



Ombudsman Report

**Investigation into whether
Council for the City of Elliot Lake
held illegal closed meetings in December 2014
and January and February 2015**

**André Marin
Ombudsman of Ontario
April 2015**

Complaint

- 1 In January 2015, my Office received a complaint about three closed sessions held by council for the City of Elliot Lake in December 2014 and one closed session held in January 2015. In February 2015, we received another complaint about a meeting held on February 9, 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 The complaint also alleged that notice of one of the meetings, held on December 22, 2014, was not provided in accordance with the city's procedure by-law.

Ombudsman jurisdiction

- 3 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.
- 4 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.
- 5 The Ombudsman is the closed meeting investigator for the City of Elliot Lake.
- 6 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

- 7 The city's procedure by-law (by-law 07-36) states that regular council meetings are held on the second and fourth Mondays of the month, at 7:00 p.m. 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 on the Thursday prior to the meeting.
- 8 The Mayor may at any time summon a special council meeting to be held at the time, date and place of his preference. Upon receipt of a petition of the majority of council members, the clerk shall summon a special meeting. The by-law states that if time does not permit the agenda to be delivered the Thursday prior to the

meeting, 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. Failure of any person to receive notice of the special meeting shall not affect the validity of the holding of the meeting.

- 9 Section 20 of the procedure by-law deals with the procedure for closed meetings and is similar to section 239 of the Act.

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 December 1, 2014 meeting

- 12 The December 1 meeting was a regular council meeting that began at 7:00 p.m. in council chambers. Item 14 on the agenda was a closed session to consider three matters:
 - A memo from the Chief Administrative Officer regarding CAO recruitment, which was closed under the "personal matters" and "labour relations or employee negotiations" exceptions to the open meeting requirements (ss. 239(2)(b) and (d) of the Act);
 - A memo from the Director of Clerks and Planning Services to discuss a request for an extension on the covenant to build on a waterfront lot. This item was closed under the "personal matters" and "acquisition or disposition of land" exceptions to the open meeting requirements (ss. 239(2)(b) and (c) of the Act); and
 - A report from the Director of Clerks and Planning Services regarding a request to purchase a property on Hwy 108 North, which was closed under the "acquisition or disposition of land" exception to the open meeting requirements (s. 239(2)(c) of the Act).
- 13 The complaint to my Office was only about the first two items.
- 14 The open session minutes indicate that council resolved to proceed in camera at 8:40 p.m. for the reasons outlined on the agenda.

CAO Recruitment

- 15** Council first discussed a memo from the current Chief Administrative Officer, regarding the recruitment of a new Chief Administrative Officer. Council discussed potential changes to the current Chief Administrative Officer's contract, which would allow him to remain employed with the city while the recruitment process was ongoing.

Analysis

- 16** The terms of an individual employee's contract, including that individual's salary, may qualify as personal information about that individual. As I noted in my 2010 report regarding the Town of Mattawa,¹ this view is consistent with decisions of the Office of the Information and Privacy Commissioner of Ontario (see for instance: Order M-5, Order 61, Order 183, and Order P-273).
- 17** The "labour relations or employee negotiations" exception can also apply to discussions of an individual employee's contract, as the exception refers to the collective relationship between an employer and its employees².
- 18** Accordingly, both of the cited exceptions applied to the discussion of Chief Administrative Officer recruitment.

Request for an extension to build on a waterfront lot

- 19** Council next discussed a request for a time extension to build on a waterfront lot. Attached for council's consideration was a letter from the owners of the lot, noting that when they purchased the lot there was a requirement that the exterior of the intended dwelling be completed within four years. Due to extenuating circumstances, the owners requested two additional years to complete construction of their home.
- 20** The result of the owner's failure to build within the allotted time was that the city could repurchase the property at 80% of the purchase price. Council directed staff to respond to the owners, denying their request for an extension.

¹ Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings (December 2010). Available online:

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

² See, for example, Order PO-2057 of the Office of the Information and Privacy Commissioner (October 29, 2002)

Analysis

- 21** Given the impact that council’s decision would have on the individual property owners – i.e., council would be repurchasing their land at only 80% of the purchase price – I am satisfied that the discussion of whether or not to extend the time for the owners to build on the property could be considered personal in nature.
- 22** Other closed meeting investigators have also recognized that re-acquisition of a property by a municipality fits within the parameters of the “acquisition or disposition of land” exception.³
- 23** Accordingly, both of the cited exceptions applied to the waterfront property discussion.

Potential purchase of property

- 24** Finally, council discussed the potential purchase of a property on Hwy 108 North. This discussion was not the subject of the complaint to my Office, and in any event it clearly fit within the s. 239(2)(c) exception cited in the resolution to proceed in camera.

The December 15, 2014 meeting

- 25** The December 15 meeting was a regular council meeting that began at 7:00 p.m. in council chambers.
- 26** Item 14 on the agenda was a closed session to deal with three matters:
- A report from the By-laws and Planning Committee regarding a request to purchase land on Ste. Camillus Crescent, closed under the “acquisition or disposition of land” exception (s. 239(2)(c) of the Act);
 - A memo from the Chief Administrative Officer regarding “extended service,” closed under the “personal matters” exception (s. 239(2)(b) of the Act); and
 - A memo from the chair of the ad hoc CAO Selection Committee regarding CAO recruitment, closed under the “personal matters” exception (s. 239(2)(b) of the Act).

³ See, for example, Amberley Gavel’s report on a September 23, 2008 meeting held by the Municipality of Highlands East (November 29, 2008)

- 27** The open session minutes indicate that council resolved to proceed in camera at 7:58 p.m. for the reasons noted on the agenda.

Request to purchase land

- 28** Council first discussed the request to purchase a lot on Ste. Camillus Crescent. The complaint to my Office alleged that, since the entire purchase proposal was made available to the public as an attachment to the agenda, there was no reason for this matter to be discussed in camera.
- 29** While in camera, council discussed the offer and also discussed the specific buyer's interest in other nearby properties. Staff advised my Office that the purchaser's interest in other properties was confidential at the time. Although the terms of the proposal were public, it was open to council not to accept the offer or to make a counter offer.

Analysis

- 30** The purpose of s. 239(2)(c) is to protect the municipality's interests when buying or selling property⁴. Council was entitled to discuss in camera its position with respect to the offer to purchase city-owned property and whether it was in agreement with the terms, even though the offer had been made public.

Extended service of the CAO

- 31** Council next discussed a memo from the Chief Administrative Officer regarding "extended service" under the personal matters exception. This was essentially a continuation of the December 1 discussion regarding the Chief Administrative Officer's contract.

Analysis

- 32** As with the December 1 discussion, this information related to specific terms of an identified employee's contract, and fit within the personal matters and labour relations exceptions to the open meeting requirements. The discussion clearly related to an identified individual's employment relationship with the municipality.

⁴ See, for example, Order MO-2468 of the Office of the Information and Privacy Commissioner (October 27, 2009)

CAO Recruitment

- 33** Lastly, council discussed a memo regarding CAO (Chief Administrative Officer) recruitment. The discussion pertained to an identified individual who had expressed interest in the position, and had submitted an application for review. Council discussed that the application had not been submitted in the proper manner. Staff and council members also discussed the contents of the application, including information about third parties that had been included in the application, and expressed opinions of the individual's qualifications for the position.

Analysis

- 34** This discussion included information about the individual who submitted the application, including work history and performance appraisals. Information relating to employment history (such as information found on resumes) can fall within the parameters of "personal information"⁵. Council members also provided opinions about this individual's qualifications, and discussed third party information that was contained in the application. For all these reasons, the discussion fit within the "personal matters" exception.

The December 22, 2014 meeting

- 35** The December 22 meeting was a special meeting that began at 5:00 p.m. in council chambers.

