



**Investigation into closed meetings held by
Council for the Municipality of St.-Charles on
May 15, 2012, June 19, 2013,
and May 29, 2014**

**Barbara Finlay
Acting Ombudsman of Ontario
February 2016**

Complaint

- 1** In May 2015, our Office received a complaint that council for the Municipality of St.-Charles discussed items in closed meetings on May 15, 2012, June 19, 2013, and May 29, 2014 that did not fit within the exceptions to the open meeting rules in the *Municipal Act, 2001* (the Act). The complainant alleged that council discussed documents from the municipality’s external auditors in closed session. These documents included draft audit reports, as well as the accompanying management letters, which identified issues with and recommended improvements to the municipality’s internal controls and financial reporting process.
- 2** 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.

Ombudsman jurisdiction

- 3** 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.
- 4** The Ombudsman is the closed meeting investigator for the Municipality of St.-Charles.
- 5** In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Council procedures

- 6** The municipality’s procedure by-law states, subject to the *Municipal Act*, all meetings of council and committees shall be open to the public. The by-law states that the section of the Act that regulates closed meetings is attached as “Schedule C”. However, Schedule C does not include any information about closed meetings, and relates only to “The Key and Distinctive Role of the Mayor”.

- 7** The Clerk advised my Office that the municipality has been aware of the need to update its procedure by-law for the last two years. St.-Charles should amend its procedure by-law to reflect the open meeting provisions of the *Municipal Act*.

Investigative process

- 8** The three meetings identified by the complainant took place before the October 2014 municipal elections. The current Mayor and two current councillors were members of council during the period the three meetings occurred. The current Chief Administrative Officer (CAO), who is also the Clerk, was present at the latter two meetings.
- 9** Open Meeting Law Enforcement Team (OMLET) staff reviewed the municipality's procedure by-law, and the meeting materials for the council meetings on May 15, 2012, June 19, 2013, and May 29, 2014. We interviewed the municipality's current CAO-Clerk, Mayor, and all current members of council.
- 10** During the investigation, the municipality informed our Office that it has now made available to the public the management letters and draft audit reports associated with the three meetings identified by the complainant. The municipality told us that, going forward, draft audit reports will be reviewed by council in open session and management letters will be made available to the public upon request.
- 11** My Office received full co-operation in this matter.

First meeting: May 15, 2012

- 12** On May 15, 2012, council held a special meeting at the Civic Office Building at 7:00 p.m. The agenda lists "Closed Session (if necessary and by resolution)".
- 13** Council resolved at 7:06 p.m. to go into a closed session to discuss the security of the property of the municipality, personal matters about an identifiable individual, and labour relations or employee negotiations.
- 14** The minutes indicate that, in addition to members of council and the CAO-Clerk, the closed meeting was attended by staff from the municipality's external audit firm.

- 15** The closed meeting minutes state that the auditors presented a draft financial report for 2011 for the municipality and the library board, and that a management letter was to be issued. The minutes state, “There were multiple complications with this year’s audit and many corrections will be required”.
- 16** The auditors reported to council with respect to “Bookkeeping services”, and the minutes note that the audit report pointed out multiple errors with municipal record-keeping. The auditors then reported on certain municipal records that were not completed because of “staff leaving work to pile up and not following the proper work procedure”. Last, and unrelated to the rest of the discussions, council discussed two named municipal employees who would be on leave for specified periods of time.
- 17** The management letter was not available at this meeting, as it was not received until May 29, 2012, but those interviewed told us the auditors conveyed some of the letter’s concerns during the meeting. In the management letter, the auditors pointed to number of weaknesses in the municipality’s financial management and record-keeping practices, and identified where improvements should be made.
- 18** The letter noted that the weaknesses identified did not have a material effect on the financial statements, and were not intended to reflect on the honesty or competence of municipal employees.
- 19** Those interviewed confirmed the auditors did not identify any individual employees during their presentation to council. After the auditors’ presentation, councillors asked the auditors about the errors as they pertained to specific staff. Council then discussed lack of experience and training for specific employees, and options for addressing the problems, such as additional training for certain individuals.
- 20** When the open session resumed, council passed four resolutions:
- To close the municipality’s general purpose fund and move the funds therein to the contingencies reserve fund;
 - To transfer the municipality’s surplus funds from 2011 to the contingencies reserve fund;
 - To accept the 2011 financial report for the municipality as presented by the municipal auditors on May 15, 2012; and
 - To accept the 2011 financial report for the library board as presented by the municipal auditors on May 15, 2012.
- 21** The meeting ended at 9:00 p.m.

Analysis

- 22** We considered each of the three exceptions that were cited by the municipality in its resolution to close the meeting.

