



Ombudsman Report

**Investigation into whether
Council for the City of Elliot Lake
held illegal closed meetings in April 2015**

**Barbara Finlay
Acting Ombudsman of Ontario
October 2015**

Complaint

- 1** In April 2015, my Office received complaints about closed sessions held by council for the City of Elliot Lake on April 13 and April 17, 2015. The complaints 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).
- 2** An additional complaint alleged that members of council met with the Chief Administrative Officer (CAO) in an anteroom following the April 17 meeting, and did not provide notice or report back publicly, contrary to the open meeting provisions of the Act.
- 3** In May 2015, my Office received a separate complaint that some councillors hold private meetings on a regular basis and then support each other during council meetings.

Ombudsman jurisdiction

- 4** 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.
- 5** As of January 1, 2008, the Act gives citizens the right to request an investigation into whether a municipality has complied with the Act in closing a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 6** The Ombudsman is the closed meeting investigator for the City of Elliot Lake.
- 7** In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-law have been observed.

Council procedures

- 8** The City of Elliot Lake's procedure by-law (by-law 07-36) states that regular council meetings are held the second and fourth Monday of the month at 7 p.m. Section 8.1(a) states that public notice of meetings is given by posting the agenda

and cover page on the city hall bulletin boards. The agenda is delivered to council members the Thursday prior to the meeting (s 8.1(c)).

- 9** The Mayor may at any time summon a special council meeting to be held at the time, date and place of his preference (s 2.4). Upon receipt of a petition of the majority of council members, the clerk shall summon a special meeting. If time does not permit the agenda to be delivered as per the general notice provision at section 8.1(a), the clerk shall attempt to inform each council member of the time, place and purpose of the meeting and deliver the agenda as soon as reasonably possible (s 8.1(d)). Failure of any person to receive notice of the special meeting shall not affect the validity of the holding of the meeting (s 8.1(e)).
- 10** There is no specific provision with respect to notice to the public of special meetings of council. In an April 2015 report about closed meetings in the City of Elliot Lake the Ombudsman recommended that the procedure by-law be amended to reflect the city's current practice with respect to notice of special meetings.
- 11** Section 20 of the procedure by-law deals with closed meetings and mirrors section 239 of the Act, except that it includes requests pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* under items that may be considered in camera, when the Act states that this topic must be considered in camera. The city's procedure by-law should be amended to properly reflect the *Municipal Act*.

Investigative process

- 12** 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, the Clerk and the Chief Administrative Officer as well as all members of council.
- 13** My Office received full co-operation in this matter.

The April 13, 2015 meeting

- 14** The April 13, 2015 meeting was a regular meeting of council. The meeting began at 7 p.m. The agenda indicated that council would be proceeding in camera to discuss three matters.

15 Two of the three matters were noted in complaints to our Office: the discussion about committee members' roles and behavior under the "personal matters" exception, and the discussion about the sale of residential land on McLaren Crescent under the "acquisition or disposition of land" exception.

16 The open session minutes state that council passed resolutions to proceed in camera under s. 239(2)(b) of the Act to discuss:

That the memo from the Chief Administrative Officer dated April 7, 2015 concerning committee members' duties and behaviour be discussed in closed session under Section 239.(2)(b) of the Municipal Act as this matter deals with personal information about identifiable individuals.

and under s. 239(2)(c) of the Act to discuss:

[...] that Staff Report CK2015-7 dated March 25, 2015 concerning the sale of residential land on McLaren Crescent be discussed in closed session under Section 239.(2)(c) of the Municipal Act as this matter deals with the disposition of property owned by the Municipality.

The closed session about these matters occurred from 8:46 p.m. to 10:07 p.m.

17 While in camera, council members discussed the behaviour and character of volunteer members of committees of council. Even though these individuals were mentioned by virtue of their official capacity as committee members, council's discussion revolved around scrutiny of their personal conduct.

18 Council also briefly discussed a decision by the By-laws and Planning Committee with respect to the disposition of property. This discussion took place in camera with the intention of updating a committee member who was believed to have been absent during the related closed session at the committee meeting. When the councillor indicated that he had in fact only been late for that meeting and was present for the closed session discussion at committee, no further discussion about this matter took place.

19 Upon returning into open session, council voted to extend the employee code of conduct to committee members and members of council.

Analysis

The discussion about committee members

- 20** The closed discussion of committee members' conduct and character fit the "personal matters" exception. While discussions under this exception must be about an individual in his or her personal capacity, rather than professional, official or business capacity, information in a professional, official or business capacity can take on a more personal nature if it relates to scrutiny of that individual's conduct.¹
- 21** In this case, the discussion of the volunteer committee members' conduct took on a more personal nature, and therefore fit within the "personal matters" exception.
- 22** Council then voted in open session to extend the employee code of conduct to committee members and members of council. Discussions of protocols, rules and responsibilities do not come within the "personal matters" exception. However, council correctly limited its in camera discussion to personal matters about identifiable individuals.

