



Ombudsman Report

**Investigation into whether
Council for the Township of Woolwich
held illegal closed meetings in August 2014
and January and February 2015**

**André Marin
Ombudsman of Ontario
June 2015**

Complaint

- 1 In February 2015, my Office received a complaint about three closed sessions held by council for the Township of Woolwich in January and February 2015 and one closed session of the Chemtura Public Advisory Committee (CPAC) held in August 2014. The complaint alleged that the in camera discussions at those meetings did not fit within the exceptions to the open meeting provisions of the *Municipal Act, 2001* (the Act).

Ombudsman jurisdiction

- 2 Under the Act, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 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 Township of Woolwich.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Council procedures

- 6 The Township's procedure by-law (by-law 45-2014) states that agendas are prepared and delivered to each member of council or a committee at least 48 hours before a meeting. Electronic copies are posted on the Township's website by 1:00 p.m. the Friday prior to a meeting. The schedule of council meetings is also advertised on the Township's website.
- 7 Special meetings may be called by the Mayor or when a petition is presented to the clerk by a majority of council. The clerk shall notify all members of council at least 24 hours in advance, unless the notice provision is waived in the case of an emergency. Notice of special meetings is provided to the public by the posting of the agenda on the website.

- 8** Section 23 of the by-law pertains to closed meetings and mirrors the exceptions found in s. 239 of the Act.
- 9** The procedure by-law states that, prior to proceeding in camera, council shall state by resolution the fact of holding a closed meeting and the general nature of the subject matter to be considered.

Investigative process

- 10** My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipality's procedure by-law and the Act, as well as the meeting materials for the meetings in question. They also spoke with the Mayor and municipal staff.
- 11** My Office received full co-operation in this matter.

The August 11, 2014 meeting of CPAC

- 12** The Chemtura Public Advisory Committee (CPAC) is a committee of council that was established to address historical, current, and potential future concerns with the operations of Chemtura Canada Co., a specialty chemicals company operating in Elmira. The committee provides information and makes recommendations to council. Although there were municipal elections in Ontario in October 2014, the composition of this committee did not change.
- 13** The meeting began at 6:00 p.m. The agenda indicated that council would be proceeding in camera under the "litigation or potential litigation" exception, found in s. 239(2)(e) of the Act.
- 14** My Office reviewed the closed session minutes for the meeting. Open session minutes were not kept.
- 15** The closed session minutes state that the committee passed a resolution to proceed in camera under the litigation or potential litigation exception. No further information was provided in the resolution. Present in camera were the members of the CPAC as well as the Clerk and the Chief Administrative Officer.
- 16** While in camera, CPAC members discussed an opinion received from legal counsel that outlined steps that should be taken prior to pursuing a civil action on a particular matter. Staff advised my Office that the committee was considering all viable options before deciding if litigation was the best course of action.

Analysis

The substance of the discussion

- 17** In order for the “litigation or potential litigation” exception to apply, litigation must be more than a remote possibility, but it does not need to be a certainty. Council or a committee must believe that litigation is a reasonable prospect, and must use the closed meeting to explore that prospect in some way. As my Office noted in an April 2014 letter regarding a meeting held by council for the City of Timmins, the Ontario courts have also held that litigation privilege may cover situations where litigation was considered but not pursued¹.
- 18** At the August 11 meeting, the CPAC considered legal advice on whether it should pursue litigation on a particular matter. Although there was no litigation ongoing at the time of the meeting, it was a reasonable prospect that was being considered.
- 19** As the CPAC was discussing specific advice from legal counsel, the “advice that is subject to solicitor-client privilege” exception found in s. 239(2)(f) of the Act also could have applied to the discussion.

The meeting record

- 20** No open session minutes were kept for this meeting. Section 239(7) of the Act requires that a record be kept of all resolutions, decisions, and other proceedings of a meeting of council, a local board, or a committee of either of them.
- 21** Although the substantive discussions on August 11 took place in camera, the CPAC was required to hold a brief open session, during which the resolution to proceed in camera was passed. Accordingly, open session minutes should have been kept as a record of this open portion of the meeting.

The January 13, 2015 Committee of the Whole meeting

- 22** The publicly available agenda for the January 13, 2015 meeting noted that a closed session would be held at 4:00 p.m., prior to the 6:00 p.m. open session, which was held in council chambers.

¹ The April 9, 2014 letter, which quotes *CIT Financial Ltd, v. JDS Uniphase Corp.* (2003), 124 ACWS (3d) 455 (Ont. S.C.J.) is available online here:
<https://ombudsman.on.ca/Files/sitemedia/Images/Reports/Timmins-Closing-April9-2014.pdf>

- 23** The confidential closed session agenda indicated that the closed meeting would be held at 4:00 p.m. in the councillors' office. The location of the closed session was not made available to the public. Municipal staff advised my Office that this was an oversight that occurred when the format of the Township's agendas was changed in 2014.
- 24** Applications for appointments to several committees were attached to the confidential agenda.
- 25** The open session minutes state that the Committee of the Whole passed a resolution to proceed in camera to discuss personal matters about identifiable individuals under s. 239(2)(b) of the Act, and litigation or potential litigation under s. 239(2)(e) of the Act. No further information was provided in the resolution.

The CPAC application deadline discussion

- 26** The first item discussed in camera pertained to the application deadline for appointments to the CPAC. Council discussed that the CPAC's term would expire at the end of May and it was suggested that council hold a public meeting in March and invite stakeholders to share ideas of how the CPAC should operate going forward.
- 27** Council also discussed concerns with the performance of certain current members of the committee, as well as concerns regarding a member of the public who regularly attends meetings. Staff advised my Office that this made up the bulk of the discussion.

Analysis

- 28** Discussion of the application deadline for a committee does not fit within the exceptions to the open meeting requirements. This portion of the discussion should have taken place in open session. In addition, the discussions about the extension of the CPAC's term, the format for the committee, and the possibility of engaging stakeholders to share ideas on the operation of the committee did not fit within any exceptions to the open meeting requirements. These matters also should have been discussed in open session.
- 29** We were advised, however, that the majority of the discussion pertained to council's concerns with the performance of certain individuals who had served on the last term of the CPAC, as well as with the actions of a member of the public.

- 30** In reviewing the scope of the “personal matters” exception, my Office often considers the definition of “personal information” found in the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA), as well as orders of the Information and Privacy Commissioner. Although not binding on my Office, they can provide some guidance.
- 31** The definition of “personal information” in MFIPPA includes “the personal opinions or views of another individual about the individual”. In this case, personal opinions were expressed, both about members of the CPAC and about a member of the public.
- 32** Although the discussions were about CPAC members in their professional roles, information about individuals in a professional capacity may still qualify as personal information if it reveals something of a personal nature. Furthermore, information about a person in their professional capacity can take on a more personal nature if it relates to scrutiny of that individual’s conduct².
- 33** Accordingly, portions of the discussion that related to personal opinions about the conduct of identified individuals fit within the “personal matters” exception.

The school discussion

- 34** According to the closed session minutes, the next item discussed pertained to the decision of the school board to close a school and build a new school in another area. It was recommended that a public meeting be held to discuss the matter in February.
- 35** During interviews, we were advised that the substance of the discussion was whether council was willing to sell a particular piece of land to the school board to build the new school. Staff advised that the “acquisition or disposition of land” exception (s. 239(2)(c) of the Act) should have been cited for this discussion, but was inadvertently omitted from the resolution to proceed in camera.

Analysis

- 36** The purpose of s. 239(2)(c) is to protect the municipality’s interests when buying or selling property. Council’s discussion of a potential land disposition fit within this exception. However, the relevant exception was not cited in the resolution to proceed in camera.

² See IPC Orders MO-2368 and MO-2519

- 37** Furthermore, the closed session minutes did not provide any information regarding why the matter was being discussed in camera. Council should ensure that its closed meeting record accurately reflects all procedural and substantive discussions that take place in camera.

The Kiwanis House discussion

- 38** Finally, council discussed Kiwanis House, a transitional residential program located in a building owned by the municipality. Staff requested direction on the future of the building.

Analysis

- 39** As with the school discussion, consideration of this potential land disposition fit within the “acquisition or disposition of land” exception. However, this exception was not cited in the resolution to proceed in camera.
- 40** When the open session resumed, council passed several resolutions pertaining to committee appointments. There was no information provided in open session regarding council’s discussion of the CPAC application deadline, the school, or Kiwanis House.

The January 20, 2015 council meeting

- 41** The public agenda for the January 20 meeting indicated that there would be a closed session at 6:00 p.m., prior to the 7:00 p.m. open session, which was held in council chambers. There were no further details of the closed session on the agenda.
- 42** The confidential closed session agenda indicated that the in camera session would begin at 6:00 p.m. in the councillors’ office. As with the January 13 meeting, the location of the closed session was not available to the public.
- 43** The open session minutes state that council passed a resolution to proceed in camera to discuss personal matters under s. 239(2)(b) of the Act. No further information is provided in the resolution to proceed into closed session.
- 44** According to the closed session minutes, the Director of Recreation provided background information on recreation associations, which are volunteer organizations that operate Township parks and facilities on behalf of the

municipality. The Director noted that the previous council had directed staff to develop an affiliation service agreement with each recreation association.

- 45** Council discussed next steps, including approaching each association individually or as a group to ask what they would like to continue to manage and what they would like to pass on to the Township.
- 46** Council directed staff to build an estimate of the cost to operate the recreation associations without volunteers and report back before any further action was taken.
- 47** During interviews, we were advised that the bulk of these discussions were about the associations in general, rather than about any specific individual member. The Mayor recalled that there may have been some discussion of an error made by identifiable individuals who volunteer for a recreation association.

Analysis

- 48** The majority of the in camera discussion of recreation associations pertained to the associations in general, rather than any individual volunteers. Accordingly, this discussion did not fit within the “personal matters about an identifiable individual” exception, or any exception to the open meeting requirements. This portion of the discussion should have taken place in open session.
- 49** During this closed session, council provided a direction to staff. Section 239(6) of the Act states that a meeting cannot be closed to the public during a vote unless the meeting is permitted to be closed to the public by the exceptions found in s. 239(2) or (3) of the Act, and the vote is for a procedural matter or to provide direction to staff. Because this meeting was not permitted to be closed to the public, the vote to direct staff was also illegal.

The February 3, 2015 Committee of the Whole meeting

- 50** The public agenda for the February 3 meeting indicated there would be a closed session at 5:30 p.m., prior to the 6:00 p.m. open session, which was held in council chambers. There were no details of the closed session included on the agenda.
- 51** The confidential closed session agenda indicated the meeting would begin at 5:30 p.m. in the councillors’ office. As with the previous meetings, there was no public notice of the location of the closed session.

- 52** The open session minutes state that council passed a resolution to proceed in camera as Committee of the Whole at 5:30 p.m., to discuss personal matters about identifiable individuals. There was no further information provided in the resolution.

The discussion of committee appointments

- 53** The closed session minutes indicate that council discussed appointments to two committees: the Waterloo Regional Aeronautical Noise Management Committee and the Heritage Committee.
- 54** With respect to the Waterloo Regional Aeronautical Noise Management Committee, council considered a staff report that recommended council appoint two members of council to the committee. The staff report noted that there had been no citizen applications for the committee, and outlined staff's efforts to reach out to past members.
- 55** During interviews, we were advised that council discussed one past member in particular, and the personal reasons they were not able to serve on the committee at that time. Council also discussed an application received from a member of the public outside of the deadline, which rendered it ineligible for consideration.
- 56** With respect to the Heritage Committee, council reviewed a staff report that recommended eight individuals for appointment to the committee. Applications were also attached to the staff report.
- 57** The closed session minutes state that council considered the recommended appointments.

Analysis

- 58** With respect to the Waterloo Regional Aeronautical Noise Management Committee, the closed session minutes indicate that council considered a staff report that recommended council appoint two council members to the committee. During interviews, we were advised that council discussed personal information about a past member of the committee, as well as a current applicant.
- 59** Discussion of personal information about past committee members and a current applicant for the committee could fit within the s. 239(2)(b) exception. However, the closed meeting record should have more clearly detailed why this matter was

being discussed in camera. In addition, discussion of the appointment of council members to a committee does not fit within this exception.

- 60** With respect to the Heritage Committee, council’s consideration of applications to this committee fit within the s. 239(2)(b) exception. As noted in my recent report regarding the Town of Bracebridge³, discussions of applications to boards and committees involve consideration of personal information – such as work history and volunteer experience – as well as personal opinions about the qualifications of identifiable individuals.

Other matters considered

- 61** The closed session minutes state that council also considered three additional matters. My Office was advised that these matters were not originally on the agenda for closed session discussion, but were added at the meeting.
- 62** A member of council raised a question regarding the Elmira Skate Park, specifically whether any financial information had been received with respect to the park. The treasurer advised that staff expected to receive financial details once the project was completed.
- 63** The Mayor advised our Office that she recalled some discussion of a personal matter relating to an identified individual who worked on the skate park project. However, the information in the minutes, and the information received from staff, does not support that the bulk of the discussion was personal in nature.
- 64** Discussion of this item did not fit within the “personal matters” exception, or any exception to the open meeting requirements.
- 65** Council next received an update on a police investigation regarding a former member of council. Staff advised that this matter had just come to their attention and they felt it was necessary to update council before the issue was disclosed to the public and the media.
- 66** As this discussion pertained to personal matters about an identifiable individual, it fit within the s. 239(2)(b) exception.
- 67** Finally, council discussed a question from a council member regarding breaks between closed and open sessions. Council directed staff to provide a ten-minute break between closed and open session meetings. Staff advised that this was not

³ Available online: <https://ombudsman.on.ca/Resources/Reports/Town-of-Bracebridge.aspx>

supposed to be discussed in camera that day, and only arose because a council member raised the question.

- 68** This discussion was about an administrative matter and did not fit within any exceptions to the open meeting requirements. As with the January 20 meeting, because the meeting was not permitted to be closed to the public, the vote to direct staff was also illegal.
- 69** Whenever possible, council should avoid adding items to the closed session at the last minute, and both council members and staff should turn their mind to whether any added items fit within the exceptions to the open meeting requirements.
- 70** When the open session resumed, council passed two resolutions relating to the closed session discussions, one to appoint two members to the Waterloo Regional Aeronautical Noise Management Committee, and another to appoint eight individuals to the Heritage Committee. No information was provided about the other matters discussed in camera.

Procedural matters

- 71** My investigation revealed several issues with the Township's closed meeting procedures.

Agendas

- 72** In a letter from January 31, 2013, regarding a closed meeting held by council for the Township on November 12, 2012, my Office recommended that publicly available agendas identify the topic or topics to be discussed in a closed session, and/or the exception under which the meeting was being closed. The agendas reviewed for this investigation still do not provide any of this information.
- 73** Although it is not a requirement of the Act to provide the public with details of a closed meeting in advance, it is a best practice, in the interest of transparency, to list all items of discussion on the agenda in advance of the meeting.

Notice of closed meetings

- 74** At the meetings held on January 13, January 20, and February 3, 2015, council for the Township of Woolwich held closed sessions prior to the open meetings. The location of these closed sessions was not provided to the public. Even when a meeting is otherwise properly closed to the public, council is obligated to hold a brief open session at which the resolution to proceed in camera is passed. The

public has the right to attend this open portion of the meeting, and accordingly must be provided with the time and location of the meeting in the notice of the closed session.

- 75** Staff advised our Office that this was an oversight, caused by a change in the format of the meeting agendas in 2014. The municipality should ensure that, in the future, notices of closed sessions are complete and include all information the public would need to allow them to attend the open session prior to the closed meeting.

Resolution to proceed in camera

- 76** My January 2013 letter also noted that the Township’s resolution to proceed in camera at the November 12, 2012 meeting only referenced the exception relied on to close that meeting to the public. Both the Act (section 239(4)) and the municipality’s own procedure by-law require that the resolution to proceed into closed session include the general nature of the subject matter to be considered.
- 77** As noted by the Ontario Court of Appeal in *Farber v. Kingston City*⁴, “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.”
- 78** Furthermore, at the meeting held on January 13, 2015, council discussed matters that fit within the “acquisition or disposition of land” exception, however this exception was not cited in the resolution to proceed in camera. Council should ensure that the resolution discloses all exceptions authorizing the closed meeting discussion.

Meeting records

- 79** As noted above, no open session minutes were kept for the August 11, 2014 CPAC meeting. In order to meet its obligations under the Act, the municipality should ensure that both open and closed session minutes are kept for all meetings of council, local boards, and committees of either of them.
- 80** My investigation also found that, in several instances, the closed meeting record did not reflect the actual substance of the discussion that took place in camera.
- 81** In accordance with s. 239(7) of the Act, a municipality is required to record, without note or comment, all resolutions, decisions, and other proceedings at its

⁴ [2007] O.J. No. 919, at page 151.

meetings. While the Act prohibits notes or comments from being included in the official record, this does not mean that the subjects discussed at a meeting should not be referred to. All of the substantive and procedural items that were discussed at a closed meeting should be recorded.

- 82** As discussed in my July 7, 2010 report regarding the Town of South Bruce Peninsula⁵, a 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 documents considered;
 - any motions, including who introduced the motion and seconders;
 - all votes taken, and all directions given.
- 83** I also strongly encourage municipalities to make audio or video recordings of council proceedings. This provides the most clear, accessible record for closed meeting investigators to review, and assists in ensuring that officials do not stray from the legal requirements during closed meetings.
- 84** More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include: the Townships of Tiny, Adelaide Metcalfe and McMurrich-Monteith, the Town of Midland, the Municipalities of Lambton Shores and Brighton, and the Cities of Oshawa, Sault Ste. Marie and Welland.

Reporting back

- 85** Although the Township does pass resolutions resulting from closed session discussions once the open session resumes, it does not follow a practice of reporting back on other matters discussed during the closed session.
- 86** I encourage councils to report back publicly on what occurred in camera, at least in a general way. In some cases, public reporting might simply consist of a general discussion in open session of subjects considered in closed session, similar to the information in the resolution authorizing the session together with information about staff directions, decisions and resolutions. In other cases, however, the

⁵ Available online:

<https://ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/omletsouthbrucefinalju ly5.pdf>

nature of the discussion might allow for considerable information about the closed session to be provided publicly.

Opinion

- 87** My investigation found that council for the Township of Woolwich contravened the *Municipal Act, 2001* during in-camera meetings on January 13 and January 20, and February 3, 2015, when it considered items in camera that did not fit within the exceptions to the open meeting requirements. Because council voted to direct staff while in camera on January 20 and February 3, while discussing matters that were not permitted to be in camera under the exceptions to the open meeting requirements, these votes also violated the Act.
- 88** Council did not contravene the Act when it considered a matter in camera at its August 11, 2014 CPAC meeting, under the “litigation or potential litigation” exception.
- 89** I am making the following recommendations to assist the Township in fulfilling its obligations under the Act, and in enhancing the transparency of its meetings.

Recommendations

Recommendation 1

The Township of Woolwich 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 2

As a best practice, the Township of Woolwich should identify the topic or topics to be discussed in closed session on its public agendas.

Recommendation 3

The Township of Woolwich should ensure that notice of the time and location of closed sessions is provided to the public in advance of the meeting, and that an open session is held prior to every closed session, during which the resolution to proceed in camera is passed.

Recommendation 4

When proceeding in camera, council for the Township of Woolwich should pass a resolution that includes both the fact of holding the closed meeting and the general nature of the subject matter to be discussed.

Recommendation 5

The Township of Woolwich should ensure that both open and closed session minutes are kept of all meetings of council, local boards, and committees of either of them.

Recommendation 6

The Township of Woolwich should ensure that meeting records are complete and accurately reflect all of the substantive and procedural items that were discussed.

Recommendation 7

The Township of Woolwich should implement a practice of audio or video recording its closed sessions.

Recommendation 8

The Township of Woolwich should follow a practice of reporting back after closed sessions.

Report

- 90** OMLET staff spoke with the Mayor and the Clerk on June 17, 2015 to provide an overview of these findings, and to give the municipality an opportunity to comment. Any comments received were taken into account in preparing this report.
- 91** My report should be shared with council for the Township of Woolwich and made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario