



## **Ombudsman Report**

**Investigation into the closed meeting held by  
council for the Municipality of St.-Charles on  
April 3, 2019**

**Paul Dubé  
Ombudsman of Ontario  
October 2019**

## Complaint

- 1 In April 2019, my Office received a complaint about the April 3, 2019 Committee of the Whole meeting held by council for the Municipality of St.-Charles (the municipality). The complaint alleged that during this meeting, council discussed documents and recommendations about the municipality's finances contrary to the *Municipal Act, 2001*.

## Ombudsman jurisdiction

- 2 Under the *Municipal Act, 2001* (the Act)<sup>1</sup>, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 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 When investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality's procedure by-law have been observed.
- 6 To assist municipal councils, staff, and citizens, we have developed an online digest of open meeting decisions that contains summaries of the Ombudsman's open meeting cases. This searchable repository was created to provide interested parties with easy access to the Ombudsman's past decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether a matter should or may be discussed in closed session, as well as issues related to open meeting procedure. Summaries of all previous Ombudsman decisions may be consulted in the digest at [www.ombudsman.on.ca/digest](http://www.ombudsman.on.ca/digest).

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<sup>1</sup> SO 2001, c 25.

## Council procedures

- 7 The municipality's procedural by-law (By-law 2018-46) provides that the Committee of the Whole is a committee composed of all members of council. The by-law further indicates that all council and committee meetings must be open to the public except as provided by the Act.

## Investigative process

- 8 On May 31, 2019, we advised the Municipality of St.-Charles of our intent to investigate this complaint.
- 9 Members of my Office reviewed relevant portions of the municipality's procedure by-law and the Act, as well as the agenda, minutes, and meeting materials relevant to the closed session discussion. In addition, we listened to the audio recording of the closed meeting. Audio and video recordings provide the most accurate and complete record of a meeting and we commend the municipality for adopting the practice of audio recording its council meetings.
- 10 To understand the background and context of the closed session discussion, we interviewed the then-Clerk, Mayor, and Chief Administrative Officer (CAO), the Treasurer/Director of Finance and a councillor.
- 11 We received full co-operation with our investigation.

## April 3, 2019 Committee of the Whole meeting

- 12 On April 3, 2019, council met for a Committee of the Whole meeting at 6:00 p.m. in council chambers.
- 13 After the meeting convened in open session, council passed a resolution to proceed into closed session at 6:33 p.m. to discuss:
  - personal matters about an identifiable individual, including municipal or local board employees, as authorized under Section 239 (2) (b) of the *Municipal Act, 2001*, as amended;
  - labour relations or employee negotiations, as authorized under Section 239 (2) (d) of the *Municipal Act, 2001*, as amended;

Topic: Building Department; Treasury Department

- 14** Prior to passing this resolution, Councillor Jackie Lafleur publicly cautioned council that the matter noted on the resolution to proceed in closed session, related to the Treasury Department, might not be appropriate for closed session discussion, as the subject to be discussed was similar to a management letter. She indicated that the Ombudsman's Office had previously found that management letters were not appropriate for closed session discussion.
- 15** Despite this caution, however, council proceeded *in camera*.
- 16** Our review of the meeting minutes indicates that the resolution did not specify which closed meeting exception was applicable to each agenda topic. However, during interviews we were told that the personal matters exception related to the Treasury Department matter, while the labour relations or employee negotiations exception related to the Building Department matter. As a best practice, the municipality should ensure that the resolution to proceed *in camera* clearly identifies which closed meeting exception(s) it is relying on to discuss each matter *in camera*.

## Council discussion

- 17** Once in closed session, council considered a detailed report from a financial consultant who had been retained by the municipality to assist in identifying and rectifying errors and discrepancies in the municipality's accounting software. The report contained a watermark indicating that it was "supplied in confidence" to the municipality and contained numerous recommendations to correct or improve the municipality's financial practices. We were told by the Director of Finance/Treasurer that it was her intention to refer to the report when briefing council, but that she did not expect it to be distributed to council. However, some information from this document was included in a staff report prepared for the council meeting on April 17, 2019.
- 18** According to the recording, the Director of Finance/Treasurer spoke to council about the detailed information in this report and her own observations regarding the state of the municipality's accounting system and finances. She explained what steps had been taken so far to address the report's observations, as well as additional steps she would like to take with council's consent. The Director of Finance/Treasurer indicated that failure to take certain steps would likely lead to issues during the municipality's next audit.
- 19** During the discussion, council considered various related topics, including the historical source of the errors and discrepancies in the accounting

system. As part of this discussion, certain individuals were identified by name and/or job position.

- 20** As a result of this discussion, council approved the Director of Finance/Treasurer's request to take further steps to obtain additional resources to address these issues. We were told that further details about these proposals were considered in open session at the council meeting on April 17, 2019.
- 21** After concluding the Treasury Department matter, council discussed an unrelated matter regarding the Building Department that wasn't included in the complaint to our Office. Council reconvened in open session at 8:22 p.m. According to the meeting minutes, the Mayor reported back that council received information and that direction was provided to the CAO on the closed session matters.

## Analysis

### Closed meeting exception

*"Personal matters about an identifiable individual" – s. 239(2)(b)*

- 22** Council relied on the exception for personal matters about an identifiable individual found in section 239(2)(b) to discuss issues related to the municipality's finances in closed session.
- 23** Generally, information that pertains to an individual in their professional capacity will not fit within the exception for personal matters.<sup>2</sup> However, in some cases information about a person in their professional capacity may still fit within the exception if it reveals something personal<sup>3</sup> or relates to scrutiny of an individual's conduct.
- 24** In February 2016, my Office determined that the Municipality of St.-Charles contravened the *Municipal Act* when it discussed audit reports, management letters, and other auditor findings and recommendations in closed session during three council meetings.<sup>4</sup> The Ombudsman noted that discussions of

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<sup>2</sup> IPC Order MO-2204 and Ombudsman of Ontario, *Township of Russell* (August 2014): <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Russell-Twp-Closing-Letter-FINAL-EN.pdf>>

<sup>3</sup> Ombudsman of Ontario, *City of Elliot Lake* (September 2014): <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake-Sept-8-2014.pdf>>.

<sup>4</sup> *St.-Charles (Municipality of) (Re)*, 2016 ONOMBUD 2: <<http://canlii.ca/t/gt8dc>>

individual staff performance and conduct, which ensued as a result of the review of the audit report and management letter, fell within the exceptions for personal matters and labour relations, but that the other discussions did not.

- 25** As my Office has previously noted, in most cases, information provided to council by staff about a municipality's finances does not fit within any of the exceptions to the open meeting rules and should be discussed in open session. Governments are entrusted with the management of public funds, and information about the state of those funds should be public to ensure financial accountability at the local level.<sup>5</sup>
- 26** In this case, only a small portion of council's discussion scrutinized the conduct of named individuals, while the vast majority related to broader issues with the municipality's finances and the steps that should be taken to rectify these issues and prevent their recurrence. These broader discussions about the municipality's finances do not fit within the personal matters exception. Accordingly, council was not permitted to rely on the personal matters exception to discuss broader issues with the municipality's finances.
- 27** During interviews, we were told that the financial information considered at the meeting on April 3, 2019 needed to be discussed in closed session because councillors would likely talk about the job performance of particular staff members. Those we spoke with said that council would not be able to separate the discussion about identifiable individuals from the broader financial discussion. In *St. Catharines v. IPCO, 2011*, the Divisional Court found that it is unrealistic to expect municipal councils to split up discussions to ensure that nothing which can be discussed in open session is ever discussed in a closed meeting.<sup>6</sup> This applies to discussion on a single topic, where splitting the information would require interrupting the conversation.
- 28** The *St. Catharines* case can be distinguished from the case at hand. While the financial consultant's observations and recommendations may have prompted the discussion about employee performance, the two topics were distinct. Council could have discussed the consultant's report in open session before proceeding into closed session to address any related employee performance issues.
- 29** In the current case, we were also told that council felt it had to discuss the consultant's report in closed session because it contained a watermark advising that it was "supplied in confidence" to the municipality. While

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<sup>5</sup> *Pelham (Town of) (Re)*, 2018 ONOMBUD 4: <<http://canlii.ca/t/hvmtr>>.

<sup>6</sup> *St. Catharines (City) v. IPCO, 2011 ONSC 2346* (CanLII) at para. 42.

section (239)(2)(i) the *Municipal Act* does allow municipalities to consider “information supplied in confidence by a third party” in closed session, this is intended to protect confidential information about the third party, not a report from a third party summarizing and analyzing information about the municipality. As my Office has found in other cases, an individual’s assertion that they would like a discussion or document to remain private does not mean that the *Municipal Act* permits this.<sup>7</sup>

#### *Other closed meeting exception*

- 30** Although not cited by the municipality, one person we interviewed said they felt that the closed meeting exception for security of the property may have allowed council to discuss the municipality’s finances *in camera*.
- 31** Section 239(2)(a) of the *Municipal Act* allows a municipality or local board to discuss the security of property of the municipality or local board in closed session. The Act does not define “security” for the purposes of this exception, but the Ombudsman has found that the exception does not apply to discussions regarding the financial interests of the municipality.<sup>8</sup> As a result, the exception for security of the property would not apply to council’s discussion.

## Opinion

- 32** Council for the Municipality of St.-Charles contravened the *Municipal Act, 2001* on April 3, 2019, when it went *in camera* to discuss financial information about the municipality. Council’s discussion about the steps necessary to rectify errors and discrepancies in its accounting software did not fit within the exception for personal matters, or any exception, to the open meeting requirements.

## Recommendations

- 33** I make the following recommendations to assist the municipality in fulfilling its obligations under the Act and enhancing the transparency of its 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.

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<sup>7</sup> *Brockville (City of)*, 2016 ONOMBUD 12: <<http://canlii.ca/t/h2ssr>>.

<sup>8</sup> *St.-Charles (Municipality of) (Re)*, 2016 ONOMBUD 2: <<http://canlii.ca/t/gt8dc>>.

**Recommendation 2**

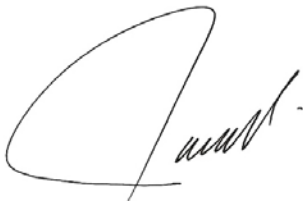
Council for the Municipality of St.-Charles should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

**Recommendation 3**

As a best practice, council for the Municipality of St.-Charles should ensure that its resolutions to proceed *in camera* clearly identify which closed meeting exception(s) it is relying on to discuss each matter *in camera*.

**Report**

- 34** The Municipality of St.-Charles was given the opportunity to review a preliminary version of this report and provide comments. Comments received were considered in the preparation of this final report.
- 35** My report should be shared with council for the Municipality of St.-Charles. My report should be made available to the public as soon as possible, and no later than the next council meeting. In accordance with section 239.2(12) of the *Municipal Act*, council should pass a resolution stating how it intends to address this report



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**Paul Dubé**  
**Ontario Ombudsman**