The discussion about disposition of land

- 23** The closed session discussion about the By-laws and Planning Committee decision fit within the "acquisition or disposition of land" exception.
- 24** The "acquisition or disposition of land" exception is intended to protect the municipality's bargaining position.² While the disposition of the property at issue had already been made public, given the purpose of the exception, subsequent discussions at council about property-related deliberations could continue to fit within the exception.
- 25** In this case, however, the discussions were ultimately abandoned as moot.

The April 17, 2015 meeting

- 26** The agenda for the special meeting of council on April 17, 2015, noted that a meeting would be held at 4 p.m. in council chambers. The special meeting was

¹ Order MO-2519 (29 April 2010), online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2519.pdf>>.

² Order MO-2468-F (27 October 2009), online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2468-F.pdf>>.

called by four councillors, a majority, in compliance with the city's procedure by-law. The agenda indicated that council would be proceeding in camera to discuss the conduct of council members under the “personal matters” exception.

27 The open session minutes state that council passed the following resolution to proceed in camera:

That the conduct of members of Council be discussed in closed session under Section 239.(2)(b) of the Municipal Act, as this matter deals with personal information about identifiable individuals.

The closed session ran from 4:22 p.m. to 5:51 p.m.

28 The minutes note that the Mayor requested a recorded vote, and that all members of council except the Mayor and one councillor voted to proceed into closed session.

29 The closed session minutes show that council scrutinized the Mayor’s conduct in his official and professional capacity. Parts of the discussion also extended to the roles and responsibilities of the Mayor.³

30 Upon returning into open session, the open session minutes show that council voted to “express their unity and confidence” in the Mayor.

31 My Office was informed that, after the conclusion of the meeting, the CAO spoke with two councillors in the adjacent committee room about a matter unrelated to council’s discussions that day. Other members of council were coming in and out of the room at the time, as it is also used to store council members’ personal effects during council meetings.

Analysis

The discussion about council member conduct

32 The Act does not define “personal matters.” However, my Office often considers the case law of the Office of the Information and Privacy Commissioner (the IPC) when reviewing the parameters of the open meeting exceptions.

³ The subject of the discussion has since become a matter of public record. The motion that followed the closed session as well as related media coverage made it obvious that the Mayor was the primary topic of discussion. See: Kevin McSheffrey, “Council goes in-camera to discuss ‘council conduct’”, *Elliot Lake Standard* (23 April 2015), online: <<http://www.elliottlakestandard.ca/2015/04/23/council-goes-in-camera-to-discuss-council-conduct>>.

33 A review of decisions of the IPC has shown that even discussions about an individual in his or her professional capacity may be considered "personal" in nature. For example, in Order MO-2519 the adjudicator considered whether information about a member of an Economic Development Committee that appeared in meeting minutes was “personal” or “professional” in nature.⁴ The IPC found:

Although the appellant attended the meeting in an official capacity, there is some information in the record which indicates that this individual’s conduct was scrutinized and questioned. Previous orders of this office have established that information about persons in their professional or employment capacity may qualify as their personal information if it involves an evaluation of that individual’s performance as an employee or an investigation into his or her conduct as an employee [see, for example, Orders P-939, PO-2414, PO-2516, PO-2524, MO-2395]. In the circumstances of this appeal, I find that the information contained in the record reveals something of a personal nature about the appellant. Because the information relating to the appellant relates to his conduct, in the circumstances it takes on a different, more personal quality. Consequently, I find that the information relating to the appellant reveals something of a personal nature about him. [emphasis added]

34 With respect to the closed meeting, the IPC adjudicator found that the Committee in question was authorized by section 239(2)(b) of the *Municipal Act* to hold a closed meeting to discuss this committee member’s “personal” information.

35 This IPC decision indicates that the conduct of a committee member being scrutinized and questioned at a committee meeting can qualify as "personal matters" and/or "personal information", where it involves evaluation of a person's conduct or performance.

36 Closed meeting investigators have also found that the conduct of a council member in his or her professional or official capacity may fall within the “personal matters” exception in certain circumstances. The investigator for the City of Orillia found that discussion of the conduct of a member of the Waste Management Advisory Committee was permitted to be closed under the “personal matters” exception;⁵ the investigator for the City of Cornwall found that the discussion of the propriety of a councillor’s statements to the media about the conduct of a staff member could have been appropriate for in camera

⁴ *Supra* note 1.

⁵ John Craig Consulting, *City of Orillia Closed Meeting Complaint Investigation* (January 2010).

discussion under “personal matters”;⁶ and, the investigator for the Municipality of Northern Bruce Peninsula found that the conduct of a member of council, in his or her capacity as a member of council, may be discussed in closed session under the “personal matters” exception. The investigator found that this was analogous to the discussion of employee performance and that there are no identifiable individuals excluded from the “personal matters” exception.⁷

37 More recently, the Ombudsman discussed the applicability of the “personal matters” exception in a September 2014 letter pertaining to a different meeting of council for the City of Elliot Lake, held on October 25, 2013.⁸ In that case, council discussed the alleged release of confidential information by an identified member of council. The Ombudsman found that this discussion fit within the “personal matters” exception as the allegations were unproven, related to alleged covert actions by the council member, and included information that was not available to the public at the time.

38 In line with previous findings with respect to councillor conduct, the discussion of the Mayor’s performance and conduct by council for the City of Elliot Lake fell within the “personal matters” exception.

39 Parts of the discussion in closed session with respect to the Mayor’s official conduct fell outside the “personal matters” exception, such as matters of public record and discussions around the roles and responsibilities of the Mayor. However, as the Ontario Superior Court noted in *St. Catharines (City) v. IPCO*,⁹ parsing a closed meeting discussion in this way would not be realistic, given the intimate connection between the “personal matters” and those that may not fall within the exception.

40 In the circumstances, given the nature and scope of the discussion, the closed session discussion of the Mayor’s conduct by council for the City of Elliot Lake fell within the “personal matters” exception to the open meeting requirements of the *Municipal Act, 2001*.

41 It must be noted, however, that the personal matters exception to the open meeting requirements is discretionary, not mandatory. Council has the option to

⁶ Stephen Fournier, *Closed Meeting Investigation – Council of the Corporation of the City of Cornwall* (April 2012).

⁷ Local Authority Services, *Report to the Corporation of the Municipality of Northern Bruce Peninsula* (January 2014), online: < www.agavel.com/wp-content/uploads/2013/09/Northern-Bruce-Peninsula-2013-final.docx>.

⁸ Letter from Ombudsman of Ontario to the City of Elliot Lake (8 September 2014), online: <<https://www.ombudsman.on.ca/Resources/Reports/City-of-Elliot-Lake-%286%29.aspx>>.

⁹ 2011 ONSC 2346.

discuss such matters in closed session where it feels it is appropriate to do so. OMLET staff were told on more than one occasion that the Mayor was willing to have concerns about his performance and conduct discussed in public.

- 42** As discussed above, the “personal matters” exception is intended to protect an individual’s privacy. Where the individual concerned, in this case the Mayor, consents to the public disclosure of the information, council should give greater consideration to proceeding in open session in the interest of transparency.

After the meeting

- 43** In discussion with the Clerk, CAO and all members of council, OMLET staff could find no evidence to support the allegation that members of council had an informal meeting following the adjournment of the special council meeting.

The private gatherings

- 44** A separate complaint to our Office alleged that three members of council meet regularly outside of council meetings to discuss council business.
- 45** In the course of the investigation, OMLET staff were informed by a constituent that he had been invited to meet with Councillor Scot Reinhardt on April 20, 2015 at 7 p.m. with respect to a matter the constituent had raised with council. The gathering took place in Councillor Reinhardt’s home. According to the constituent, Councillors Connie Nykyforak and Tammy Van Roon were also in attendance.
- 46** A May 27, 2015 media report indicates that same gathering had been mentioned during council’s May 25, 2015 meeting.¹⁰
- 47** In discussion with OMLET staff, one of the councillors who had attended the gathering characterized it as personal business, as there was no quorum of council. Another characterized it as an informal conversation.

¹⁰ David Briggs, “Veteran lambasts council over flag issue, calls for resignations” *Elliot Lake Standard* (27 May 2015), online: <<http://www.elliottlakestandard.ca/2015/05/27/veteran-lambasts-council-over-flag-issue-calls-for-resignations>>.

Analysis

48 In a 2008 report,¹¹ through review of the relevant case law and keeping in mind the underlying objectives of open meeting legislation, the Ombudsman developed a working definition of “meeting” to assist in applying the law:

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

49 This definition is consistent with leading interpretations of the open meetings law and reinforces the right of the public to observe municipal government in process.¹²

50 When determining if a meeting has occurred, the concept of a legal quorum is an important consideration. Alone, it is not conclusive, but having a quorum means a sufficient number of members is present to legally transact business. It is obvious that once a gathering constitutes a quorum of council or committee, the risk of those individuals collectively exercising their authority increases.

51 In a January 2013 letter to the Municipality of Leamington, OMLET staff noted that “the provisions of the [Municipal] Act were not intended to prevent Council members from communicating with constituents and responding to their inquiries”.¹³ Moreover, in an October 2014 report with respect to the City of Owen Sound, the Ombudsman found that councillors meeting informally with constituents to discuss concerns, where there was no quorum and no exercise of the power or authority of council, was not a meeting for the purposes of the open meeting requirements of the Act.¹⁴

¹¹ Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal* (April 2008), online: http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/SudburyReportEng2_2.pdf.

¹² *London (City) v RSJ Holdings Inc*, [2007] 2 SCR 588, 2007 SCC 29 at para 32; *Southam Inc v Ottawa (City)* (1991), 5 OR (3d) 726 (Ont Div Ct) at paras 12-18; *Southam Inc v HamiltonWentworth Economic Development Committee* (1988), 66 OR (2d) 213 (Ont CA) at paras 9-12.

¹³ Letter from Ombudsman of Ontario to the Municipality of Leamington (6 January 2013), online: <https://ombudsman.on.ca/Resources/Reports/Municipality-of-Leamington.aspx>.

¹⁴ Ombudsman of Ontario, *A Contentious Lot: Investigation in whether Council for the City of Owen Sound held illegal closed meetings in August 2014* (October 2014), online: [https://ombudsman.on.ca/Resources/Reports/City-of-Owen-Sound-\(1\).aspx](https://ombudsman.on.ca/Resources/Reports/City-of-Owen-Sound-(1).aspx).

52 In the City of Elliot Lake case, on April 20, 2015 three members of council met privately with a constituent. As council for the City of Elliot Lake has seven members, less than a quorum of council was in attendance. This private gathering was not subject to the open meeting provisions of the Act.

Opinion

53 My investigation found that council for the City of Elliot Lake did not contravene the *Municipal Act, 2001* during in-camera meetings on April 13 and April 17, 2015. In addition, there was no evidence that an informal meeting took place on April 17, 2015 following the meeting of council.

54 My investigation also found that the April 20, 2015 gathering of three members of council was not a meeting for the purposes of the open meeting requirements of the *Municipal Act, 2001*.

55 In the course of my investigation, certain members of council raised concerns about gaining the community's trust and noted that the Office has received a high number of closed meeting complaints in recent years. Others stated their belief that the Office is being abused by frivolous and vexatious closed meeting complainants. It was further suggested that the Office charge a fee for its services.

56 The Ombudsman's Office does not charge a fee for its services. Charging a fee to make a complaint would run contrary to the function of the Office as well as the spirit and intention of the *Municipal Act*. As the Ombudsman noted in a 2008 report about the Township of Emo:

The whole open meeting enforcement scheme is premised on the public willingly coming forward to assist in ensuring that transparency is maintained at the municipal level.

[...]

Charging a fee for complaining is entirely inconsistent with the primary intent of the open meeting provisions to foster democratic legitimacy at the local level.¹⁵

¹⁵ Ombudsman of Ontario, *Municipal Government by Stealth: Investigation into the Council of the Township of Emo Closed Meeting of April 8, 2008* (January 2009), online: <<http://www.ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/emofinaleng.pdf>>.

57 In addition, the Ombudsman’s role as closed meeting investigator is “to ensure as much as possible that municipal meetings are transparent where appropriate and that municipalities comply with the legislation” put in place by the government.¹⁶ Under the *Ombudsman Act* the Ombudsman has the discretionary authority not to investigate any complaint that is found to be frivolous, vexatious or not made in good faith. Although the above allegations were ultimately not founded, the complaints warranted investigation as they raised an important question as to what extent council may discuss the conduct of its members behind closed doors. Even investigations that find nothing of concern can be beneficial in that they serve to shed greater light on events and strengthen public confidence in local government.

58 While my investigation did not find that council for the City of Elliot Lake contravened the Act, I have identified the following best practices and procedural steps to assist the city in improving its meeting practices.

Recommendations

Recommendation 1

Council for the City of Elliot Lake should amend its procedure by-law to reflect the city’s current practice with respect to notice of special meetings.

Recommendation 2

Council for the City of Elliot Lake should amend its procedure by-law to properly reflect subsection 239(3) of the *Municipal Act, 2001* of the open meeting exception for requests made under the *Municipal Freedom of Information and Protection of Privacy Act*.

Report

59 OMLET staff spoke with the Mayor and the Clerk on October 22, 2015 to provide an overview of these findings, and to give the municipality an

¹⁶ Brad Duguid, Parliamentary Assistant to the Minister of Municipal Affairs and Housing, Standing Committee on General Government (11 December 2006), online: <www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&Date=2006-12-11&ParlCommID=7422&BillID=427&Business=130&DocumentID=20825>.

opportunity to comment. Any comments received were taken into account in preparing this report.

- 60** My report should be shared with council for the City of Elliot Lake and made available to the public as soon as possible, and no later than the next council meeting.



Barbara Finlay
Acting Ombudsman of Ontario