



“Open Conflict”

**Investigation into whether the
Town of South Bruce Peninsula Council
improperly held closed meetings**

**André Marin
Ombudsman of Ontario
July 7, 2010**

Table of Contents

Complaint.....	1
Ombudsman Jurisdiction	1
Council Meeting Procedures.....	1
Investigative Process.....	3
Investigative Findings.....	4
<i>Appointing a Manager of Financial Services at the June 23, 2009 Council Meeting</i>	4
<i>Removing the Mayor from the CAO Negotiating Team at the September 22 Council Meeting</i>	7
<i>“Meet Me at Timmy’s”</i>	8
Analysis of Findings	9
<i>Public Notice of Closed Meetings</i>	9
<i>Addition of Items</i>	9
<i>Resolution Authorizing Closed Session</i>	10
<i>Voting in Closed Session</i>	12
<i>Records of Meetings</i>	12
<i>Reporting Back</i>	14
<i>“Meeting” the Legal Test</i>	14
Opinion	15
Recommendations.....	16
Response from the Council of the Town of South Bruce Peninsula.....	17
Report.....	18

Complaint

- 1 On June 26, 2009, our Office received a complaint alleging that members of council for the Town of South Bruce Peninsula had improperly held in-camera meetings, and, in particular, had met sometime prior to the June 23, 2009 council meeting to discuss bringing a motion to appoint a Manager of Financial Services at that meeting.
- 2 On September 25, 2009, our Office received a second complaint about a closed meeting held on September 22, 2009. The complainant alleged that during the closed session, council improperly discussed and voted on removing the mayor from the negotiating team that had been tasked with appointing a Chief Administrative Officer.

Ombudsman Jurisdiction

- 3 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, changes to the *Municipal Act, 2001* gave citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The Town of South Bruce Peninsula has not appointed its own investigator and accordingly, the Ombudsman is the town's closed meeting investigator under s.239.1 of the *Municipal Act, 2001*.
- 6 In investigating closed meeting complaints, our Office considers whether the meeting was closed in accordance with the provisions of the Act, and the relevant municipal procedure by-law.

Council Meeting Procedures

- 7 The town's procedure by-law (by-law number 16-2009) provides that notice of council meetings is to be posted on the municipality's website and in accordance with the town's notice by-law. Regular council meetings are generally to be held on the second and fourth Tuesdays of every month. The clerk is required to endeavour

- to deliver the meeting agenda to council members no later than 48 hours before the meeting.
- 8** The procedure by-law also provides that in order for an issue to be considered at a council meeting, the council member bringing it forward must give notice of the motion to introduce a new matter and it has to be added to the meeting agenda. Otherwise, council cannot consider a new item unless it involves a point of order, a matter of urgency or a majority of council members present at a meeting vote to dispense with the notice requirement.
- 9** The by-law also allows council to suspend or amend any of the by-law provisions, other than the quorum requirement, at or for a particular meeting, upon resolution of a two-thirds majority of council members present.
- 10** In accordance with the *Municipal Act, 2001* and the town's procedure by-law, council may consider the following topics in closed session:
- Security of the property of the municipality or local board;
 - Personal matters about an identifiable individual, including municipal or local board employees;
 - Proposed or pending acquisition or disposition of land by the municipality or local board;
 - Labour relations or employee negotiations;
 - Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
 - Advice that is subject to solicitor-client privilege, including communications necessary for that purpose; and
 - Matters in respect of which a council, board, committee or other body may hold a closed meeting under another Act.
- 11** The Act and by-law also provide that council may meet in closed session for the purpose of education or training of council members, provided no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.
- 12** In addition, council is also required to close meetings to the public if the subject matter relates to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act* and the body is acting as an institution for the purposes of that Act.

Investigative Process

- 13 On August 21, 2009, following preliminary inquiries, the town was notified that our Office would be pursuing an investigation into the complaint alleging that improper in-camera meetings had been held, in particular, prior to the June 23, 2009 council meeting.
- 14 On October 23, 2009, after our Office had completed a review of the original complaint, the town was notified that we would be investigating a second complaint that council had improperly discussed and voted in closed session to remove the mayor from the CAO negotiating team on September 22, 2009.
- 15 During the course of our investigations, relevant municipal documents were obtained and reviewed, including minutes, agendas, emails and other municipal records. We also considered the town's procedure by-law and applicable legislation.
- 16 In accordance with s. 19(1) of the *Ombudsman Act*, members of council and town staff are required to provide our Office with any documents or information requested during the course of our investigations. In fact, failure to co-operate with the Ombudsman's investigations may constitute a provincial offence under s. 27 of the Act. While town staff co-operated fully with our investigations, some members of council resisted our efforts to conduct interviews with them.
- 17 Mayor Gwen Gilbert and councillors Yvonne Harron, Art King, and Mark Wunderlich all complied with our requests for interviews. Councillors Stan Hoath and Wray Lamont co-operated with our initial investigation, but refused to speak with us about our investigation of the September 22 meeting.
- 18 It is our general practice, for reasons of accuracy, productivity, and efficiency, to digitally record interviews with the consent of the witness in question. Councillor Ana Vukovic initially refused to be interviewed unless she could record the interview herself. We were prepared to conduct the interview without recording it or to provide Ms. Vukovic with a copy of the recording after our investigation had concluded. However, in order to preserve the integrity of our investigative process, we would not agree to allow her to keep a separate recording of the interview. Ms. Vukovic declined the interview. She also later refused to participate in the second investigation, alleging, without further explanation, that it was frivolous and vexatious.
- 19 Councillor Dan Kerr initially refused to be interviewed in connection with our first investigation. While he declined to have his interview digitally recorded, he later agreed to discuss both complaints with our investigators.

- 20** Councillor Betty Hall, who had not attended the June 23, 2009 council meeting, did meet with one of our investigators to discuss the circumstances surrounding that meeting. The investigator briefly outlined what could be expected as a result of the interview process, but soon discovered that Ms. Hall had been surreptitiously recording their conversation. Ms. Hall refused to continue with an interview unless she could record the proceedings. She also refused to be interviewed in connection with the complaint received about the September 22 meeting, on the basis that she had “nothing to say.”
- 21** Although the Ombudsman has the ability to summon witnesses and examine them under oath, and has done so in some closed meeting investigations, based on the information that we obtained from other sources, we determined that it was unnecessary to compel the attendance of those councillors who refused to cooperate with our investigations. However, I believe that the conduct displayed by these councillors reflects not only disrespect for my Office, but also for the principles of accountability and transparency underlying the open meeting provisions. Their refusal to engage in a legal process that was established in the public interest to ensure openness in municipal government also represents a significant disservice to the citizens of South Bruce Peninsula, who are entitled to expect more of their locally elected officials.
- 22** Unfortunately, as local media reports attest, South Bruce Peninsula’s mayor and council members have been engaged in a series of very public disagreements for some time. My investigations have taken place against this backdrop of well-publicized dysfunction.
- 23** The recent dissension appears to have been triggered, in part, by the appointment of a Manager of Financial Services, after this topic was discussed during an in-camera session on June 23, 2009.

Investigative Findings

Appointing a Manager of Financial Services at the June 23, 2009 Council Meeting

- 24** Notice of the June 23 regular meeting of council was posted, along with a meeting agenda, on the municipality’s website in accordance with the town’s procedure by-law. There was reference on the agenda to three items to be discussed in the closed session of the meeting. These topics related to adopting the previous closed meeting minutes, solicitor’s invoices, and litigation or potential litigation including matters before administrative tribunals (water charges). There was no indication that the appointment of a Manager of Financial Services would be discussed.

- 25** During the open session of the June 23 council meeting, Councillor Lamont brought a motion, without prior notice, proposing that council discuss and decide on the appointment of a Manager of Financial Services. The town staff and councillors we interviewed denied any prior knowledge of this motion.
- 26** Council had appointed a hiring committee in the spring of 2009 to recruit for the position of Manager of Financial Services. The mayor, the Chief Administrative Officer and the town’s external auditor were on that committee. During our investigation, some councillors explained that they felt that the hiring committee had been “dragging its heels.” Councillor Lamont explained that he had heard through town scuttlebutt that two of three candidates for the Manager of Financial Services position had withdrawn their applications, leaving only one internal candidate. He said he believed that this person was qualified for the position, and that council should hire her under the circumstances. He advised that he brought the motion forward on June 23 on his own initiative and without discussing this with other members of council.
- 27** The meeting minutes indicate that the clerk advised council that this item would have to be discussed in closed session, as it dealt with a personal matter about an identifiable individual. There is no reference in the minutes to council having voted to suspend the notice requirement before adding this item to the closed meeting agenda. However, the council members we interviewed confirmed that this addition was approved by the requisite number after a “show of hands.” Council resolved to consider this item in closed session, consistent with the reason identified by the clerk. Another item, relating to a proposed or pending acquisition of land, was also added to the closed meeting agenda.
- 28** During the open portion of the meeting, council passed a resolution authorizing it to proceed in closed session to address “a matter pertaining to personal matters relating to an identifiable individual (MFS, CAO performance evaluation), a proposed or pending acquisition or disposition of land, litigation or potential litigation, and receiving advice subject to solicitor-client privilege.”
- 29** Based on our review of the closed session minutes and the information obtained from interviews, it appears that council discussed the various items slated for consideration in closed session, including the appointment of a Manager of Financial Services, during the in-camera portion of its meeting.
- 30** The minutes from the closed session do not record what transpired in any detail. Those we interviewed who were present at the meeting indicated that the discussion was quite brief – from three to 10 minutes in length. The minutes note that “subsequent to further discussion,” it was recommended that Councillor Lamont’s

motion on the appointment of the Manager of Financial Services be considered in open session.

- 31** When the council returned to open session, a vote was taken on the motion to appoint the internal candidate as the Manager of Financial Services. Six councillors voted in favour of the motion, with Mayor Gilbert and Councillor King voting against it. As indicated above, Councillor Hall was absent from council that evening.
- 32** We were advised that the council follows a practice of reporting publicly on its closed meeting sessions once it has adjourned and reconvened in public session. While there were some members of the public in attendance during the initial open session of council on June 23, no one returned to chambers when the open meeting resumed after the closed session. Some of those we interviewed explained that it is generally known that council returns to open session once an in-camera meeting has concluded. However, it doesn't appear that any specific steps are taken in advance to explain to the public that open session will resume after the in-camera portion of the meeting. Apparently, the practice is for council to place a sign saying "closed" on the council chamber door during in-camera meetings and to remove it once the closed session has concluded.
- 33** The June 23 appointment of the Manager of Financial Services generated considerable controversy in the municipality. The situation appears to have escalated on July 16, 2009, when an article appeared in the media concerning this appointment. In that article, Mayor Gilbert was quoted as making very critical statements about what had occurred and suggesting that there might be a perception of corruption. That same day, the woman who had been appointed Manager of Financial Services declined the appointment.
- 34** On July 21, a motion was carried at a meeting of the Committee of the Whole to remove the mayor from her seat unless she apologized to each member of council in connection with her comments to the media.
- 35** On July 28, at a regular council meeting, the original resolution appointing the Manager of Financial Services was rescinded and council carried a motion censuring the mayor for her public comments relating to the appointment, and ordering her to vacate her office until she retracted the allegations and apologized. At the same time, council resolved to retain consultants to discuss and mediate contentious issues to assist council in functioning more effectively.
- 36** Finally, after further discussion, on August 11, 2009, the council rescinded the resolutions censuring the mayor for her conduct.

- 37** In the meantime, my Office had received a complaint concerning the June 23 closed meeting, and, after conducting preliminary inquiries, our Open Meeting Law Enforcement Team (OMLET) launched an investigation on August 21, 2009.
- 38** On September 1, 2009, the consultants retained by the town reported the results of their review and recommended that they be retained to provide training to council and review the town's procedure by-law. Ultimately, rather than invest further funds in this process, council chose to note and file the consultants' report.
- 39** However, the conflict among council members continued to rage. A few weeks later, we received another complaint – this one concerning the closed session held on September 22, 2009. At that in-camera meeting, a majority of councillors had voted to remove the mayor from the team appointed by council in late spring 2009 to renegotiate the Chief Administrative Officer's employment contract.

Removing the Mayor from the CAO Negotiating Team at the September 22 Council Meeting

- 40** Notice of the September 22 regular meeting of council was posted on the municipality's website, as required by the town's procedure by-law. A meeting agenda was also posted. Under the closed meeting agenda, it was noted that personal matters about an identifiable individual would be considered, specifically the Building Department receptionist. There was no reference on the agenda to the topic of the CAO negotiating team.
- 41** Councillor Lamont, as Deputy Chair of council, chaired the September 22 meeting in the mayor's absence.
- 42** During the open portion of the meeting, council passed a resolution authorizing it to proceed into closed session. The resolution stated that council would address a matter pertaining to "personal matters about an identifiable individual, including local board employee (Building Receptionist, CAO, Clerk); labour relations or employee negotiations (Building Receptionist, CAO); and litigation or potential litigation." We were unable to confirm how the issues, which were not identified on the agenda prior to the meeting, were added to the resolution authorizing closed session. In the case of the September 22 meeting, there was no specific vote during the open session to suspend the normal rules of procedure and allow addition of these items.
- 43** Based on the information obtained from our interviews, it appears that council members were not generally aware prior to the meeting that the topic of the Chief Administrative Officer would be raised for discussion in closed session or that this item would also involve consideration of the membership of the CAO negotiating team. However, two of the councillors and the Clerk suggested during the

investigation that the issue was pressing since they believed that the Mayor was disclosing information to the CAO, which was compromising the town's negotiating position.

- 44** At the closed session, council members not only discussed the various items identified in the resolution in closed session, but also went on to address the CAO negotiating team and vote on a motion to remove the mayor from the team. The closed meeting minutes indicate that the motion passed 8-1. There are no additional details concerning this vote in the minutes.
- 45** When council reconvened in open session that evening, it passed a by-law to appoint a Building Department receptionist, a motion to waive the rental fee of the Ross Whichler Centre for the Bruce Peninsula Veterinarians' meeting and a confirmatory by-law. However, there was no mention that council had discussed and voted on removing the mayor from the CAO negotiating team.
- 46** We were unable to confirm whether any members of the public were in attendance when council re-emerged from closed session and resumed the regular open meeting.
- 47** The removal of the mayor from the CAO negotiating team, coupled with another dispute concerning the mayor's presentation to the Minister of Municipal Affairs and Housing during an Association of Municipalities of Ontario conference, have continued to attract public attention to the disharmony existing on South Bruce Peninsula council.
- 48** Another factor contributing to the division on council is the practice of some members of council to congregate at the local Tim Horton's after council meetings. This has led to speculation that improper council meetings are being held outside of public view.

"Meet Me at Timmy's"

- 49** The mayor advised our investigators that she does not meet with members of council at a local Tim Horton's coffee shop after council meetings. However, she is aware that it is the practice of some of the other members of council. She explained – and all the councillors we interviewed confirmed – that she has cautioned councillors about these informal gatherings and told them that if there are more than five councillors present, representing quorum, they should be keeping minutes of what is discussed.
- 50** Three of the councillors we interviewed confirmed that they regularly frequent Tim Horton's for coffee after council meetings. They acknowledged that some members of the public have taken issue with these gatherings, even going so far as to jokingly

refer to them as “the council meeting.” However, they stated that council business is not discussed or furthered at these meetings, and that they are social gatherings, allowing the councillors to get together informally. One councillor explained that they have recently started to invite members of the public to sit with them when they meet at Tim Horton’s.

Analysis of Findings

Public Notice of Closed Meetings

- 51** The Town of South Bruce Peninsula did post notice of the June 23 and September 22 council meetings in accordance with its procedure by-law. It also posted the meeting agendas, including general reference to items to be considered in closed session. The practice of posting an open and closed meeting agenda in advance is consistent with the intent of the open meeting requirements, as it allows citizens to make an informed choice as to whether to attend a particular meeting.
- 52** However, some of the items that council discussed in closed session were not identified on the agendas posted in advance of the June 23 and September 22 meetings. These appear to have been last-minute additions.
- 53** For instance, the issue of the appointment of a Manager of Financial Services was not referred to on the agenda for the June 23 meeting, as it was only added once the meeting was underway.
- 54** Similarly, the discussion concerning the negotiations with the Chief Administrative Officer was a late addition to the September 22 closed meeting agenda, and was not referenced on the public agenda prior to the meeting.
- 55** Consistent with the principles of openness, transparency and accountability underlying the open meeting requirements, council should generally avoid discussing items that have not been the subject of prior notice. However, in exceptional circumstances, particularly relating to matters of urgency, it may be appropriate to consider last-minute additions, provided procedural rules are followed.

Addition of Items

- 56** The Town of South Bruce Peninsula has established a specific process in its procedure by-law to be followed when adding items to a meeting agenda. To justify addition, the matter must be urgent, or a two-thirds majority of council must vote to suspend the normal notice requirements and allow consideration of the issue.

- 57** Unfortunately, our review of the proceedings of the June 23 and September 22 meetings suggests that council has not observed these procedural requirements with any particular formality or regularity.
- 58** In the case of the June 23 meeting, the evidence we obtained through interviews confirmed that council did suspend the rules in accordance with its by-law to allow consideration in closed session of the appointment of the Manager of Financial Services. There is no indication that a similar process was followed to add the item relating to the proposed or pending acquisition of land, which was also discussed in closed session at the June 23 meeting. The minutes do not record any vote allowing consideration of these items.
- 59** At the September 22 meeting, a number of items were added for consideration at the in-camera session without the necessary two-thirds majority of council approving suspension of the normal rules. Council should not add any items to its closed meeting agenda unless they have been properly brought forward in accordance with its procedure by-law.
- 60** There was also no suggestion that any of the items added at the last minute were so urgent that they justified discussion by council without prior notice.
- 61** While council has the authority to add items that have not been the subject of prior notice to the public, it should do so sparingly and treat this as an exceptional process. Matters should not be added at the last minute unless they are clearly urgent or there are significantly compelling reasons to justify suspending the normal rules.
- 62** Regrettably, I am left with the impression that the very public conflict amongst certain factions of this council has affected the propriety of its meeting procedures.

Resolution Authorizing Closed Session

- 63** The *Municipal Act, 2001* requires that before holding a meeting or part of a meeting that is to be closed to the public, a municipality must state by resolution the fact that a closed meeting will be held, as well as the general nature of the subject matter to be considered. (s.239(4)). The resolution must occur in public before the closed meeting takes place.
- 64** At the June 23, 2009 and September 22, 2009 meetings, council did resolve to go in camera during the open session, consistent with the *Municipal Act, 2001* requirements.
- 65** The resolution authorizing the closed session on June 23 identified the Manager of Financial Services and the CAO performance evaluation under the category of

- “personal matters about an identifiable individual.” These matters appear to fall appropriately under s. 239(2)(b) of the *Municipal Act, 2001*, which allows councils to consider “personal matters about an identifiable individual, including municipal or local board employees” in closed session. The other items identified in this resolution also appear to have come within prescribed open meeting exceptions.
- 66** The resolution authorizing the closed session on September 22 also identified issues coming within the permissible exceptions to the open meeting requirements, including general reference to the “CAO” under “personal matters about an identifiable individual.”
- 67** However, while the resolutions relating to these closed sessions identified most of the issues that council considered during the closed session, there was no reference to the issue related to the membership of the CAO negotiating team in the resolution authorizing the September 22 closed meeting.
- 68** Council can only discuss items in closed session if they have been properly added to the meeting agenda, come within a permitted exception to the open meeting requirements, and are properly identified in the resolution authorizing the session.
- 69** While council members were aware that they would be considering the town’s Chief Administrative Officer in camera, the CAO negotiating team issue was a separate substantive topic. Council should have considered whether this topic was appropriate for consideration within closed session and whether it justified addition to the agenda. The procedure by-law requirements for adding a new item to a closed meeting agenda should also have been followed. Finally, the resolution authorizing the closed session should have specifically identified this issue in the resolution before the closed meeting commenced. Council neglected to take any of these steps on September 22, 2009, and consequently it acted improperly when it went on to consider this matter during the closed session that day.
- 70** In addition, both of the council’s closed meeting resolutions set out very little detail about the topics to be considered. Generally, resolutions should provide meaningful information about the issue to be discussed in closed session. As noted by the Ontario Court of Appeal in *Farber v. Kingston City*,¹ “the resolution to go into closed session 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.”
- 71** Understandably, there may be instances when providing more information about a subject to be considered in camera might effectively compromise the need for confidential discussion. However, even in the case of sensitive personal

¹ [2007] O.J. No. 919, at page 151.

information, at the very least, council members and the Clerk should be aware of the substantive nature of the subject to be discussed in camera. One of the dangers of the practice of adding items at the last minute is that council members may also be caught off guard and unprepared for the ensuing discussion.

- 72** In the case of the September 22 closed session, no prior notice of the CAO negotiating team item was provided to council members prior to the session. The Mayor, in particular, who was absent that evening, had no idea that a discussion would take place that might affect her personally.
- 73** Council's casual treatment of the addition of the CAO negotiating team item was compounded when it went on to vote in camera on removing the mayor from the negotiating team.

Voting in Closed Session

- 74** Subsections 239(5) and (6) of the *Municipal Act, 2001* clearly state that a vote can only be taken during a closed meeting if the meeting has been properly closed and the vote is for a procedural matter, or for giving directions or instructions to officers, employees agents, or persons retained or under contract with the municipality. Article 17.6 of the town's procedure by-law is consistent with the requirements of the *Municipal Act, 2001* on the issue of voting in closed session.
- 75** According to the witnesses we interviewed who were in attendance at the closed session on September 22, 2009, as well as the council minutes, a recorded vote was held at that session to remove the mayor from the CAO negotiating team. This was clearly in contravention of the *Municipal Act, 2001* prohibition against voting in closed session.

Records of Meetings

- 76** In accordance with s. 239(7) of the *Municipal Act, 2001*, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings.
- 77** The town's procedure by-law sets out the town's minute-keeping practices. Article 11.1 of the by-law states that the minutes:
- ... shall not record any discussion undertaken in the course of a meeting, but shall only record decisions of the Council expressed in resolution form and shall record all such resolutions including those which are affirmatively voted upon by a majority of the Council members present and those motions which are defeated.

78 Unfortunately, the procedure set out in the town's by-law is not necessarily consistent with the requirements of the *Municipal Act, 2001*, which mandate that all resolutions, regardless of their form, decisions and other proceedings be recorded. In addition, while the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed in a meeting should not be referred to. Generally, minutes should record the various substantive and procedural items that were discussed at the meeting. As I noted in my report concerning our investigation into a special meeting of the City of Oshawa's Development Services Committee, entitled *The ABCs of Education and Training*:

The admonition not to include notes or comments does not mean that no information regarding the subjects discussed at a meeting should be recorded. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the intent of the open meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government. While extraneous notes and comments not germane to the actual proceedings of a committee should be excluded, the minutes should reflect what actually transpired, including the general nature of the subjects discussed.²

79 Ideally, a meeting record of a closed meeting should include reference to:

- 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.

80 In the case of the town's June 23 council meeting, while those we interviewed confirmed that the subject of the appointment of the Manager of Financial Services was added during open session after the requisite two-thirds support of those council members in attendance was obtained, this was not recorded in the minutes. The fact that the vote was undertaken through a "show of hands," rather than a more formal

² The full report is available on our website, here:
<http://www.ombudsman.on.ca/media/44626/oshawamay08final.pdf>

resolution, does not excuse the municipality from following the record keeping requirements of the *Municipal Act, 2001*.

- 81 In future, the town should ensure that its closed meeting records comply with the legislative provisions.

Reporting Back

- 82 The council generally follows a good practice of reporting back in public after its closed sessions. However, to be truly open and transparent, the council should ensure that members of the public are aware that they are entitled to return when council reconvenes in open session after in camera discussions. The town does not follow any consistent practice to notify the people of their right to return to council chambers once a closed meeting has ended, other than to remove the “closed” sign from the door. In future, council should ensure that members of the public are aware that they are entitled to be present at all portions of the open meeting, including after any in-camera session has been held.
- 83 In the case of the September 22 closed session, council neglected to make any mention in open session of the fact that it had voted to remove the mayor from the CAO negotiating team. There does not appear to be an explanation for this omission.

“Meeting” the Legal Test

- 84 My investigation confirmed that a number of council members do regularly meet at Tim Horton’s after council meetings. However, not all gatherings of council members qualify as “meetings” as defined by the open meeting provisions of the law.
- 85 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.” The town has also adopted this definition in its procedure by-law.
- 86 After considering the principles behind the open meeting law, as well as the relevant case law, I have developed the following working definition of a “meeting” to assist in determining whether a gathering is subject to the open meeting provisions. To come within the *Municipal Act, 2001* requirements:

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.

- 87 The presence of quorum, the minimum number of members of a body required to be present at a meeting in order for council to exercise its power or authority, is an important indicator of when a meeting is a “meeting” under the law – since a body can take official action when it has quorum – but this is not definitive.
- 88 Informal gatherings for social purposes are not generally considered to be “meetings.” However, where the purpose of the gathering is to discuss the business of council and/or to make decisions, a gathering is more likely to be deemed a “meeting” that is subject to the open meeting requirements.
- 89 In this case, there is no evidence that the gatherings at Tim Horton’s were anything other than social get-togethers. However, these circumstances illustrate the dangers inherent in council members meeting informally, particularly in close proximity to official council meetings. Such gatherings naturally attract speculation about the nature of the discussions taking place, and council members should be extremely careful to ensure that a casual social conversation does not drift into improper areas.

Opinion

- 90 Our investigation did not find that the council of the Town of South Bruce Peninsula held any improper closed meetings prior to the June 23, 2009 regular council meeting to discuss the appointment of a Manager of Financial Services. Based on the information we obtained, we also did not find that council members who met informally at the local Tim Horton’s were engaged in illegal closed meetings, as was speculated within the community.
- 91 While the appointment of a Manager of Financial Services was an item that the council could properly consider in closed session, in this case, I believe that council should have exercised greater caution in adding this item at the last minute to its closed meeting agenda. Council should generally avoid discussion of matters that have not been the subject of prior notice, and should only add items where there are urgent circumstances or compelling justification for suspending the normal notice requirements. In addition, council should ensure that a recorded vote is taken on any motion to suspend the rules to allow for addition of a new item, and that the minutes properly reflect this. The town’s procedure by-law should also be amended so that its record-keeping practices are clearly consistent with the *Municipal Act, 2001* requirements.
- 92 With respect to the September 22, 2009 closed meeting, a number of items were added to the agenda at the last minute, in contravention of the town’s procedure by-law. No prior notice was given of these subjects. There was no discussion during the closed session suggesting that these matters required urgent attention and the procedural requirements were not suspended as provided for in the by-law.

- Accordingly, these issues should not have been discussed at that time. There was also no prior notice that council would be considering the CAO negotiating team in closed session, and this topic was not identified in the resolution authorizing the closed session. Under the circumstances, discussion of this matter was also improper.
- 93** Additionally, the council members in attendance at the closed session that evening clearly violated the *Municipal Act, 2001* when they voted to remove the mayor from the CAO negotiating team. This vote did not come within the exceptions to the general prohibition against voting in closed session. Council also neglected to report back on the results of its vote when open session resumed, and generally does not inform members of the public of their right to return to chambers after in-camera discussions have concluded.
- 94** The people of the Town of South Bruce Peninsula are entitled to expect that council, as well as each individual member of council, will abide by the *Municipal Act, 2001* and the town's procedure by-law when conducting closed meetings.
- 95** Unfortunately, it would appear that unhealthy tensions exist on council that have contributed to its failure to comply with the *Municipal Act, 2001* and its own procedure by-law rules concerning closed meetings.
- 96** Council should not allow its internal and very public conflicts and differences to override the values of openness, transparency and accountability underscoring the open meeting requirements.
- 97** I urge council to work collectively and co-operatively to ensure that it complies with its open meeting obligations in future. I am making a number of recommendations to assist council in meeting the legal requirements and following best practices for conducting closed meetings.

Recommendations

Recommendation 1

The council for the Town of South Bruce Peninsula should ensure that no new items are added to the closed meeting agenda, except as specifically provided for in its procedure by-law.

Recommendation 2

The council for the Town of South Bruce Peninsula should ensure that no subject is discussed in closed session unless:

- (a) It has been properly added to the agenda in accordance with the town's procedure by-law;
- (b) It clearly comes within one of the statutory exceptions to the open meeting requirements;
- (c) There is a resolution made in advance, in open session, authorizing that the subject be discussed in closed session; and
- (d) The subject has been generally described with as much specificity as possible so as to maximize the information available to the public, without undermining the reason why the matter is being dealt with in camera.

Recommendation 3

The council for the Town of South Bruce Peninsula should ensure that it conducts a formal vote on and records the result of all motions to suspend the notice requirements to allow the addition of an item to the agenda for a closed meeting, in accordance with its procedure by-law.

Recommendation 4

The council for the Town of South Bruce Peninsula should amend its procedure by-law so that its minute-keeping practices comply with s. 239(7) of the *Municipal Act, 2001*.

Recommendation 5

The council for the Town of South Bruce Peninsula should never vote in closed session, unless the vote is expressly authorized by the *Municipal Act, 2001*.

Recommendation 6

Council should follow a practice of informing members of the public that once the closed portion of a regular council meeting has ended, they are entitled to return for the concluding open session.

Recommendation 7

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

Response from the Council of the Town of South Bruce Peninsula

- 97 On May 19, 2010, by way of a verbal summary, investigators from my Office provided the town clerk with my preliminary findings and recommendations and asked her to relay this information to council so it had an opportunity to respond prior to the report being finalized.

- 98 The results of my investigation were discussed by council on June 1, 2010, at a Committee of the Whole meeting. At that time, council recommended that I provide further clarification regarding “note and comment.” I presume that this suggestion relates to the *Municipal Act* requirement to keep a record of proceedings and my recommendation that the town amend its procedure by-law to ensure that its minute-keeping practices comply with the Act. As discussed earlier in this report, s. 239(7) of the *Municipal Act* requires municipalities to record, without note or comment, all resolutions, decisions and other proceedings at their meetings. It is my view that the prohibition against recording notes or comments was intended to be interpreted consistently with the principles of openness, transparency and accountability underlying the *Municipal Act*, and that it is directed at ensuring that no subjective opinions, extraneous information, comments or remarks are inserted into the official meeting record. It is in the public interest, and indeed in the interest of the municipality, for the official meeting record to contain an accurate and complete account of what actually happened.
- 99 At present, the town’s procedure by-law requires that only decisions expressed in resolution form be recorded, and prohibits the recording of any discussion undertaken in a meeting. In my view, this procedural requirement results in the municipality failing to record the “proceedings at meetings,” as it is required to do under the Act.
- 100 I have not received any other responses or comments from council regarding my preliminary findings and recommendations, and accordingly I have finalized my report. I encourage the municipality to implement my recommendations.

Report

- 101 The Town of South Bruce Peninsula council is required to make my report on this matter public in accordance with s.14 (2.6) of the *Ombudsman Act*.



André Marin
Ombudsman of Ontario