



Ombudsman Report

**Investigation into closed meetings held
by the Town of Amherstburg on August 8,
September 13, November 8, and November 16, 2021**

**Paul Dubé
Ombudsman of Ontario
July 2022**

Complaint

- 1 Our Office received complaints about four closed meetings held by council for the Town of Amherstburg (the “Town”) on August 8, September 13, November 8, and November 16, 2021. It was alleged that the subjects discussed at these meetings did not come within the closed meeting exceptions found in the *Municipal Act, 2001*¹ (the “Act”).
- 2 My investigation has determined that the Town did not contravene the Act’s open meeting requirements in closing these meetings to the public.
- 3 However, my investigation found that the Town contravened the requirements of section 239(4)(a) of the Act on September 13 and November 16, 2021 by failing to state by resolution the general nature of the matters to be considered *in camera*.
- 4 My investigation also found that the Town contravened the requirements of section 239(7) of the Act by failing to keep a record of what occurred *in camera* on November 8 and November 16, 2021.

Ombudsman jurisdiction

- 5 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.
- 6 As of January 1, 2008, the Act gives anyone the right to request an investigation into whether a municipality or local board has complied with the Act in closing a meeting to the public. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own investigator to review complaints about whether the municipality or a local board has complied with the open meeting rules.
- 7 The Ombudsman is the closed meeting investigator for the Town of Amherstburg.
- 8 When investigating closed meeting complaints, we consider whether the open meeting requirements in the Act and the applicable procedure by-law have been observed.

¹ SO 2001, c 25.

- 9 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman's 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 certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman's previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

Investigative process

- 10 In March 2022, we advised the Town of our intent to investigate these complaints.
- 11 Members of my Office's open meeting team reviewed relevant portions of the Town's Procedural By-law and recordings of the open sessions preceding and following each closed meeting where available. We also reviewed the agendas and minutes for each meeting where available.
- 12 We interviewed the Mayor, the current Clerk, the former Acting Chief Administrative Officer (who was in the role during the month of September 2021), the former Interim Chief Administrative Officer (who was in the role from October 2021 to February 2022), and all members of council.
- 13 My Office received full co-operation in this matter.

August 8, 2021 council meeting

- 14 A special meeting of council was held on August 8, 2021. The minutes indicate that a resolution to go *in camera* was passed at 2:05 p.m. citing three exceptions from the Act: the exception for personal matters about an identifiable individual at section 239(2)(b), the exception for labour relations or employee negotiations at section 239(2)(d), and the exception for advice subject to solicitor-client privilege at section 239(2)(f).
- 15 Once *in camera*, a solicitor provided an overview of the conduct of three specific employees. These individuals were identified by name, and their job performances were reviewed.

- 16 We were told that the content of the discussion, as well as the positions these employees held, meant it was not possible to discuss their conduct without making their identities evident.
- 17 The solicitor advised council about its options and made recommendations about how to respond to issues related to these employees. Council discussed the solicitor's advice.
- 18 The closed meeting was adjourned at 3:23 p.m.

Analysis

- 19 Section 239(2)(b) of the Act allows a meeting to be closed to the public when discussions pertain to a personal matter about an identifiable individual, including about a municipal employee. In order to qualify as "personal information" for the purpose of the exception, the information must be reasonably expected to identify an individual² and be about an individual in their personal, rather than professional, capacity.³ However, information about an individual in their professional capacity may still qualify as personal information if it reveals something of a personal nature.⁴
- 20 Our Office has found that discussion about an individual's conduct and job performance falls within the exception for personal matters about an identifiable individual.⁵
- 21 In this case, the *in camera* discussion was about three specific individuals who were identified by name. The conversation was about their job performances and conduct in the workplace. Council also discussed the solicitor's recommendations with respect to the employees.
- 22 This discussion was properly closed under the exception for personal matters about an identifiable individual. As such, it is not necessary to consider the applicability of the other two exceptions raised.

² *Ontario (AG) v Pascoe*, 2002 CanLII 30891 (ONCA) at para 1, online: <<https://canlii.ca/t/1chz2>>.

³ *Amherstburg (Town of) (Re)*, 2015 ONOMBUD 13 at para 22, online: <<https://canlii.ca/t/gtp5z>>.

⁴ *Ibid.*

⁵ *Kirkland Lake (Town of) (Re)*, 2021 ONOMBUD 12, online: <<https://canlii.ca/t/jqvld>>.

September 13, 2021 council meeting

- 23 Council held a special meeting on September 13, 2021. Council moved to go *in camera* at 4:36 p.m. pursuant to the exception for advice subject to solicitor-client privilege at section 239(2)(f) of the Act. No further information was contained in the resolution.
- 24 During this closed meeting, a report and legal correspondence were presented to council relating to the Town's options under a contractual agreement with a specific entity. The minutes further indicate that a solicitor was present and answered council's questions about its options.
- 25 Council rose from the closed session at 6:02 p.m.

Analysis

- 26 Under section 239(2)(f) of the Act, a meeting or part of a meeting may be closed to the public if the subject matter being considered is advice that is subject to solicitor-client privilege, including communications necessary for that purpose. The purpose of the exception is to ensure that municipal officials can speak freely about legal advice without fear of disclosure.⁶
- 27 In this case, council received advice from the solicitor, both through the legal correspondence that was provided to them and through the solicitor who was present at the meeting. Council asked questions about the risks involved with various courses of legal action and discussed the advice it received.
- 28 This advice was considered confidential because council did not want to publicly expose the legal risks associated with each option. Accordingly, the discussion held *in camera* properly fit within the exception for communications subject to solicitor-client privilege.

November 8, 2021 council meeting

- 29 Council held a regular meeting on November 8, 2021. Council moved *in camera* at 8:25 p.m. pursuant to the exception for personal matters about an identifiable individual at section 239(2)(b) of the Act.

⁶ *Hamilton (City of) (Re)*, 2019 ONOMBUD 3 at para 33, online: <<https://canlii.ca/t/j2b49>>.

- 30 The resolution indicated that the topic of the *in camera* discussion would be “item 11.2 on the Regular Agenda being The Centennial Park Highest and Best Use Analysis Report.”
- 31 The *in camera* meeting was not recorded and minutes of the closed session were not kept.
- 32 During the open portion of the council meeting, council discussed an analysis report, called “The Centennial Park Highest and Best Use Analysis Report”, a report analyzing the possible uses of land in local Centennial Park. As part of council’s discussion, questions arose relating to the creation of the report. Council proceeded *in camera* to discuss this aspect of the report further. Once in closed session, we were told that council discussed who had hired the consultant to draft the report as well as other aspects of the report’s creation. A specific individual was identified and council discussed this person’s authority to commission the report.
- 33 The closed meeting was adjourned at 9:11 p.m.

Analysis

- 34 As noted above, a meeting or part of a meeting may be closed to the public if the discussion would reveal personal information about an identifiable individual. This includes information about an individual’s conduct as an employee and their job performance.⁷
- 35 The *in camera* discussion focused on who authorized the Centennial Park Highest and Best Use Analysis Report and if that individual had received approval from Council to hire a consultant to create the report. As the discussion was about a specific employee’s conduct, the discussion fell under the exception for personal matters about an identifiable individual.

November 16, 2021 council meeting

- 36 Council met for a special meeting on November 16, 2021. A resolution was passed to go *in camera* at 6:11 p.m. to discuss two items. The topics of conversation for the *in camera* meeting were not included in the resolution to close the meeting to the public.

⁷ *Supra* note 6.

- 37 The first topic of conversation was the Town's vaccination policy, and this discussion was closed pursuant to the exception for personal matters about an identifiable individual at section 239(2)(b) of the Act and the exception for labour relations or employee negotiations at section 239(2)(d) of the Act.
- 38 Council discussed specific Town employees who had not provided proof of vaccination against the COVID-19 virus, as is required by Town policy. A solicitor was present and provided advice regarding possible courses of action the Town could take with respect to these employees.
- 39 While the employees who had not submitted proof of vaccination were not identified by name, their job titles were discussed and we were told this would have identified them due to the small number of municipal staff. Council discussed the job titles of these unvaccinated individuals in the context of determining whether or not the municipality should terminate them.
- 40 The second topic of conversation was the Town's ongoing litigation with a former staff member; this section of the meeting was closed pursuant to the exception for personal matters about an identifiable individual at section 239(2)(b), the exception for labour relations or employee negotiations at section 239(2)(d), and the exception for litigation or potential litigation at section 239(2)(e) of the Act.
- 41 During this discussion, a solicitor provided updates to council with respect to the ongoing litigation. The solicitor provided advice as to next steps in the litigation, and council discussed its options. We were told that this information was considered confidential by the Town as it related to ongoing litigation and settlement options.
- 42 The *in camera* meeting was not recorded and minutes of the closed session were not kept.
- 43 Council rose from closed session at 8:18 p.m.

Analysis

The Town's vaccination policy

- 44 Under section 239(2)(d) of the Act, a meeting or part of a meeting may be closed to the public if the subject matter being considered is related to labour relations or employee negotiations. This exception applies where there is a discussion about the relationship between the municipality and its employees.

- 45 Our Office has determined that discussions of employee termination fall under the exception for labour relations or employee negotiations.⁸ At this meeting, the conversation was about whether or not the Town could terminate specific employees who had not provided proof of vaccination.
- 46 Accordingly, this discussion about the Town's vaccination policy fit within the exception for labour relations or employee negotiations. As such, it is not necessary to analyze whether any other closed meeting exception applied.

Litigation with a former staff member

- 47 The exception for litigation or potential litigation at section 239(2)(e) of the Act applies where council discusses ongoing or anticipated litigation.
- 48 Our Office has found that, for this exception to apply, it is not necessary that council discuss litigation strategy – council may simply receive information or ask questions about the status of the litigation.⁹
- 49 During the closed meeting, council discussed an ongoing legal dispute between the Town and a former staff member. A solicitor was present and provided council with an update about the ongoing litigation and advice on potential next steps.
- 50 The conversation was about an ongoing litigation matter; therefore, the discussion fit within the exception relating to litigation or potential litigation, and it is not necessary to analyze the applicability of any other exception.

Closed meeting minutes

- 51 The Town provided us with open meeting minutes for all four meetings investigated, as well as minutes for the August 8 and September 13 closed sessions. Our investigation determined that closed meeting minutes were not kept for the closed sessions held on November 8 and November 16, 2021.

⁸ *Amherstburg (Town of)*, 2015 ONOMBUD 33 online: <<https://canlii.ca/t/gtp7d>>.

⁹ *Brudenell, Lyndoch and Raglan (Township of) (Re)*, 2021 ONOMBUD 16 at para 32, online: <<https://canlii.ca/t/jjf8w>>.

- 52 Town staff explained that closed meeting minutes were not kept on November 8 and November 16 because there were no votes on substantive matters or direction given to staff to take specific actions. My Office was also told that a detailed description of the discussion was not noted because of the sensitivity of the matter being discussed and to protect the Town's legal positions.
- 53 Section 239(7) of the Act requires that a municipality record, without note or comment, all resolutions, decisions and other proceedings at its meetings. This obligation applies to both open and closed meetings.
- 54 My Office has stated that "keeping complete and accurate minutes of closed session meetings ensures that members of the public feel confident that matters dealt with in closed session were appropriate for *in camera* discussion and that requirements of the *Municipal Act* and local by-laws have been followed."¹⁰
- 55 My Office has noted that records of a closed meeting should include the following:
- Where the meeting took place;
 - When the meeting started and adjourned;
 - Who chaired the meeting;
 - Who was in attendance, with specific reference to 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 reference to any specific documents considered;
 - Any motions, including who introduced the motion and seconders;
 - All votes taken, and all directions given.¹¹
- 56 Closed meeting minutes should provide a separate record of the *in camera* proceedings even if some of this information could be implied from the open meeting minutes.

¹⁰ *Supra* note 11 at 60.

¹¹ *Open Meetings: Guide for Municipalities*, Ontario Ombudsman, online: <https://www.ombudsman.on.ca/have-a-complaint/who-we-oversee/municipalities/municipal-closed-meetings/open-meetings-guide-for-municipalities>.

- 57 In failing to keep closed meeting minutes that recorded all resolutions, decisions and other proceedings of council, the Town failed to fulfill its statutory obligation to record council meeting proceedings.
- 58 As a best practice, many municipalities opt to make audio or video recordings of closed meetings to ensure that a complete record exists. Audio or video recordings can assist greatly during an investigation, and enhance the public's confidence in the municipality's compliance with the open meeting rules. Had the Town created an audio or video recording of its closed sessions, a complete and reliable record of the discussion would have been available to assist my staff during this investigation.

Resolution to proceed *in camera*

- 59 Under section 239(4) of the Act, before moving into a closed session, a municipality, local board, or committee of either must state by resolution in open session that a closed meeting will be held. It must also state the general nature of the matter to be considered at the closed meeting.
- 60 As the Court of Appeal noted in *Farber v Kingston*, the resolution to go into a closed meeting should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.¹² The Ombudsman has also recommended that councils provide more substantive detail in resolutions authorizing closed sessions. This requirement is generally not satisfied by stating only the exception in the Act.¹³
- 61 The resolution for the closed meeting held on September 13, 2021, indicated that council intended to discuss:
- Item A - Section 239(2)(f) - Advice that is subject to solicitor-client privilege, including communications necessary for that purpose.
- 62 The resolution did not provide a further description of the topic to be discussed *in camera* beyond citing the relevant exception. Similarly, the resolutions to proceed into a closed meeting on November 16, 2021 merely cited the exception council relied upon to move *in camera*.

¹² *Farber v Kingston (City)*, 2007 ONCA 173.

¹³ *Brockville (City of)*, 2016 ONOMBUD 12 at para 53, online: <<https://canlii.ca/t/h2ssr>>.

- 63 My Office was not provided with a satisfactory explanation as to why more information could not be revealed to the public. For example, on November 16, council could have explicitly indicated in its resolution to move *in camera* that it would discuss the vaccination policy and employment-related litigation without undermining the reason for which the public was excluded from the discussion.
- 64 In failing to provide a general description of the topic of discussion on September 13, and November 16, 2021, the Town contravened the requirements of section 239(4)(a) of the Act.
- 65 Conversely, for the November 8, 2021 meeting of council, the resolution to move *in camera* provided more substantive details about the nature of the closed session discussions. Indeed, council indicated that it would discuss personal matters about an identifiable individual “resulting from [...] The Centennial Park Highest and Best Use Analysis Report”.
- 66 Furthermore, although the resolution to move *in camera* on August 8, 2021 only cited the applicable exceptions in the Act, I am satisfied in this particular case that no further information could be provided by council without undermining the reason for which the public was excluded from the discussion.

Report back

- 67 At the beginning of the September 13, 2021 regular meeting, council provided a report back for *in camera* meetings on August 8, August 16, August 25, and September 13, 2021. Council explained the exceptions relied upon to close these meetings and added that “there is nothing further to report at this time” for any of the meetings.
- 68 Following the closed meeting on November 16, 2021, no information was provided to the public about the two topics of discussion.
- 69 Section 3.2.7 of the Town’s procedural by-law provides that the Clerk may report back in open session about *in camera* discussions.

- 70 Numerous closed meeting investigators, including my Office, recommend as a best practice that municipalities report back after closed sessions and provide general information about what occurred *in camera*.¹⁴ A report back may consist of a general discussion in open session of subjects considered in closed session, together with information about any decisions, resolutions, and directions given to staff. In other cases, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.¹⁵
- 71 Reporting back after each closed session provides meaningful information to the public about the issues discussed *in camera* and inspires confidence that the meeting has been properly closed.
- 72 The report back provided for the August 8, 2021 *in camera* meeting was delayed to September 13, 2021. At that meeting, there was also a report back for the September 13, 2021 *in camera* meeting as well as two other previous closed sessions. However, merely citing the exceptions relied upon to close the meetings to the public does not provide a helpful or meaningful indication of what was discussed in closed session.
- 73 Although my Office was told that open session discussions after the November 16, 2021 closed meeting touched on information discussed in closed, this does not constitute a report back. Rather, to maximize information available to the public, council could have revealed that it discussed proof of vaccination of individual Town employees. The fact that subsequent discussions about vaccination occurred in open session does not inform the public of closed session discussions.
- 74 In future, I encourage Council to adopt the best practice of reporting back meaningful information, where possible, of what was discussed *in camera*.

Opinion

- 75 My investigation found that council for the Town of Amherstburg did not contravene the *Municipal Act, 2001* when it discussed various topics *in camera* on August 8, September 13, November 8 and November 16, 2021.

¹⁴ *Oshawa (City of) (Re)*, 2016 ONOMBUD 10 at para 58, online: <<https://canlii.ca/t/h2ssm>>.

¹⁵ *The Nation (Municipality of) (Re)*, 2019 ONOMBUD 4 at para 82, online: <<https://canlii.ca/t/j2b4c>>.

- 76 However, the Town of Amherstburg contravened the requirements of section 239(4)(a) of the Act on September 13 and November 16, 2021 by failing to state by resolution the general nature of the matters to be considered *in camera*.
- 77 The Town of Amherstburg also contravened the requirements of section 239(7) of the Act on November 8 and November 16, 2021 by failing to keep a record of what occurred *in camera*.

Recommendations

- 78 I make the following recommendations to assist the Town of Amherstburg in fulfilling its obligations under the Act and enhancing the transparency of its 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 compliance with their responsibilities under the *Municipal Act, 2001* and the Town's procedural by-law.

Recommendation 2

When proceeding *in camera*, the Town of Amherstburg should ensure that its resolutions provide a general description of the issues to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public.

Recommendation 3

The Town of Amherstburg should ensure that closed session minutes are kept of all meetings of council.

Recommendation 4

As a best practice, the Town of Amherstburg should audio or video record its closed sessions.

Recommendation 5

As a best practice, the Town of Amherstburg should follow a practice of reporting back publicly on matters considered *in camera* after a closed session.

Report

- 79 Council for the Town of Amherstburg was given the opportunity to review a preliminary version of this report and provide comments to my Office. Due to restrictions in place related to COVID-19, some adjustments were made to the normal preliminary review process and we thank council and staff for their co-operation and flexibility. All comments we received were considered in the preparation of this final report.
- 80 This report will be published on my Office's website, and should also be made public by the Town of Amherstburg. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council is required to pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario