



**Investigation into complaints about meetings
held by Council for the Town of Amherstburg
on October 14 and 26, 2015, and discussions
over email during December 2014 and
January 2015**

**Paul Dubé
Ontario Ombudsman
July 2016**

Complaint

- 1 My Office received a complaint that council for the Town of Amherstburg discussed approval of the town's accounts payable over email during December 2014 and January 2015, contrary to the open meeting rules in the *Municipal Act, 2001* (the Act).
- 2 We also received complaints that council for the Town of Amherstburg discussed items in closed meetings on October 14 and 26, 2015 that did not fit within the exceptions to the open meeting rules.
- 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.

Ombudsman jurisdiction

- 4 Under the *Municipal Act, 2001*, all meetings of council, local boards, and committees of either of them must be open to the public, unless they fall within prescribed exceptions.
- 5 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.
- 6 The Ombudsman is the closed meeting investigator for the Town of Amherstburg.
- 7 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

- 8 We informed the town of our intent to investigate these complaints on March 4, 2016. My Office's Open Meeting Law Enforcement Team

(OMLET) reviewed the town's procedure by-law. We obtained and reviewed emails exchanged by council members and staff in December 2014 and January 2015 and reviewed relevant meeting materials from those months. We interviewed the Mayor and all members of council, as well as the Clerk, the Chief Administrative Officer (CAO), and the Director of Corporate Services and Treasurer, who was the town's Director of Financial Services at the time of the email exchange (we refer to him as the Director of Financial Services in this report as that was his title at the time). We also reviewed the meeting materials for the council meetings on October 14 and 26, 2015, including audio recordings of both meetings provided by the town, and obtained further information about these meetings during interviews.

- 9 My Office received full co-operation in this matter.

Council procedures

- 10 The town's procedure by-law states that the Head of Council or the CAO may, at any time, summon a special meeting of council.
- 11 The procedure by-law also outlines the open meeting requirements and states that only matters provided for in sections 239(2), (3), and (3.1) of the Act may be discussed in a closed meeting.

Emails exchanged in December 2014 and January 2015

Background

- 12 At its inaugural meeting on December 1, 2014, the new council for the town deferred a motion to appoint cheque-signing authorities. At a special council meeting on December 10, council passed By-Law 2014-127 to appoint the Mayor and Deputy Mayor as the town's cheque-signing authorities, revoking a prior requirement for banking approvals to come from the Mayor or Deputy Mayor along with a specified member of senior staff.
- 13 The Director of Financial Services provided a report to council on December 11, 2014 stating that the appointment of only the Mayor and

Deputy Mayor as cheque-signing authorities would limit staff's ability to conduct the day to day operations of the town in an efficient manner. The report notes that restricting banking authority to the two members of council would impede professional accountants employed by the town from completing key functions of their jobs, such as weekly payroll transfers, making OMERS pension plan payments, and paying the town's energy bills. The report further notes that the Mayor and Deputy Mayor would have to be trained to use the town's banking software, and would have to be available to conduct day to day banking at the town. It also cautions that the by-law lessened the financial controls in place at the town by eliminating the oversight role of senior administrators.

14 The report noted that, as of December 11, the town had \$611,998.79 in cheques awaiting signature.

15 On December 15, 2014, council passed the following motion:

To direct Administration to provide Council with an opportunity each month to view, question and approve accounts payable prior to payment with the exception of mandatory payments such as hydro, negotiated wages, the Solicitor General, benefits, insurance and OMERS payments.

16 During interviews, we were told that, prior to the decisions of council on December 10 and 15, a registry showing all municipal expenditures went to council regularly, but it was only provided for information purposes. Staff were able to pay amounts owing by the municipality in accordance with the budget approved by council and the town's procurement policies without waiting for council approval. With the passing of the December 15 resolution, council restricted staff from paying any amount owing, regardless of how small the amount might be, until council approves the expense.

Emails exchanged

17 On December 17, 2014, the town's CAO sent an email to all of council proposing a new process for approving accounts payable. He suggested that a summary of proposed payments would be sent to council weekly or biweekly. If a member of council had a concern or question about an expense, they would contact the Director of Financial Services and that

payment would be held back. If no concerns were expressed about an expense, staff would provide a cheque to be signed by the town's signing authorities.

- 18 In his email, the CAO asked council to approve the issuance of cheques for a list of specific accounts payable attached to the email. He asked that council members reply before the end of the day on December 19, either to approve the expenses or to question certain items. The CAO stated that council's "next meeting is January 12, 2015 and holding all non-mandatory payments until after this date may create some challenges for some of our vendors".
- 19 Later on December 17, the Director of Financial Services sent an email to the CAO and all of council. He provided a copy of the day's cheques and electronic fund transfers. He asked for a response from council by the end of the day on December 19 so that he might "release the cheques in a timely fashion". The Director of Financial Services told us there was a significant amount of money owing to various vendors at the time, and that delaying payment could lead to serious problems for the town.
- 20 A few hours later, one councillor responded to the CAO's email raising a concern about a particular expense on the accounts payable list. The Director of Financial Services responded to the councillor, copying all of council, the CAO, and the Deputy Clerk. He explained the expense identified by the councillor.
- 21 On December 18, another councillor echoed the concerns raised by the first councillor about a particular accounts payable item. The CAO responded to this email, clarifying the expense and explaining the rules governing such expenses. On December 19, that councillor responded to thank the CAO for the explanation.
- 22 On December 20, the Deputy Mayor wrote to the Director of Financial Services and the CAO asking for payment to be made to a specific business, explaining that the individual needed to be paid by the town for services rendered in order to pay his employees.
- 23 No further emails were exchanged on this matter until January 5, 2015, when the Director of Financial Services again emailed council and the CAO. He indicated that he had not received approval to release all non-

essential cheques and requested that councillors respond with one of the following responses:

1. Approval of all cheques
 2. Approval with exception to a certain cheques - more information required, or
 3. No approval of cheques
- 24** In this email, the Director noted that the town was starting to get calls from concerned vendors and he would like to receive a response before the January 12, 2015 council meeting. He advised, “we will put all of the email communication on the matter in a report to the public on January 12, 2015”.
- 25** Deputy Mayor Bart Di Pascale responded to the Director by email, stating, “Unless there are some that shouldn’t be paid, I approve all cheques be paid.”
- 26** Councillor Jason Lavigne also replied directly to the Director, stating, “I approve of all the cheques being issued”.
- 27** Councillor Leo Meloche replied to the Director, the CAO, and all of council stating that he was “ok with releasing the cheques”, but wanted to address an issue concerning “the purchase of Polo shirts” at the next meeting.
- 28** The Director told us that he took the Mayor’s decision to sign the cheques as his approval of the expenses in question, such that four council members had approved the expenditures. The Mayor confirmed this interpretation, explaining that he expressed his approval of the expenditures by signing the cheques.
- 29** The Director confirmed that the town released a large number of cheques on January 8, 2015.

Council meeting on January 12, 2015

- 30** Council for the Town of Amherstburg held a regular council meeting at 7:00 p.m. on January 12, 2015. An agenda package distributed prior to that meeting included a Financial Services report dated December 17, 2014 by the town’s Director of Financial Services.

- 31 The report states that, due to the upcoming holidays and potential delays in sending cheques out, staff emailed council the accounts payable report for the period of December 1 to December 17. Staff asked for council approval to release the cheques for outstanding bills.
- 32 The report states that the release of cheques “was approved by the majority of members via email correspondence”. The report includes copies of the email correspondence as summarized above, as well as the accounts payable documents.
- 33 According to the minutes of the January 12 council meeting, council discussed the December 1 to December 17 accounts payable report. Council voted to receive the report and to amend its previous motion to review the accounts payable report monthly to bi-monthly, as per the staff recommendation. There is no indication of a vote taken to approve the release of cheques for the outstanding accounts.

Analysis

- 34 The *Municipal Act, 2001* defines a “meeting” as “any regular, special or other meeting of a council, of a local board or of a committee of either of them.”¹ This definition is circular and not particularly helpful in determining whether a meeting has actually occurred.
- 35 In a 2008 report,² in accordance with the underlying objectives of open meeting legislation and relevant case law, our Office developed a working definition of “meeting” to assist in the interpretation of the definition contained in the Act:

Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.³

¹ *Municipal Act, 2001*, S.O. 2001, Ch. 25, s. 238(1).

² Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 25, 2008), online: <Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal>.

³ *Ibid* at paras 54-60.

- 36** This definition supports the principles underlying the open meetings rules and reinforces the right of the public to observe municipal government in process.⁴
- 37** A meeting of council is not limited to a physical gathering of its members. Instead, a meeting may occur whenever council exercises its authority, including over email.
- 38** In an April 2008 investigation, our Office considered whether sequential phone calls between the Mayor and individual councillors for the Township of Nipissing could be considered a “meeting” for the purpose of the open meeting requirements.⁵ In that case, the Mayor convened a special meeting of council and proceeded to telephone one councillor at a time. A quorum of council was never present in the same room or on the phone during any of the conversations. However, as a result of the calls, council collectively came to a consensus to approve additional costs related to the purchase of a fire vehicle. Our report notes:

It is not necessarily the form that a meeting takes that should be determinative, but its substance. In my view, a meeting of council is not limited to a physical gathering of its members. Sequential telephone conversations of council members, for the purpose of exercising the power or authority of the council or for the purpose of doing the groundwork necessary to exercise that power or authority, may constitute a meeting...⁶

- 39** In the same way, a series of emails between council members for the purpose of exercising the power or authority of council, or for the purpose of laying the groundwork necessary to exercise that power or authority, may also constitute a meeting for the purposes of the Act’s open meeting requirements.
- 40** In a May 2015 report about the Township of Leeds and the Thousand Islands, our Office found that a series of emails exchanged by councillors-

⁴ London (City) v. RSJ Holdings Inc., [2007] 2 S.C.R. 588, 2007 SCC 29 at para. 32; Southam Inc. v. Ottawa (City) (1991), 5 O.R. (3d) 726 (Ont. Div. Ct.) at paras. 12-18; Southam Inc. v. Hamilton- Wentworth Economic Development Committee (1988), 66 O.R. (2d) 213 (Ont. C.A.) at paras. 9-12.

⁵ Ombudsman Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008*, (February 6, 2009), online: <<https://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>>

⁶ *Ibid* at paras 29-30.

elect before they were sworn in laid the groundwork for future decisions of council, and would have violated the *Municipal Act* had council been in office at the time. In a June 2015 about the same township, we found that emails exchanged by council members laid the groundwork for an upcoming council decision, but that the exchange did not constitute a meeting as the emails were not received by a quorum of council.

- 41 Local Authority Services (LAS) has also found that a series of emails can constitute a meeting for the purposes of the open meeting rules. In a September 2015 about the Township of the Archipelago, Amberley Gavel, on behalf of LAS, considered emails from the Reeve to councillors sent to establish and agree upon criteria for decision-making around an upcoming staff Christmas party. Amberley Gavel cautioned the township about having "pre-meeting discussions" over email or other "non-public venues". The report states "...we consider these forms of 'pre-meeting discussions' to be meetings under the provisions of the Act... Making pre-determinations about matters which will be under discussion at future meetings, through electronic mail transmissions or other non-public forums, is not open and transparent, as well as being a breach of the Act".⁷
- 42 Not all emails that go to a quorum of council will constitute a meeting for the purpose of the open meeting rules. In a January 2013 letter about the Municipality of Leamington, we considered whether an email from the Mayor to a member of the public that copied all of council was a meeting. Our Office wrote that "...the provisions of the Act were not intended to prevent council members from communicating with constituents and responding to their inquiries". In that case, there was no evidence to suggest that council discussed the matter itself, or laid the groundwork for future decision-making.
- 43 The emails exchanged by council for Amherstburg were sent to all of council. They discussed a decision that was to be made by council – namely, whether to approve the pending payments identified by staff. The emails went further than laying the groundwork for a decision, as council made the decision to approve the expenses by way of its email correspondence. The staff report subsequently brought to council stated:

⁷ 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 14, online: http://www.thearchipelago.on.ca/images/M_images/hr_reort_improper_closed_mtgs_amberley_gavel.pdf.

“The Accounts Payable Report for the period December 1st to December 17th, 2014 [sic] provided for review to the Mayor and Members of Town Council was approved by the majority of members via email correspondence.”

- 44 The emails exchanged by council for the Town of Amherstburg for the purpose of approving accounts payable and the release of cheques constituted a meeting of council that was closed to the public, contrary to the open meeting rules.
- 45 The Director of Finance told us that, had he and the CAO not taken steps to ensure that the financial affairs of the town could be continued, 43 days would have elapsed with no payments released from the town. The CAO told us that staff felt it was important to pay the town’s bills in an expedient manner, as it would not have been fair to make vendors wait until after the next scheduled council meeting.
- 46 While the town’s by-law provides for either the Head of Council or the CAO to summon a special meeting at any time, the CAO told us that, given the proximity of the holiday season, he was not sure the town could have met the notice requirements in the by-law, and did not believe that the meeting would have qualified as an emergency. He also told us that he and the Director of Finance were both relatively new in their roles at this time, and were focused on ensuring the vendors were paid. Further, throughout the email exchange, the town’s Clerk was off for personal reasons.

The October 14, 2015 meeting

- 47 The agenda for the regular council meeting on October 14, 2015 included a special in-camera meeting to discuss three matters, including, “ITEM C - Legal Fee Reimbursement”, under the exception in s. 239(2)(b) for personal matters about an identifiable individual. This item is the subject of the complaint received by our Office.
- 48 Council was provided with a confidential staff report outlining the background of a legal fee reimbursement request and information about applicable town policies and by-laws. The report indicates that staff sought external legal advice on the matter and includes a copy of that legal advice.

- 49 Council was also provided with a copy of a letter from a solicitor to the individual requesting the reimbursement, which indicates that the solicitor was retained and sets out the fee that was paid.
- 50 The regular council meeting on October 14, 2015 began at 6:02 p.m. in council chambers. At 7:13 p.m., council resolved to go in camera to discuss four matters, including:
- C. Legal fee reimbursement – s. 239(2)(b), personal matters about an identifiable individual.
- 51 When the closed meeting began, six members of the seven-member council were present. One councillor left the meeting at 8:15 p.m., before council began to discuss Item C. Councillor Richard Fryer disclosed a pecuniary interest in item C, and left the meeting from 8:40 to 8:45 p.m., during discussion of that agenda item. Accordingly, only four members of council were present during discussion of item C.
- 52 During the discussion, one councillor suggested deferring discussion of item C to the next in camera meeting, given the three absent council members. The Chair indicated that council would vote on the deferral when it returned to open session.
- 53 Council then briefly discussed item C. Staff answered councillors’ questions and reiterated the legal advice that was provided in the confidential staff report.
- 54 The in camera session ended at 9:12 p.m.
- 55 Council voted in open session to defer the fee reimbursement discussion to its next in camera meeting.
- 56 The council meeting adjourned at 9:25 p.m.

Analysis

- 57 Council cited the exception in s. 239(2)(b) for “personal matters about an identifiable individual” with respect to the discussion of item C, an application for reimbursement of legal fees. As set out below, the

discussion does not fit within the exception for personal matters, but does fit within the exception in s. 239(2)(f) for solicitor-client privilege.

Exception for personal matters

- 58 While the *Municipal Act, 2001* does not specifically define “personal matters,” the Information and Privacy Commissioner has issued a number of orders that assess and define what types of information can be considered personal. While not binding on our Office, decisions of the Commissioner can be instructive.
- 59 The Commissioner has held that “to qualify as personal information under the Act, the information must be about the individual in a personal capacity”.⁸ Information about an individual acting in a professional, official or business capacity will not be considered to be personal information unless it reveals something of a personal nature about the individual.
- 60 In this case, council was considering whether to indemnify an individual for an expense that arose because of their official position with the town. The matter was not about the individual in a personal capacity, but rather in an official capacity. Accordingly, the discussion does not fit within the exception for personal matters in s. 239(2)(b) of the Act.

Exception for solicitor-client privilege

- 61 Although the town did not cite this exception in the resolution to proceed in camera, we considered whether the discussion fit within the exception in s. 239(2)(f) for advice subject to solicitor-client privilege.
- 62 The Supreme Court of Canada has established that solicitor-client privilege applies where there is a communication between solicitor and client that entails the seeking or giving of legal advice, and which is intended to be confidential by the parties.⁹
- 63 The staff report to council included correspondence from the town’s external solicitor setting out advice with respect to the request for reimbursement of legal fees. During the meeting, staff conveyed information reflecting the advice provided by the lawyer.

⁸ IPC Order MO-2368, November 26, 2008

⁹ *Solosky v. The Queen*, [1980] 1 S.C.R.

- 64 Council received written legal advice from a lawyer to the town in anticipation of its consideration in a confidential meeting. Accordingly, the advice and the discussion of that advice were subject to solicitor-client privilege and fit within the exception in s. 239(2)(f).

The October 26, 2015 meeting

- 65 The agenda for the regular council meeting at 6:00 p.m. on October 26, 2015 states that a special in camera meeting would be held to discuss two items, including “Legal fee reimbursement” under s. 239(2)(b), the exception for personal matters about an identifiable individual. This item is the subject of the complaint received by our Office.
- 66 The regular council meeting began at 6:03 p.m. in council chambers.
- 67 Council passed a resolution at 7:30 p.m. to move in camera to discuss two matters, including item B, “Legal Fee Reimbursement”, under s. 239(2)(b).
- 68 The open meeting minutes state that council took a break prior to entering into closed session at 7:43 p.m. Prior to entering the closed session, Councillor Fryer declared a pecuniary interest with respect to item B. According to the minutes, he left the meeting at 8:34 p.m. when council began to discuss the legal fee reimbursement.
- 69 Council discussed item B from 8:34 p.m. to 9:12 p.m. We reviewed the closed session minutes and an audio recording of the meeting to determine the content of the discussion.
- 70 In camera, council members talked about the individual who made the request for reimbursement. They speculated about the circumstances that led to the request, and offered personal anecdotes about similar circumstances faced in their own lives. They also spoke about other individuals who do not have any official position with the town.
- 71 Amongst the discussion about the individual and personal anecdotes, council discussed the applicability of the town’s indemnification policy and the *Municipal Act* to the request. They referenced instances in the past when individuals have been reimbursed under the policy.
- 72 Council decided that nothing would be reported out to the public following the closed session on this matter.

- 73 Council returned to open session at 9:12 p.m. The minutes reflect that council reported that, with respect to the legal fee reimbursement, “there is nothing further to report on this matter”. The meeting ended at 9:14 p.m.

Analysis

- 74 Council again relied on the “personal matters” exception to discuss a legal fee reimbursement request in camera. As noted above, the personal matters exception does not apply to individuals acting in their professional or official capacity, except where something personal is revealed.
- 75 On October 26, personal information was revealed throughout the in camera discussion of item B. Council discussed personal anecdotes and experiences. Councillors speculated about an individual’s personal circumstances. Council also discussed potential impacts on individuals who do not hold an official position with the town. These discussions constituted personal information for the purposes of the Act.
- 76 Interspersed with the discussions of personal information, council talked about the application of the town’s indemnification policy and the *Municipal Act* to the legal fee reimbursement request under council’s consideration. This discussion reflects the item listed on the agenda, described in the staff report, and referenced in the resolution to close the meeting.
- 77 On its own, the discussion of whether or not to reimburse an individual for legal fees in accordance with the town’s policy and the *Municipal Act* does not fit within any of the exceptions in the Act.
- 78 However, council’s discussion of item B was so interwoven with personal information, it is not clear that the two topics could have easily been disentangled.
- 79 In interviews, some members of council told us that they felt these personal discussions informed their decision with respect to the request for reimbursement. However, in other interviews we were told that the matter of reimbursement could have been discussed without disclosing personal information, had council members exercised discretion. According to staff, this topic could not have been discussed in an open session without councillors introducing confidential personal information into the discussion.

- 80 Accordingly, although the topic as stated in the resolution would not have fit within any of the closed meeting exceptions, the discussion fit within the exception for personal matters in s. 239(2)(b) of the Act because of council's extension of the discussion into personal matters.
- 81 It is understandable that, in some cases, council may need to discuss related personal matters or impacts in order to fully inform its decision-making on a certain matter, even though that matter in and of itself would not fall under the exceptions for closed meeting discussions contained in the Act. In the interest of transparency, however, I would caution council to endeavor, wherever possible, to individually and collectively ensure that its discussion in closed session is focused on those matters within the statutory exceptions, as set out in the resolution to close the meeting.
- 82 Further, council should be careful not to introduce extraneous confidential or personal information into its discussion of matters which are usually dealt with during open session because they do not by themselves fall within the exceptions under the Act. Staff should not feel the need to put matters in camera that do not fall within the statutory exceptions to avoid council inadvertently disclosing confidential information.

Opinion

- 83 My investigation found that council for the Town of Amherstburg contravened the *Municipal Act, 2001* and the municipality's procedure by-law when it approved accounts payable over email in December 2014 and January 2015. Council's collective email discussion and approval of the accounts constituted a meeting for purposes of the *Municipal Act*, which was closed to the public and did not fall within any of the Act's permitted exceptions.
- 84 On October 14, 2015, the exception for personal matters in s. 239(2)(b) cited in the resolution to close the meeting did not apply to the discussion of a legal fee reimbursement. However, council's discussion fit within the exception in s. 239(2)(f) for advice subject to solicitor client privilege.
- 85 On October 26, 2015, council's discussion fit within the exception for personal matters about an identifiable individual in s. 239(2)(b), only because council referenced extraneous personal matters throughout the discussion. Had council limited its discussion to the item stated in the

resolution, the discussion would not have fit within any of the exceptions to the open meeting rules.

Recommendations

- 86 I am making the following recommendations to assist the Town of Amherstburg in improving its practices with respect to open meetings.

Recommendation 1

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

Recommendation 2

Members of council for the Town of Amherstburg should avoid exercising email communications.

Recommendation 3

The Town of Amherstburg should ensure that no subject is discussed in a closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 4

Council for the Town of Amherstburg should individually and collectively ensure that it limits discussion in closed session to matters within the statutory exceptions in the *Municipal Act, 2001*.

Report

- 87 The municipality was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.

- 88 My report should be shared with council and made available to the public as soon as possible, and no later than the next council meeting.

Paul Dubé
Ontario Ombudsman