Personal matters about an identifiable individual

- 23** The Act does not define “personal matters” for the purposes of section 239(2)(b), but the related term “personal information” is defined in the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) to include “the views or opinions of another individual about the individual”.
- 24** When reviewing the parameters of this exception, my Office has often considered the case law of the Office of the Information and Privacy Commissioner (the IPC). Although not binding on my Office, these cases can be informative.
- 25** The IPC has found that information will only qualify as personal if it pertains to an individual in his or her personal, rather than professional, capacity. However, information about an individual in his or her professional capacity may still qualify if it reveals something personal.¹ For example, information about an employee’s job performance or conduct is considered personal information.
- 26** The audit reports discussed in closed session reflected a review of the municipal and library financial statements for 2011. Neither report reveals anything about a particular individual or errors made by specific employees. The resolutions made by council in open session after the closed meeting related to general accounting corrections suggested by the auditors.
- 27** During interviews, we were told that the auditors’ findings had to be discussed in camera because, in a small municipality with only one or two employees in certain departments, information about a department would be identified as information about those individual employees. However, the information provided by the auditors was about the municipality’s operations and finances; it was not information of a personal nature about municipal employees.
- 28** The auditors’ presentation, report, and management letter did not pertain to employee performance or conduct and did not identify individual employees. The presentation, report, and management letter did not fit within the personal matters exception or any other exception to the open meeting requirements in the Act. This portion of the discussion should not have taken place in closed session.

¹ IPC Order MO-2204.

- 29** The discussion in camera continued beyond the audit report and management letter, when councillors focused on problems with the performance of particular staff members, who were identified by name. This part of the discussion included details about employee job performance. This part of the discussion fit within the exception for personal matters about an identifiable individual.
- 30** In *St. Catharines v. IPCO, 2011*, the Divisional Court found that it is unrealistic to expect municipal councils to split up discussions to ensure nothing that can be discussed in open session is ever discussed in a closed meeting.² This applies to discussion on a single topic, where splitting the information would require interrupting the conversation. The *St. Catharines* case can be distinguished from the case at hand. While the auditors’ findings may have prompted the discussion about employee performance, the two topics were distinct. Council could have discussed the auditors’ findings, including their draft report and management letter, in open session before proceeding into a closed session to address the employee performance issues.
- 31** Council also addressed a matter regarding two employees taking sick leave. This matter fell within the exception for personal matters, as it revealed personal information about the individuals.

Labour relations or employee negotiations

- 32** Council also cited the “labour relations or employee negotiations” exception in its resolution to close this meeting.
- 33** According to the Ontario Court of Appeal, the meaning of “labour relations” can extend to the relations and conditions of work beyond those related to collective bargaining.³ In 2014, the IPC clarified that “labour relations” can also apply to relationships outside a strict collective bargaining relationship, as long as they are analogous to those governed by collective bargaining legislation.⁴
- 34** In a September 2015 report by Local Authority Services (LAS) regarding the Township of the Archipelago, the closed meeting investigator stated that the exception for “labour relations” cannot be “extended in its broadest sense to cover all matters dealing with the relationship between a council, as the employer, and

² *St. Catharines (City) v. IPCO, 2011 ONSC 2346 (CanLII)* at para. 42.

³ *Ontario (Minister of Health & Long-Term Care) v. Ontario (Assistant Information & Privacy Commissioner) 2003 CarswellOnt 4071, [2003] O.J. No. 4123, 126 A.C.W.S. (3d) 185, 178 O.A.C. 171.* See also IPC Order PO-3311 (2014); and IPC Order PO-3311 (2014).

⁴ IPC Order MO-2997, [2014] O.I.P.C. No. 5. See also IPC Order PO-2057 [2002].

its employees”.⁵ With respect to “employee negotiations”, LAS wrote that the exception applies to ongoing negotiations with a particular employee and is intended to protect the municipality’s bargaining position.

- 35** In that case, LAS found that several discussions were not appropriate for closed session, including discussions about the salary range for the township’s CAO / Clerk; a proposed service recognition policy for staff; the general level of staff morale; planning details for an employee holiday party; or a survey related to staff satisfaction.
- 36** During the discussion about the draft audit report, St.-Charles councillors heard information about the performance of various departments. The discussion did not fit within the exception for labour relations or employee negotiations, as it pertained to general information about how various departments had functioned and performed, rather than ‘relations’ or ‘negotiations’ with staff.
- 37** However, the discussion about the job performance of particular employees, and options council could pursue to address issue with those individuals’ performance, did fit within the exception for “labour relations” in the Act.
- 38** As with the exception for personal matters discussed above, the portion of council’s discussion that fit within the exception could have been separated from the discussion about the financial documents presented by the auditors, which did not fit within the exception.
- 39** The discussion about two employees taking sick leave also fit within the exception for labour relations or employee negotiations.

Security of the property of the municipality

- 40** Council also cited the exception in s. 239(2)(a) for discussions about “the security of the property of the municipality” in its resolution to close the meeting.
- 41** The Act does not define “security” for the purposes of section 239. In 2009, the IPC found that “security of the property of the municipality” should be given its plain meaning, in that it applies to protecting property from physical loss or damage (such as vandalism or theft), and the protection of public safety in relation

⁵ Local Authority Services, “Report to the Council of the Township of The Archipelago regarding the Investigation of Closed Meetings of the Council of the Township of The Archipelago and Council’s Human Resources Committee” (September 2015) at 10, online: <http://www.thearchipelago.on.ca/images/M_images/hr_reort_improper_closed_mtgs_amberley_gavel.pdf>.

to that property.⁶ The order found that the term does not include the security or protection of financial or economic interests relating to property.

- 42** In 2011, the IPC clarified that the term can apply to both “corporeal” and “incorporeal” property, as long as it is owned by the municipality and the discussion is about preventing its loss or damage.⁷ In that decision, the IPC noted that the 2009 findings were made in the context of specific factual circumstances, and that the term “property” can extend to incorporeal property interests, including financial interests, if the subject of the discussion is the security of that property, “in the sense of taking measures to prevent loss or damage to it”.
- 43** Accordingly, there may be circumstances wherein a discussion of a municipality’s finances fits within the exception for security of the property in the Act. This will be the case where the municipality owns the property that is being discussed (whether corporeal or incorporeal), and the subject matter being considered at the meeting is the security of that property, in the sense of taking measures to prevent its loss or damage.
- 44** The presentation by St.-Charles’ external auditors contained information about the municipality’s finances, but did not include a discussion of any potential loss or damage to that property. The closed meeting discussions did not include reference to any fraud or theft allegations (against staff or otherwise), or any other threat to municipal property. Discussions about a municipality’s finances that do not relate to the protection or security of those assets do not fit within the exception for discussions about the security of the property of the municipality.

Second meeting: June 19, 2013

- 45** On June 19, 2013, council held a regular meeting at the Civic Office Building at 7:05 p.m. Item 11 on the agenda was “Closed Session (if necessary and by resolution) – Re: Management Letter from Municipal Auditors”.
- 46** At 8:05 p.m., council resolved to go into closed session to discuss personal matters about an identifiable individual and labour relations or employee negotiations. The agenda states: “Re: Management Letter from the Municipal Auditors & by-law 2013-22 to appoint a Captain”.

⁶ IPC Order MO-2468-F, October 27, 2009.

⁷ IPC Order MO-2683-I, December 30, 2011.

- 47** During the closed session, council was provided with a copy of the auditors' management letter for 2012 (dated May 30, 2013). The letter outlined issues observed by the auditors and their recommendations. It identified material deficiencies in internal control with respect to the municipality's financial practices. As with the previous year's letter, it noted that the weaknesses identified did not have a material effect on the financial statements and were not intended to reflect on the honesty or competence of municipal employees.
- 48** Council had received and approved the draft financial statements from the auditors in May. Interviewees told our Office that the purpose of this meeting was to discuss the management letter.
- 49** Those interviewed maintained that the closed session discussion of the management letter focused entirely on issues related to how staff had failed to maintain complete and accurate financial records. Councillors also talked about the fact that errors identified by the auditors in 2012 were again listed as errors in the 2013 letter. Throughout this discussion, councillors identified specific employees, discussed their job performance, and proposed options for addressing the performance issues.
- 50** Council next discussed the candidacy of an individual for a job with the municipality. This discussion included information about the candidate's past employment history.
- 51** When the open meeting resumed, council passed a by-law appointing a captain for the fire department. The meeting adjourned at 8:45 p.m.

Analysis

- 52** Council cited personal matters about an identifiable individual and labour relations or employee negotiations in the resolution to go in camera.
- 53** The management letter included information about errors made by the municipality in managing and recording the municipality's finances, but did not name any particular employee, either by name or position.
- 54** The focus of this meeting differed from the 2012 meeting, in that Council did not discuss the draft financial report at this meeting and the final financial statement had already been approved in open session.

- 55** Those interviewed advised that the purpose of the 2013 closed session was to consider the employee performance issues that members of council associated with the findings in the auditors' management letter. The discussion focused on an assessment of employee capability and options to address the issues, including additional employee training.
- 56** The discussion about employee performance and conduct fell within the exceptions for personal matters about an identifiable individual and labour relations or employee negotiations.
- 57** While the management letter may have spurred council's discussion about employee performance, the letter itself was not the focus of the discussion and the content of the letter did not fit within any of the exceptions to the open meeting rules.
- 58** In a 2014 report regarding a complaint about a meeting of council for the Municipality of Northern Bruce Peninsula, Local Authority Services noted:
- [I]t is indeed inappropriate for a Council to introduce a lengthy report or other document legitimately into a closed session discussion only to discuss a small portion that would, on its own, not be eligible for discussion in the absence of the public.⁸
- 59** St.-Charles council could have received the management letter in open session, then held a closed session to discuss any implications respecting staff performance. The receipt of the management letter did not fit within any of the exceptions in s. 239 of the Act.

Third meeting: May 29, 2014

- 60** On May 29, 2014, council held a special meeting at the Civic Office Building at 6:00 p.m. The agenda indicates that a draft audit report was presented by the municipality's external auditors, and would be discussed in open session, followed by a closed session (if necessary and by resolution).

⁸ Local Authority Services, *Report to the Corporation of the Municipality of Northern Bruce Peninsula with respect to a meeting held March 11, 2013* (January 2014) at 5, online: <<http://www.agavel.com/wp-content/uploads/2013/09/Northern-Bruce-Peninsula-2013-final.docx>>.

- 61** The municipality’s external auditors attended the meeting and presented the draft audit report in open session. The minutes note that there were no questions from council and that the report would be approved at the next regular council meeting.
- 62** Council resolved to go into closed session at 6:27 p.m. to discuss the “security of the property of the municipality or local board”.
- 63** As with the 2012 meeting described above, the auditors conveyed concerns that they planned to include in a forthcoming management letter.⁹ The slides presented by the auditors refer to significant findings, including the “accuracy of tax revenue, completeness of accounts receivable and accounts payable and accrued liabilities”. They also included a list of uncorrected misstatements, including “disclosure deficiencies”, which were not the subject of the audit, but were to be included in the management letter.
- 64** The auditors’ presentation in camera did not include specific information about particular employees.
- 65** Following the presentation, councillors asked questions about the auditors’ findings and the audit generally. Certain councillors recalled questions being asked about the municipality’s financial reserves. During this part of the discussion, no individual employees were named or discussed.
- 66** The auditors then left the meeting. Council next discussed the concerns that had been raised and their additional concerns about the performance of a particular employee. Ombudsman staff were told that councillors attributed errors identified by the auditors to particular employees and decided to seek additional information from the auditors and the employees.
- 67** The meeting adjourned at 7:45 p.m.

Analysis

- 68** The municipality cited the exception for “security of the property of the municipality” in s. 239(2)(a) in its resolution to close the meeting. As discussed above, this exception should be interpreted narrowly and applies to discussions about preventing loss or damage to municipal property.

⁹ The management letter was sent to St.-Charles on June 17, 2014.

- 69** Those interviewed advised us that the in camera discussions did not include allegations of fraud related to the municipality's funds or property, and that there were no discussions about protecting the municipality's property from loss or damage.
- 70** The discussion of the audit report and the proposed content of the management letter, as well as the auditors' findings and recommendations, did not fit within the exception in s. 239(2)(a) or any of the other enumerated exceptions in the Act. This discussion should have taken place in open session.
- 71** The discussions that took place in camera after the auditors left the meeting related to the performance of specific employees. As with the meetings reviewed above, this discussion fit within the exception for personal matters about identifiable individuals in s. 239(2)(b) and the exception for labour relations or employee negotiations in s. 239(2)(d).

Opinion

- 72** Council for the Municipality of St-Charles contravened the *Municipal Act, 2001* when it discussed audit reports, management letters, and other auditor findings and recommendations in closed session on May 15, 2012, June 19, 2013, and May 29, 2014. These discussions did not fit within any of the enumerated exceptions in the *Municipal Act*.
- 73** Discussions of individual staff performance and conduct, which ensued as a result of the review of the audit report and management letter, fell within the personal matters and labour relations exceptions under the *Municipal Act*. These portions of the meetings on May 15, 2012, June 19, 2013 and May 29, 2014 were permitted pursuant to the exceptions in the Act.
- 74** As noted above, St.-Charles has already taken steps to rectify the problems brought to light by this investigation. Past management letters and draft audit reports have now been made available to the public. Going forward, draft audit reports will be reviewed by council in open session and management letters will be made available to the public upon request.

Recommendations

- 75** I make the following recommendations to assist the Municipality of St.-Charles in improving its practices with respect to open meetings.

Recommendation 1

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

Recommendation 2

The Municipality of St.-Charles should ensure that no matter is discussed in a closed session unless it clearly falls within one of the enumerated exceptions in section 239 of the *Municipal Act*.

Recommendation 3

The Municipality of St.-Charles should amend its procedure by-law to accord with the open meeting provisions of the *Municipal Act, 2001*.

Report

- 76** A preliminary version of this report was provided to the Clerk and all members of council in order to give the municipality an opportunity to comment. Any comments received were taken into consideration in preparing this report.
- 77** My report should be shared with council for the Municipality of St.-Charles and made available to the public as soon as possible, and no later than the next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario