of land by the municipality or local board;
4. Labour relations or employee negotiations;
5. Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
6. Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
7. A matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act; and

8. Education and training of the members of the council, local board or committee (as long as no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making).

And they **must** consider the following topic in a closed meeting:

9. A request under the *Municipal Freedom of Information and Protection of Privacy Act*.

The Ombudsman has frequently pointed out that the first eight exceptions should be interpreted narrowly - when in doubt, a meeting should be open, not closed. However, in our experience, the most common error municipal officials make is in misapplying these exceptions, usually by citing the wrong ones or interpreting them too broadly.

“Litigation” and “Solicitor-Client Privilege”

With increasing frequency, municipalities are citing the “litigation or potential litigation” or “solicitor-client privilege” exceptions to close meetings that would otherwise be open to the public. The first is intended for when municipalities are engaged in or threatened with litigation proceedings, including matters before administrative tribunals such as the Ontario Municipal Board. The second allows the municipality to seek and obtain confidential legal advice.

These are the most misunderstood exceptions to the Sunshine Law.

For example, we found that the townships of **Tiny** and **Ryerson** and the **Town of Gravenhurst** all used the “potential litigation” exception to close meetings, even though there was actually no litigation pending or threatened against any of them. The **Niagara District Airport Commission (NDAC)** and the **Township of Adelaide Metcalfe** both improperly cited the “solicitor-client privilege exception” to close meetings, even though the NDAC was only discussing a request for proposals, and Adelaide Metcalfe had already voluntarily waived solicitor-client privilege by disclosing the information in question to third parties (other than staff or council members) present at the meeting.

Some municipalities have learned from past experience, however. In the **Town of Pelham**, our review found that the “solicitor-client privilege” exception was appropriately used for *in camera* discussions about a by-law where a lawyer provided advice and answered questions. Similarly, the **Township of Woolwich** correctly used the “solicitor-client privilege” and “litigation” exceptions to close a meeting where a solicitor provided an update and answered questions on the status of a mediation before the Ontario Municipal Board. The **City of Hamilton** also appropriately used this exception to have *in camera* discussions with its solicitor about modifications to a contract.

“Personal Matters About an Identifiable Individual”

This is the most misused exception, likely because the Act gives no definition of “personal matters” that should be discussed behind closed doors. We frequently receive complaints about closed meetings where there was no factual basis for using this exception.

As we advised the **City of Elliot Lake**, the **Town of Hearst** and the municipalities of **Lambton Shores** and **Powassan**, in our interpretation of the “personal matters” exception we consider definitions from other legal sources as to what constitutes “personal information” that should remain private. The Information and Privacy Commissioner of Ontario has said, for example, that “personal information” must be “about the individual in a personal capacity” and not in a “professional, official or business capacity.”



November 26, 2012: Members of the Open Meeting Law Enforcement Team speak to Elliot Lake city council.

Naturally, many topics discussed at meetings involve identifiable individuals; this does not mean meetings have to be closed whenever names are mentioned. Nor does it apply when the discussion is about an individual's professional capacity, as was the case in a **February 2013** meeting in the **Town of Fort Erie**, where a meeting was improperly closed to discuss the Mayor's conduct in the course of his official duties.

As we noted in the **Powassan** case, when closing meetings, municipal officials must also be careful to choose the appropriate exception to ensure that the most accurate information is provided to the public in advance.

Keeping the Public in the Dark

Even when a meeting is closed, the Sunshine Law requires the public to be given at least some information about it. The most common procedural violations we uncover in our investigations involve the notification given about closed meetings – or lack thereof – as well as failure to keep proper records of the closed meetings themselves.

Lack of Information

The *Municipal Act* requires all municipal councils, local boards and committees to keep records “without note or comment” of all resolutions, decisions and other proceedings, whether the meetings are open or closed. It also requires that some general information be given – beyond the exception cited – about the matter to be discussed in closed session. But in our reviews of meetings in the townships of **Tiny** and **Woolwich** and the **City of Greater Sudbury**, only the exception was cited. Public confusion, speculation and complaints can be avoided if municipal officials pass comprehensive resolutions when going into closed session, providing the public with as much information as possible.

We also advised many municipalities to report publicly in open session – even just in a general way – about what transpired in closed session, in the interest of transparency (and averting complaints). In cases in **Tiny**, **Sudbury**, **Gravenhurst**, **Adelaide Metcalfe**, **Larder Lake** and **Prescott**, we noted that “reporting back” could simply consist of a general discussion of the subjects considered in the closed session and any decisions or resolutions made, but that as much information as possible should be provided to the public.

Voting

Voting in closed meetings is not allowed, unless the vote is purely for procedural matters or for giving directions to officers, employees, agents and consultants. The Act makes this clear, but some municipalities persist in this practice. We found illegal voting in closed meetings in cases involving **Sudbury** and **Lambton Shores** councils and the **Niagara District Airport Commission**. Sudbury council voted *in camera* to direct council members to enter into contract negotiations – illegal because councillors are not municipal staff. An *in camera* vote by Lambton Shores council to appoint council members to a transition team was against the law for the same reason.

Many municipal officials are under the mistaken impression that an informal “show of hands” in a closed meeting is not a “vote” for the purposes of the Act. We have repeatedly advised municipalities that reaching a consensus on a matter in closed session, in whatever manner, constitutes a vote and is not allowed. In our latest case in **Amherstburg**, for example, we again cautioned council (as we did in 2011) to avoid holding votes by a “show of hands” in closed session, prior to voting officially in open session.

Broken Records

Written records of all meetings, whether they are open or closed, are required under s. 239(7) of the Act. We reminded councils in **Larder Lake** and **Prescott** of this in the past year, and we advised the **City of St. Catharines** for the second time that a clear and accurate record of closed meetings is an important safeguard to ensure that only permissible topics are considered in the absence of the public. Our investigation into a series of closed meetings in **Adelaide Metcalfe** also concluded with detailed recommendations on the keeping of better written records of closed meetings.

The following items should typically be included in a closed meeting record:

- Where the meeting took place;
- When the meeting started and adjourned;
- Who chaired the meeting;
- Who was in attendance, including the identity of the clerk or other designated official responsible for recording the meeting;
- Whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- A detailed description of the substantive and procedural matters discussed, including specific reference to any documents considered;
- Any motions, including who introduced the motion and seconders; and
- All votes taken, and all directions given.

Sometimes there is confusion because the Act states that meetings must be recorded “without note or comment.” This means that no subjective comments should be added by the person responsible for the record. Some officials interpret this as a reason not to keep fulsome notes of closed meetings. But it is clearly not meant to preclude documentation of the subjects discussed; in fact, these should be recorded in a manner consistent with the Sunshine Law’s intent – to enhance the openness, transparency and accountability of municipal government.

For this reason, the Ombudsman recommends that municipalities keep not just notes but full audio or video records of all meetings, open and closed.

““ Every one of our meetings is recorded. Closed meetings are recorded. We don’t meet as councillors in groups. We keep the rules in place [at social functions]. I’m very proud of the fact that we’re not one of the cities listed [in the Ombudsman’s report]. I think what’s happened is that every member of council is more in tune with the rules of understanding what’s supposed to happen and when it’s an open and closed meeting and how it works. ””

Oshawa Mayor John Henry, quoted in *Oshawa Express*, November 14, 2012

““ I’m confused by the lack of courage in dealing with this issue [of audio recording closed meetings]. It’s unfortunate that we’re stumbling over perception rather than the reality of the issue and acting in a manner that is squeamish as opposed to courageous. ””

Hamilton Councillor Sam Merulla, quoted in *Hamilton Spectator*, July 17, 2013

What is a Committee?

Although local boards and their committees are subject to the same open meeting rules as councils, the definition of “committee” in the *Municipal Act* is sometimes a source of confusion. It states that a “committee” is “any advisory or other committee, sub-committee or similar entity of which at least 50% of the members are also members of one or more councils or local boards.”

This year, we reviewed complaints that committees from both the **City of Sarnia** and **Town of Midland** were meeting in closed session, in violation of the *Municipal Act*. But in both cases, we found that the committees in question did not fit the Act’s definition of “committee.” In the Sarnia case, involving committee meetings between June and September 2012, there was an insufficient number of council or board members on the committee; in Midland, the regular briefing sessions held with staff, approximately a week before each General Committee meeting, were only to clarify the contents of staff reports, and were purely administrative in nature. As we wrote in our findings on the Midland case, our position is that when municipal politicians interact with administrators to engage in administration, they are not exercising power in a manner subject to the Sunshine Law.



October 15, 2012: Members of the Open Meeting Law Enforcement Team speak to Midland town council.

“ I still think more is being discussed [in camera] than should be. There are very few things that need to be held in-camera. ”
– Kitchener Councillor John Gazzola

“ We haven’t had any [complaints]. We’re pretty scrupulous – to the point of frustration sometimes. One of the first questions people will ask at the closed meeting is ‘why is this on the closed agenda?’ ”
– Waterloo Region Chair Ken Seiling

“ We’re very particular about our closed meetings and anything we do is verified by the legal department and the clerks. I feel we’re in compliance with closed meetings. ”
– Cambridge Mayor Doug Craig

“ I think us not being in the [Ombudsman’s] report shows that we are doing a really good job. ”
– Acting Kitchener Mayor Bill Ioannidis

“Local Municipalities pass province’s transparency test,” *Waterloo Record*, November 1, 2012

Communications and Outreach

In the spirit of the Sunshine Law's principles of transparency, openness and accountability of local government, the Ombudsman believes his role should involve more than just enforcement of the law. Our Office also works to raise awareness of the rules and the importance of open meetings amongst the public and local officials, through in-person interaction, social media, our website and print publications.

In the 2012-2013 period covered by this report, the Ombudsman and OMLET staff were invited to make presentations about our investigations at council meetings in **Sudbury**, **Midland** and **Elliot Lake**. Video of these presentations is available on our website and **YouTube** for anyone interested in how we work (www.youtube.com/OntarioOmbudsman).



OMLET has produced various publications to raise awareness of the open meeting rules among municipal representatives and the public, including the *Sunshine Law Handbook* (available online) and “tip cards” on best practices and closing meetings.



Videos of OMLET presentations on the Sunshine Law are available on our YouTube channel.

As well, the Ombudsman answered hundreds of questions and kept interested followers updated about open meetings and our investigations on **Facebook** and **Twitter** (often using the hashtag #OpenMtgs). The release of our first OMLET Annual Report in October 2012 generated significant interest from local media (more than 100 articles, reaching an aggregate audience of 4.5 million people, according to Infomart), and the video of the Ombudsman's press conference has been viewed more than 400 times.

Since 2008, we have created several products to help all Ontarians understand the open meeting requirements of the *Municipal Act* and the complaints regime for closed meetings. We published two editions of the pocket-sized *Sunshine Law Handbook*, and more than 10,000 copies have been sent to every municipal councillor and clerk across the province. The next edition will be sent out after the 2014 municipal elections; in the meantime, the Handbook continues to be available to anyone online. Last year, as part of the OMLET Annual Report, we produced *Tips for Closing Meetings* – a pocket-sized card that was also sent to every councillor and clerk. And this year, the *Best Practices* list on the front cover of this report is also being sent to every council member and clerk, again as a pocket-sized reference card. Our OMLET Annual Reports and the cards are also online, and hard copies are available to the public upon request.

Our website has a special section for **Municipal Investigations**, including a database that lists all of the closed meeting investigators in the province, to allow citizens to determine where to complain (look for **Find Your Municipality**.) For all municipalities that use the Ombudsman as their investigator, the database also includes **the results of all our recent investigations** under the municipality's name, to make them easy to find in one place. The Sunshine Law requires all municipalities to make closed meeting investigation reports public, but their websites and methods vary and reports can often be difficult to locate. To our knowledge, our **Find Your Municipality** database is the only such list of all municipal investigators in Ontario.



The “Municipal Investigations” section of our website includes a database listing investigators in all Ontario municipalities, and links to recent OMLET cases.

Township of Adelaide Metcalfe

The township council illegally closed three meetings in July and August 2012, OMLET's investigation found. There were multiple violations of the *Municipal Act*, including using the wrong exceptions to close sessions, failing to give adequate public notice, failing to pass a resolution to go *in camera*, and even breaking a township by-law by holding a meeting less than 24 hours after the meeting was called. We found that one of the meetings, called at the last minute by the Mayor to deal with a contract between the township and a third party, referenced a site plan and corresponding agreement – topics that are not permissible for closed meetings under the Act. Two other meetings – one in which council again didn't give notice of the session, and another in which councillors closed the meeting with the wrong exception – also contravened the law. In his report, the Ombudsman recommended the township be more vigilant in adhering to the rules for closed meetings, including giving advance notice, reporting publicly on the closed meeting, and recording audio or video of all closed sessions.



Town of Amherstburg

In our investigation of complaints about five closed meetings between October 2012 and March 2013, we found the topics discussed were appropriate for closed sessions. These included an organizational review of municipal employees' responsibilities (labour relations/employee negotiations exception), personal information about the chief administrative officer, or CAO (personal matters exception), and the provision of legal advice (solicitor-client privilege exception). However, we found that council violated the *Municipal Act* by voting at a November 2012 closed meeting on a substantive matter – to hire a consultant. We also reiterated that council members should not hold “show of hands” votes in closed session, and made the best practice recommendation that council indicate clearly in the public minutes which aspects of the *in camera* discussions are being disclosed to the public. Notably, this was the only complaint received from Amherstburg, down from 7-8 complaints per year in the past.



Town of Blind River

The Ombudsman received complaints that council met in secret in September 2012 to discuss amendments to municipal property by-laws. OMLET determined that there had actually been no discussion of by-laws during the meeting; instead, councillors discussed ongoing litigation, employee performance and salary, property acquisition, and legal advice regarding the terms of a contract. These are all permissible topics under the *Municipal Act*. However, OMLET made procedural recommendations to help council improve the transparency of its closed meeting process, including that both the agenda and the resolution to go into closed session identify the exception authorizing the closed meeting, and that council keep audio or video recordings of closed meetings to ensure an accurate record and reduce time and resources used in investigations.



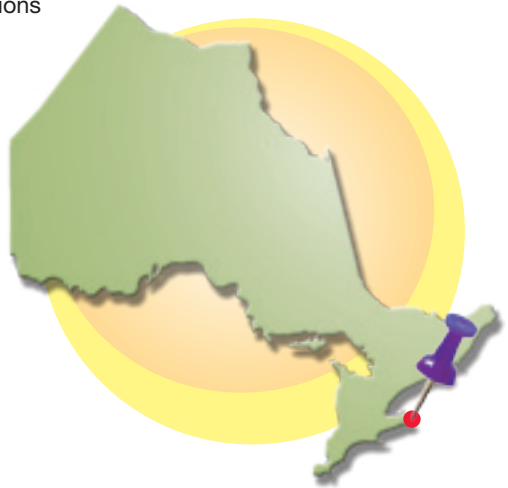
City of Elliot Lake

The city council improved its closed meeting practices after a public presentation by Ombudsman staff in Elliot Lake in November 2012. OMLET investigated complaints about meetings in October 2012 and March and June 2013 and found none of the closed meetings illegal. However, during one meeting in October 2012, council neglected to report publicly on what occurred during a closed session; and in June 2013, the public notice of a closed meeting gave the wrong starting time. Another complaint alleged that council didn't provide notice for a special meeting to discuss an urgent matter with the city solicitor; OMLET found that although this meeting wasn't posted on the city's website, the clerk did make reasonable attempts to inform the media of the time and location.



Town of Fort Erie

A meeting in early February 2013 raised public suspicions that council had met illegally under the “personal matters” exception. During the meeting, councillors discussed whether public comments by the Mayor (about his frustration with the process of hiring a chief administrative officer for the town), breached the town’s code of conduct. OMLET determined that the subject matter did not fall within the “personal matters” exception, because the Mayor’s statements were made in his professional, not personal, capacity. It was therefore an illegal meeting. OMLET noted that although councillors were attempting to handle a sensitive topic with discretion, this did not bring the topic within the “personal matters” exception.



Town of Hearst

We received a complaint that council discussed five applications for a vacant council seat at a closed meeting in October 2012. Since the discussion involved multiple candidates’ employment and educational history, OMLET found the meeting was properly closed under the “personal matters about an identifiable individual” exception. However, given the public interest in the appointment, we suggested council adopt a more transparent process for public appointments, including consideration of applicants with their informed consent in open session.



Municipality of Lambton Shores

The termination of the municipality's chief administrative officer (CAO) sparked complaints to our Office, including allegations that council discussed it at a secret meeting. We were also asked to review the fairness of council's treatment of the CAO. OMLET advised the complainants that our Office can only look at the rules surrounding closed meetings, and can't review the substance of council decision-making. We determined there was no illegal meeting; however, we did find that council voted improperly during a closed session, and advised councillors that votes should only be for procedural matters, such as directing employees to take specific actions. We commended council for audio-recording its closed meetings, which made for an expeditious review of the complaint.



OMLET also reviewed a separate set of meetings for an oversight committee that Lambton Shores officials didn't realize fell under the *Municipal Act*. We advised them that committees made up of 50% or more council members should follow the open meeting requirements, including providing advance notice of meetings, making a public resolution to proceed *in camera*, and keeping a record of closed sessions.

Municipality of Leamington

In late 2012, OMLET received a complaint about a series of emails from council members to constituents. The complainant was worried that the emails could constitute secret meetings. OMLET determined that the emails, which were sent in response to a resident's inquiry, were informational and didn't appear to lay the groundwork for council business. The Ombudsman has said that serial meetings – including email exchanges between councillors that further city business – can be subject to the open meeting requirements. However, nothing in the Sunshine Law prevents council members from communicating with constituents.



Township of Leeds and the Thousand Islands

OMLET found that a majority of council met illegally in November 2012 before decorating a float for a local Christmas parade. Although the meeting was held with no public notice in the “in camera meeting room” where closed meetings normally took place, the Mayor maintained it was not a closed meeting because it was only to brief members on a proposed compensation scheme for senior staff and not to make a decision – and the door was left open. We also investigated a February 2013 committee meeting that was appropriately closed to discuss “employee negotiations” – however, it violated the Act because no public notice was given. The Township’s procedural by-law at that time failed to provide for public notice of committee meetings. This has since been remedied.

The Ombudsman recommended councillors refrain from using social gatherings as a pretext to conduct city business, be vigilant in ensuring council knows and follows the open meeting rules, and record audio or video of all closed meetings.

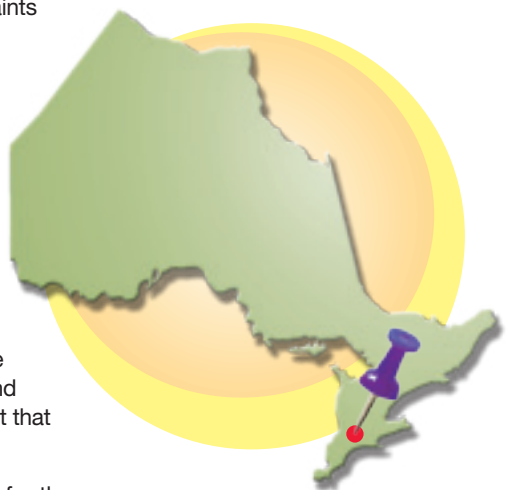


City of London

London council generated the highest number of complaints to our Office in the period covered by this report – 64. Of those, 60 related to a single gathering of councillors on a Saturday in February 2013, a few days prior to an important budget vote. Public suspicions were aroused when six councillors and the mayor gathered in the back room of a local restaurant that day – some arriving by the back door. Although they publicly stated that the meeting occurred by happenstance and no city business was discussed, our investigation determined that an illegal closed meeting did occur. Seven members is one short of legal quorum for London’s 15-member council, but those present represented a quorum of four city committees and discussed the business of one of them, relating to a grant that the committee was later tasked with considering.

The Special Ombudsman Response Team, responsible for the Ombudsman’s major systemic investigations, assisted in this case, which involved two rounds of interviews and extensive reviews of other evidence, including council members’ cell phone records. The Ombudsman noted that the case is significant because it clarifies the difference between mere socializing by elected officials and an illegal meeting held under the pretext of a social gathering.

In his report, he noted that the case is a “cautionary tale” that should serve to remind municipal officials not to use socializing as a “shield for clandestine meetings to further city business away from public scrutiny.” London council unanimously accepted the Ombudsman’s recommendations.



Town of Midland

We received complaints that briefing sessions between councillors and staff in late 2012 contravened the *Municipal Act*, since no minutes were kept and the sessions were closed to the public. These sessions were specifically to discuss staff reports for submission to a general committee. The chairs and vice-chairs of various subcommittees, who were present at the meetings, had no independent decision-making authority and no substantive decisions could be made at these briefing sessions. OMLET determined that these sessions were administrative in nature, and not considered illegal “meetings” under the Act.

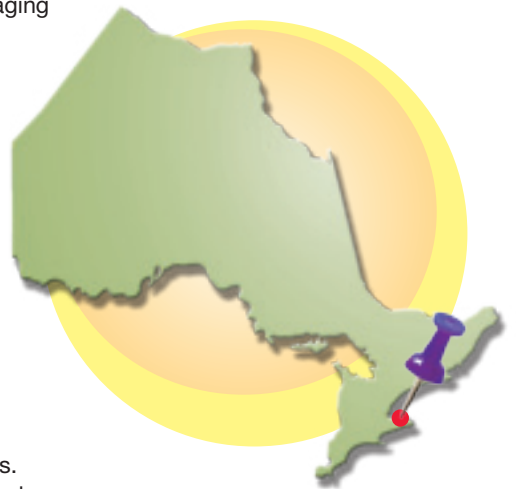
In response to an additional complaint regarding a closed meeting of the Planning and Development Committee in November 2012, we found the committee’s consideration of a zoning dispute to be permissible under the “potential litigation” exception. This was based on a finding that council had considered a letter from a resident’s lawyer identifying specific legal action that would be taken if the zoning matter was not resolved (i.e., a very real threat was made). However, the closed meeting record did not include information concerning a vote that took place in the closed session and did not reflect a discussion that the committee reportedly held on whether or not the zoning issue properly fell within the “potential litigation” exception. The town has improved its record-keeping practices and now audio records closed sessions, as we recommended.



Niagara District Airport Commission

The Commission is a joint board responsible for managing the Niagara District Airport for the municipalities of Niagara Falls, St. Catharines and Niagara-on-the-Lake. We received complaints that it met illegally to discuss financial matters in May 2012. OMLET investigated and determined that there were two illegal meetings. The commission cited the reason for closing one meeting as “legal/financial matters” – wording that doesn’t exist in the *Municipal Act*’s permitted exceptions. It closed another meeting to discuss “personal matters about an identifiable individual,” which is permissible, but the discussion was about a local mayor and his professional relationship with the commission, and therefore not about personal matters. There were also illegal votes at both meetings.

The Ombudsman recommended that the commission change several of its practices, including keeping more detailed minutes, giving the public more information about the nature of the meeting, and avoiding informal “show of hands” votes behind closed doors.



City of Niagara Falls

After a staff member's sudden resignation, an informal discussion by council in February 2013 prompted a complaint. OMLET reviewed the exchange and it was not illegal, as the only thing discussed was the resignation, and there were no deliberations or substantive discussions that would have laid the groundwork for council business. We also learned there was a closed meeting later that month where councillors discussed new developments on this topic. This meeting was problematic: Both the agenda and the resolution to proceed *in camera* neglected to mention this topic as the reason for going into closed session, and the discussion wasn't recorded in the minutes. We advised the city to fix these practices and recommended that it make audio or video recordings of closed meetings.



City of Oshawa

Two closed meetings in Oshawa – in March and May – prompted complaints to our Office. Both involved the purchase or sale of land by the city, a valid exception under the Sunshine Law. OMLET investigators were able to review audio tapes of the closed meetings and quickly determined that they were in line with the law. The Ombudsman commended council for audio recording meetings and commented that this practice contributed to a quick and efficient investigation.



Township of Ryerson

OMLET reviewed a complaint that a November 2012 meeting to discuss the zoning application for a proposed quarry was closed improperly. Council, worried about the public appealing any decisions regarding this application, had closed the meeting using the “litigation privilege” exception. OMLET found that the exception was used improperly because no decisions on the application had been made and there was no imminent legal action. However, we also determined that a review of written legal advice at the end of the meeting could have been considered under the “solicitor-client privilege” exception, and we cautioned council to be more conscientious in ensuring the subject matter of a closed meeting meets the Sunshine Law requirements.



City of Sault Ste. Marie

We received complaints that two meetings of the city's Procedure By-Law Review Committee in November 2012 and January 2013 were improperly closed so council and staff could discuss amendments to procedural by-laws. The city's own by-law at the time required special committee meetings to be open to the public, but no public notice was provided and the subject matter of the meetings did not fit within the exceptions set out in the *Municipal Act*. The Ombudsman found both meetings to be in contravention of the *Municipal Act* and urged council to abide by its own by-laws in the future.



City of Greater Sudbury

We received a total of 54 complaints about closed meetings in Sudbury during the period covered by this report – second only to London, Ont., which generated 64. In November 2012, Sudbury council discussed information about an ongoing court case – a valid reason for a closed meeting. Other complaints stemmed from an article in a local newspaper that reported the city auditor general’s contract had been terminated; complainants alleged that this decision must have been made in secret because it was never debated in public.



OMLET found that council did close two separate meetings to discuss the “personal matter” of an identifiable individual’s contract, also a valid reason for a closed meeting. However, that meeting included an improper vote to direct councillors to negotiate with a member of staff. The Ombudsman recommended councillors interpret the open meeting law as narrowly as possible and keep meetings open when dealing with matters of significant public interest – such as the renewal of the contract of a high-profile public figure. He noted that speculation, media attention and complaints could have been avoided had this matter proceeded in the open.

In December 2012, the Ombudsman was invited to address Sudbury council about the OMLET process and concerns he raised in earlier investigations about councillors’ failure to co-operate. In February 2013, council voted to hire an investigator through Local Authority Services (LAS) to replace the Ombudsman’s Office as the city’s closed-meeting investigator. This decision prompted more than 50 complaints, most alleging that councillors had privately – and illegally – discussed a plan to oust the Ombudsman prior to the public vote. The Ombudsman referred complainants to the LAS investigator. The LAS report on that investigation was issued in September 2013 and cost the city \$7,100, according to local news reports. It found that a series of emails between councillors prior to the decision did not constitute an illegal meeting.

Township of Tiny

The township council illegally closed a meeting in October 2012 under the “litigation or potential litigation” exception out of concern that litigation might arise due to a proposed by-law. Since there was no real threat of litigation, OMLET determined that this exception wasn’t appropriate. Council also neglected to cite the exception in its resolution to proceed into closed session and did not report back publicly on what was discussed.

We also received complaints alleging that council met secretly to discuss a by-law dealing with wind turbines, prior to its quick passage at a meeting in January 2013 without advance notice. OMLET found that informal gatherings had indeed occurred between council members and constituents, but that meetings with citizens are permitted under the Act. However, we also noted that the bylaw was introduced in an unusual manner by the Deputy Mayor, who told OMLET he could not recall who had assisted him in drafting it. We were unable to find evidence that other councillors were involved, but advised council that the by-law should have been introduced in a more transparent fashion and recommended it avoid adding substantive matters to the agenda at the last minute, unless they are urgent.

After OMLET closed this case, the township replaced the Ombudsman as its closed meeting investigator.



Your Feedback

“ I just think you're much better off having someone who has no relationship with the municipal sector... Having someone who is totally independent and has the resources to do it at no extra cost to the taxpayer just to me makes sense... I wish there were more people out there like [the Ombudsman] voicing their opinions when people do wrong. ”

Sarnia Mayor Mike Bradley,
quoted in *Windsor Star*, April 30, 2013

“ [T]here's good reason to believe that Marin's investigations into complaints of illegally closed meetings do their bit to combat cynicism by showing that when it comes to transparency, citizens really can fight City Hall and win. ”

Andrew Dreschel, *Hamilton Spectator*,
October 31, 2012

“ We decided to go with the Ombudsman because he's fair and independent... We've been quite satisfied with his work. ”

Fort Erie Mayor Doug Martin,
quoted in *Niagara Bullet News*,
October 31, 2012

“ If I had my druthers, I'd say let the Ombudsman handle Windsor complaints. ”

Windsor Councillor Alan Halberstadt,
quoted in *Windsor Star*,
October 31, 2012

“ Marin's office has done the valuable work of exposing secretiveness and arrogance in some municipal councils. Ontario voters should remember it Oct. 27, 2014, when they next go to the municipal polls. ”

Ottawa Citizen editorial,
November 1, 2012

“ My dealings with the Ombudsman's office have always been very good, very professional. ”

Niagara Falls city clerk Dean Iorfida,
quoted in *Niagara This Week*,
October 31, 2012

“ He delivered both, a double-barreled shot of accountability across the bow of big-city and small-town Ontario politicians who think they can meet in secret whenever they like, no matter what citizens or the law say. We can only wish more such public watchdogs – from auditors with wide purview, to bureaucrats with narrower gaze – would follow André Marin's lead. ”

Greg Van Moorsel, *London Free Press*,
November 1, 2012

“ We have taken all of the [Ombudsman's] recommendations, and the Ombudsman acknowledged and congratulated the town for that. ”

Amherstburg acting chief administrative officer
Kristina Di Paolo, quoted in *Metro Windsor*,
October 31, 2012

“ Accountability is not an option. I'm impressed with the [Ombudsman's OMLET] report. It's the framework for it, reminding that this stuff matters and that, to me, is an important part of this. ”

Robert Williams, retired University of Waterloo political
science professor, quoted in *Waterloo Record*,
November 1, 2012

“ The Ombudsman's report shows that too many municipal meetings are still taking place behind closed doors. New Democrats agree with the Ombudsman that we need to explore all avenues to make municipalities in Ontario more open. ”

NDP MPP Michael Prue,
October 31, 2012

“ The role of the ombudsman may be unpopular with local politicians, but not with Joe Public. To spend more money to hire a watchdog when Marin's services are provided for free is just another stupid example of what politicians are willing to do to get what they want while the people who elected them want something else. ”

Paul Leinweber, comment on *London Free Press* website,
April 7, 2013

“ It has always been my position that if you are doing nothing wrong, then Mr. Marin's position should be welcomed and stiffer penalties imposed on public officials who think municipalities are their personal fiefdom and piggy bank. ”

Albert Hannon, comment on *London Free Press*
website, April 7, 2013

Your Feedback

“ I, and many others, did find it strange that our strong fiscally conservative council would go with the option that costs us money instead of opting for the Ombudsman. ”

Paul Synott, comment on *Windsor Star* website, May 1, 2013

“ Marin is seen by many as someone with legal clout and the brashness to face down city council after a series of attempts to dismiss public oversight and operate in secret going back to the first days of the previous council, hence the backlash against his dismissal in a surprise, fast-tracked decision Feb. 12. ”

Brian MacLeod, *Sudbury Star*, February 23, 2013

“ I'm not sure what it is about André Marin, the provincial Ombudsman, that rubs certain councillors in London and Sudbury the wrong way, but you have to give the man credit. He knows how to reach out to the people he serves and get under the skin of those who are skirting the edge of the rules. Is he outspoken in the media and social media? Absolutely. What's bothering some is that he's telling the truth. ”

Sheryl Rooth, *The Londoner*, May 6, 2013

“ Those who want to get rid of the Ombudsman have a problem: The public. André Marin is popular with members of the public. He makes it clear he is representing them, not the council. He's accessible, outspoken, and he has a great sense of humour. He has put his own stamp on the office of the ombudsman. He works hard and expects others to do so too. He's not impressed with the puffery of some councillors. He's not above taking them down a peg or two. A man like that is likely to make an enemy or two, particularly when his job is pointing out government waste and inefficiency. ”

Gina Barber, *London Civic Watch* blog, March 21, 2013

“ [The Ombudsman] is not conducting a witch hunt, nor is he being tougher on our city council than any other. This is his job and he is doing it quite properly and correctly on our behalf. That is, on the citizens' behalf, not the council's... A new investigator hired by council would be, in effect, working for the council, not the citizens. ”

Philip McLeod, *The McLeod Report* blog, June 13, 2013

“ Councillors ... don't like Marin's use of social media and think he is 'rude.' It's rude, apparently, when someone questions you about transparency and accountability. Of course, all of these are emotional arguments, irrelevant to the real issues. The big losers in this are the taxpayers of Sudbury. The level of government closest to them is conducting itself in a manner hardly befitting elected officials. ”

Adrienne Batra, *Toronto Sun*, February 19, 2013

“ We can only hope the province acts quickly on Mr. Marin's proposal to put more teeth in municipal government transparency legislation to eliminate abuses such as are now occurring... ”

Lorne McCool, letter to the editor, *Toronto Star*, November 5, 2012

“ Marin's report should be a stark reminder for all municipal councils that the more transparent a municipal council is, the better the public is served. ”

Editorial, *Insidehalton.com*

“ The city is paying a company controlled by municipalities to investigate the complaints. Councillors could have requested Ontario's Ombudsman, who is independent, to investigate the complaints for free. Who would taxpayers choose? I think they'd choose the Ombudsman. ”

Anne Jarvis, *Windsor Star*, April 30, 2013

“ Provincial Ombudsman André Marin mentioned the outright refusal of officials who run this city to co-operate with his investigation into secret meetings. Marin was well within his rights to do so... They were elected to act in the best interests of citizens, not to decide what laws they will follow and which they will not. ”

Kirk Briscoe, letter to the editor, *Sudbury Star*, November 9, 2012

Appendix

Complaint Statistics

MUNICIPALITIES WHERE THE OMBUDSMAN IS THE INVESTIGATOR FOR CLOSED MEETING COMPLAINTS (SEPTEMBER 1, 2012 – AUGUST 31, 2013)	
1.	Adelaide Metcalfe, Township of
2.	Ajax, Town of
3.	Alberton, Township of
4.	Alfred and Plantagenet, Township of
5.	Amherstburg, Town of
6.	Armour, Township of
7.	Armstrong, Township of
8.	Arnprior, Town of
9.	Arran-Elderslie, Municipality of
10.	Ashfield-Colborne-Wawanosh, Township of
11.	Assiginack, Township of
12.	Augusta, Township of
13.	Baldwin, Township of
14.	Billings, Township of
15.	Black River-Matheson, Township of
16.	Blind River, Town of
17.	Bluewater, Municipality of
18.	Bonfield, Township of
19.	Bracebridge, Town of
20.	Brethour, Township of
21.	Brockton, Municipality of
22.	Bruce Mines, Town of
23.	Brudenell, Lyndoch & Raglan (Township of)
24.	Burk's Falls, Village of
25.	Burpee and Mills, Township of
26.	Calvin, Township of
27.	Carlton Place, Town of
28.	Casey, Township of
29.	Casselman, Village of
30.	Central Huron, Municipality of
31.	Central Manitoulin, Township of
32.	Chamberlain, Township of
33.	Champlain, Township of
34.	Chapple, Township of
35.	Charlton and Dack, Municipality of
36.	Chisholm, Township of
37.	Clarence-Rockland, City of
38.	Cobalt, Town of
39.	Cochrane, Town of
40.	Cockburn Island, Township of
41.	Coleman, Township of
42.	Dawn-Euphemia, Township of
43.	Dawson, Township of
44.	Dorion, Township of
45.	Dubreuilville, Township of
46.	Dufferin, County of
47.	East Hawkesbury, Township of
48.	Edwardsburgh/Cardinal, Township of
49.	Elliot Lake, City of
50.	Englehart, Town of
51.	Enniskillen, Township of
52.	Essex, Town of
53.	Evanturel, Township of
54.	Fauquier-Strickland, Township of
55.	Fort Erie, Town of
56.	Front of Yonge, Township of
57.	Gauthier, Township of
58.	Georgian Bay, Township of
59.	Gillies, Township of
60.	Gordon/Barrie Island, Municipality
61.	Gore Bay, Town of
62.	Gravenhurst, Town of
63.	Grey Highlands, Municipality of
64.	Grimsby, Town of
65.	Halton Hills, Town of
66.	Hamilton, City of
67.	Hanover, Town of
68.	Harley, Township of
69.	Harris, Township of
70.	Hawkesbury, Town of
71.	Head, Clara and Maria, Township of
72.	Hearst, Town of
73.	Hilliard, Township of
74.	Hilton Beach, Village of
75.	Hilton, Township of
76.	Hornepayne, Township of
77.	Howick, Township of
78.	Hudson, Township of
79.	Huron East, Municipality of
80.	Huron, County of
81.	James, Township of
82.	Jocelyn, Township of
83.	Johnson, Township of
84.	Joly, Township of
85.	Kawartha Lakes, City of
86.	Kerns, Township of
87.	Killarney, Municipality of
88.	Kitchener, City of
89.	La Vallee, Township of
90.	Laird, Township of
91.	Lake of Bays, Township of
92.	Lake of the Woods, Township of
93.	Lakeshore, Town of
94.	Lambton Shores, Municipality of
95.	Lambton, County of
96.	Larder Lake, Township of

Appendix

Complaint Statistics

MUNICIPALITIES WHERE THE OMBUDSMAN IS THE INVESTIGATOR FOR CLOSED MEETING COMPLAINTS (SEPTEMBER 1, 2012 – AUGUST 31, 2013)

97.	LaSalle, Town of	145.	Petrolia, Town of
98.	Latchford, Town of	146.	Pickering, City of
99.	Laurentian Hills, Town of	147.	Plummer Additional, Township of
100.	Leamington, Municipality of	148.	Plympton-Wyoming, Town of
101.	Leeds and the Thousand Islands, Township of	149.	Port Colborne, City of
102.	London, City of	150.	Powassan, Municipality of
103.	Macdonald, Meredith and Aberdeen Additional, Township of	151.	Prescott and Russell, United Counties of
104.	Machar, Township of	152.	Prescott, Town of
105.	Magnetawan, Municipality of	153.	Prince, Township of
106.	Marathon, Town of	154.	Rainy River, Town of
107.	Markstay-Warren, Municipality of	155.	Renfrew, Town of
108.	Matachewan, Township of	156.	Russell, Township of
109.	Mattawa, Town of	157.	Ryerson, Township of
110.	Mattawan, Township of	158.	Sables-Spanish Rivers, Township of
111.	Mattice-Val Côté, Township of	159.	Sarnia, City of
112.	McDougall, Township of	160.	Sault Ste. Marie, City of
113.	McGarry, Township of	161.	Seguin, Township of
114.	McKellar, Township of	162.	Sioux Narrows-Nestor Falls, Township of
115.	McMurrich/Monteith, Township of	163.	Smooth Rock Falls, Town of
116.	Melancthon, Township of	164.	South Algonquin, Township of
117.	Midland, Town of	165.	South Bruce Peninsula, Town of
118.	Minden Hills, Township of	166.	South Huron, Municipality of
119.	Montague, Township of	167.	South River, Village of
120.	Moonbeam, Township of	168.	Spanish, Town of
121.	Moosonee, Town of	169.	St. Catharines, City of
122.	Morley, Township of	170.	St. Charles, Municipality of
123.	Morris-Turnberry, Municipality of	171.	St. Joseph, Township of
124.	Muskoka, District Municipality of	172.	Tarbutt and Tarbutt Additional, Township of
125.	Nairn and Hyman, Township of	173.	Tehkummah, Township of
126.	Neebing, Municipality of	174.	Temagami, Municipality of
127.	Newbury, Village of	175.	Temiskaming Shores, City of
128.	Niagara Falls, City of	176.	The Nation, Municipality of
129.	Niagara, Regional Municipality of	177.	The North Shore, Township of
130.	Nipigon, Township of	178.	Thessalon, Town of
131.	Nipissing, Township of	179.	Thornloe, Village of
132.	North Dumfries, Township of	180.	Thorold, City of
133.	Northeastern Manitoulin and The Islands, Town of	181.	Timmins, City of
134.	North Frontenac, Township of	182.	Tiny, Township of
135.	Oil Springs, Village of	183.	Val Rita-Harty, Township of
136.	Opasatika, Township of	184.	Welland, City of
137.	Orangeville, Town of	185.	West Lincoln, Township of
138.	Oshawa, City of	186.	West Nipissing, Municipality of
139.	Papineau-Cameron, Township of	187.	Westport, Village of
140.	Pelee Island, Township of	188.	White River, Township of
141.	Pelham, Town of	189.	Whitestone, Municipality of
142.	Pembroke, City of	190.	Whitewater Region, Township of
143.	Penetanguishene, Town of	191.	Woolwich, Township of
144.	Perry, Township of		

Appendix

Complaint Statistics

COMPLAINTS RECEIVED, ILLEGAL MEETINGS AND PROCEDURAL VIOLATIONS FOUND, AND BEST PRACTICES RECOMMENDED – BY MUNICIPALITY (SEPTEMBER 1, 2012 – AUGUST 31, 2013)					
Municipality/Local Board	Cases Opened	Number of Meetings Reviewed	Illegal Meetings	Procedural Violations	Best Practices Suggested
Acton Business Improvement Association	1	1		4	2
Township of Adelaide Metcalfe	5	3	3	4	9
Town of Amherstburg	1	5		1	1
Township of Augusta	1				
Town of Blind River	2	1		1	2
Township of Bluewater	1	1			
Township of Bonfield	5	2			
Town of Carleton Place	1				
Village of Casselman	1	3			1
Municipality of Central Huron	1*	2	2	7	3
Municipality of Clarence-Rockland	1				
Township of Edwardsburgh	1*	1			1
City of Elliot Lake	5	5			5
Town of Fort Erie	7	4	1		
Township of Georgian Bay	1				
Town of Gravenhurst	1	2		1	2
Town of Halton Hills	1				
City of Hamilton	4	1			
Town of Hearst	1	1			3
Village of Hilton Beach	1				
Municipality of Leamington	2				
Township of La Vallee	1	1			
Municipality of Lambton Shores	13	4	2	4	
Township of Larder Lake	2	2			3
Township of Leeds and the Thousand Islands	3	3	2		4
London Board of Health	1				
City of London	64	1	1		3
Municipality of Magnetawan	1	1			
Town of Mattawa	1				
Township of McKellar	2				
Township of McMurrich/Monteith	3	1	1		2
Town of Midland	4	2			2
Township of Minden Hills	1				
Niagara Falls Business Improvement Area	1	1			
City of Niagara Falls	1	2		1	4
Regional Municipality of Niagara	1	4			1
Niagara Central Airport Commission	1				
Niagara District Airport Liaison Committee	4	1		1	
Niagara District Airport Commission	6	3	2	1	3
Township of North Dumfries	1				
Township of North Frontenac	1				
City of Oshawa	8	2			
Town of Pelham	2	2			
Town of Penetanguishene	1				
Township of Perry	1				
Municipality of Powassan	1*	9	1		4
Town of Prescott	1	1		1	2
United Counties of Precott and Russell	1	1			
Township of Ryerson	4	1	1		
City of Sarnia	1	4			
City of Sault Ste. Marie	3	2	2		
Town of Smooth Rock Falls	1				
Town of South Bruce Peninsula	2	7			
City of St. Catharines	2	1			1
Township of St. Joseph	1	1			
City of Greater Sudbury	54	3		2	2
City of Timmins	1				
Township of Tiny	3	3	1	2	2
Township of West Lincoln	1				
Township of Woolwich	2	1		1	1
TOTAL = 53 municipalities / 5 boards, 1 joint committee	246	96	19	31	63

* Cases that were opened in 2011-2012 and carried over to 2012-2013; these were reported in last year's OMLET Annual Report.



2012-2013 OMLET Annual Report

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