



Ombudsman Report

**Investigation into whether
Council for the Town of Fort Erie
held an illegal closed meeting on
December 10, 2014**

**André Marin
Ombudsman of Ontario
April 2015**

Complaint

- 1 My Office received two complaints about a closed session held by council for the Town of Fort Erie at its meeting on December 10, 2014. According to the complaint, council proceeded in camera to hear a presentation of the Fort Erie Economic Development and Tourism Corporation (EDTC).
- 2 The complaints alleged that this presentation was not appropriate for closed session, and violated the open meeting provision of the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 3 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Ombudsman is the closed meeting investigator for the Town of Fort Erie.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Investigative process

- 7 My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law and the Act, as well as the meeting materials for the meeting in question. They also spoke with the Mayor, municipal staff, and the General Manager of the EDTC, who conducted the December 10 presentation.
- 8 My Office received full co-operation in this matter.

The December 10, 2014 meeting

- 9 The agenda for the December 10 meeting indicated that it was a special closed council meeting that began at 5:30 p.m. The meeting was closed to the public

under the exceptions for “education or training” (s. 239(3.1) of the Act) and “acquisition or disposition of land” (s. 239(2)(c) of the Act), so that council could receive an overview of the mandate, operating structure, and current projects of the EDTC.

- 10** Council passed a resolution to proceed in camera at 5:51 p.m. for the reasons outlined on the agenda.
- 11** OMLET staff reviewed the confidential slide presentation that was viewed during the closed session, as well as contemporaneous notes taken by the clerk. The Mayor, clerk, and the General Manager of the EDTC provided further clarification regarding the in camera presentation.
- 12** The information provided to my Office indicated that the purpose of the in camera session was purely educational. The General Manager of the EDTC provided information to council about the EDTC and its mandate. Council members were told at the beginning of the presentation that the purpose of the session was to receive a general understanding of how the EDTC operates, and that no council business would be discussed.
- 13** The clerk told us the “acquisition or disposition of land” exception was cited because there was some information provided about the possibility of a local business purchasing lots in an industrial park. The Mayor and General Manager of the EDTC, however, felt that this exception did not apply to the closed session, as the possibility of the business wanting to acquire further lands was speculative rather than imminent, and was brought up merely as an example to illustrate a point about industrial lands in Fort Erie. This information did not relate to council business.
- 14** According to the Mayor and the General Manager of the EDTC, there were no discussions during the December 10 presentation of any land that the town would be buying or selling.

Analysis

The ‘education or training’ exception

- 15** Section 239(3.1) of the Act states that council may close a meeting to the public if the meeting is held for the purpose of educating or training members, and if no member discusses or otherwise deals with a matter in a way that materially advances the business or decision making of council.

- 16** Any attempt to rely on this exception must be carefully scrutinized. As I noted in my report “The ABCs of Education and Training¹”:

While there are an infinite number of topics that could potentially form the subject of an education session, it must be clear that the purpose of such a meeting relates to education only... A municipality cannot simply circumvent the open meeting law by characterizing a subject normally considered in open session as ‘educational.’

- 17** In an investigation of a meeting held by the County of Essex,² the closed meeting investigator for the county found that the meeting was improperly closed under the “education or training” exception, as the meeting involved an “exchange of information.” The investigation noted:

An exchange of information, whether it advances the business of the municipality or not, cannot be said to be “educating” or “training” as those words are commonly defined. To conclude otherwise would allow Council to go into closed session any time a member wanted merely to impart information.

- 18** In a recent investigation regarding the City of Welland,³ I agreed with this statement. I found that an exchange of information that related to city business, and informed council decision making later in the same meeting, did not fit within the “education or training” exception and should have occurred during an open council meeting.
- 19** The December 10 meeting held in Fort Erie can be distinguished from cases where council members engaged in a discussion and exchange of information about council business under the guise of an “education or training” session. In this case, the General Manager of the EDTC provided general information to council about the EDTC, and the information was not intended to inform council decision-making.
- 20** This meeting can also be distinguished from a previous review my Office conducted of meetings held in April and May 2012. In that case, all of Fort Erie

¹ The ABCs of Education and Training: Investigation into City of Oshawa Development Services Committee Special Meeting of May 22, 2008 (March 23, 2009). Available online: <https://ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/oshawamay08final.pdf>

² Amberley Gavel Ltd. Report to the Corporation of the County of Essex regarding the Investigation of the Closed Meeting of Essex County Council held on July 2, 2009 (September 18, 2009).

³ Investigation into multiple closed meetings by Council for the City of Welland from June 2012 to May 2014 (November 2014). Available online: https://ombudsman.on.ca/Resources/Reports/City-of-Welland.aspx#_ftn10

council attended meetings of the EDTC, to receive information about the organization and also to allow council members to engage in discussions regarding councillor priorities and alignment of those priorities with the town's strategic plan. My Office found that these discussions went beyond the parameters of the "education or training" exception, and that council was engaging in discussions that laid the groundwork for future council decision-making. There is no indication that similar discussions about councillor priorities took place during the December 10, 2014 closed session.

- 21** Accordingly, the in camera presentation on December 10 fit within the "education or training" exception.

The 'acquisition or disposition of land' exception

- 22** The information provided to my Office indicates that a purely speculative disposition of land may have been mentioned during the December 10 meeting, by way of example. However, there was no discussion of an imminent purchase or sale of land.
- 23** The purpose of the "acquisition or disposition of land" exception is to protect council's bargaining position during negotiations to purchase or sell land.⁴ It protects the municipality from potential financial harm. In this case, there was no imminent purchase or sale of land being discussed, and accordingly no bargaining position to protect. The discussion did not fit within this exception.

Opinion

- 24** Council for the Town of Fort Erie was permitted, under the "education or training" exception in the *Municipal Act*, to meet in closed session on December 10, 2014. Although the "acquisition or disposition of land" exception was also cited, the discussions that took place did not fit within this exception.
- 25** I am making the following recommendation to assist the town in fulfilling its obligations under the Act, and in enhancing the transparency of its meetings.

⁴ See, for example, IPC Order MO-2485-F, Toronto (City) (Re), 2009 CanLII 60399 (ON IPC)

Recommendation

The Town of Fort Erie should ensure that only the exceptions that apply to a closed session discussion are referenced in the resolution to proceed in camera.

Report

- 26** OMLET staff spoke with the Mayor and the Clerk on April 2, 2015 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 27** My report should be shared with council for the Town of Fort Erie and made available to the public as soon as possible, and no later than the next council meeting.



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