Notice

- 36** The complaint to our Office alleged that notice of this meeting was not provided in accordance with the procedure by-law, as the agenda had been posted on the website after the meeting occurred. This aspect of the complaint was based on the fact that the document properties on the municipality's website indicated that the agenda was posted on December 23.
- 37** Municipal staff advised my Office that the agenda was posted on the bulletin board in the municipal office and on the website in advance of the meeting, on December 22. Staff also advised the media that the meeting would be taking place.
- 38** However, the agenda that was posted initially contained information that was not meant to be shared with the public, and it was taken down after the meeting and re-

⁵ See, for example, Order MO-1909 of the Office of the Information and Privacy Commissioner (March 3, 2005)

posted on December 23, with the confidential information removed. Staff provided my Office with copies of contemporaneous internal emails to support this series of events.

- 39** The city's procedure by-law states that the Mayor may at any time summon a special council meeting to be held at the time, date and place of his preference, and that if time does not permit the agenda to be delivered the Thursday prior to the meeting, 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. Therefore, council did not violate its procedure by-law by providing notice of the meeting on the same day it was held.
- 40** Section 238(2.1) of the *Municipal Act* states that every municipality must pass a procedure by-law that provides for public notice of all meetings, including special meetings. In order to fully comply with the Act, the city should amend its procedure by-law to reflect council's practice of providing notice to the public of special meetings by posting the agenda on the website and in the municipal office, and alerting the media, when time does not allow the agenda to be posted in the usual fashion the Thursday before the meeting. City staff advised my Office that the procedure by-law currently is under review.

The in-camera discussions

- 41** The agenda for the December 22 special meeting indicated that council would discuss a report from the Coordinator of Arts and Culture regarding an upcoming "street dance." The report pertained to costs for booking a particular band for the event. There was no closed session noted on the agenda.
- 42** The open session minutes note that council voted to proceed in camera at 5:05 p.m. to "obtain further information with respect to individual band deposits and contract negotiations", citing the personal matters exception.
- 43** While in camera, the Coordinator of Arts and Culture provided information regarding fees for the preferred band for the dance. Council also discussed fees for other bands.
- 44** The open session resumed at 5:15 p.m. and council voted to approve the budget for the street dance.

Analysis

- 45** As noted in my report regarding the United Townships of Head, Clara and Maria⁶, the purpose of the “personal matters” exception is to protect an identified individual’s right to privacy. In the case of the December 22 meeting, the purpose of bringing the discussion in camera was to protect the city’s bargaining position when discussing fees for bands the city was considering retaining.
- 46** There is no indication that personal information about an identifiable individual was discussed during the December 22 closed session. The discussion centered on what fees were charged to various groups for professional services. No general exception exists in the Act to allow councils to hold in camera discussions for the purpose of negotiating a contract for services.
- 47** Accordingly, this discussion did not fit within the exceptions to the open meeting requirements.

The January 5, 2015 meeting

- 48** The January 5 meeting was a special council meeting that began at 6:30 p.m. in council chambers. The only item on the agenda was a report from the Director of Clerks and Planning Services regarding the appointment of volunteers to various boards and committees. The agenda indicated this item would be discussed in camera under the “personal matters” exception.
- 49** The complaint to my Office alleged that there was no reason to bring this matter in camera, as the advertisement requesting volunteers for the committees stated that all submissions would become part of the public record. Our Office reviewed the advertisement and confirmed that it did contain this statement.
- 50** City staff advised my Office that there was no intention to discuss the volunteer applications publicly, and that the notice should have said that the applications “may” become part of the public record. For the sake of clarity, the city should consider amending the wording on future notices.
- 51** While in camera on January 5 council considered a staff report regarding potential candidates for volunteer appointments to various boards and committees. Copies of the applications received were attached to the report. The closed session discussions involved a detailed review of information about the candidates,

⁶ Investigation into closed meetings held by the United Townships of Head, Clara and Maria on October 21 and November 4, 2011 (August 2012). Available online: <https://ombudsman.on.ca/Files/sitemedia/Documents/Resources/Reports/Municipal/HCM-Final-Report.pdf>

including work history and their past experiences on performance on other council committees.

- 52** The open session resumed at 8:00 p.m. In open session, council voted on the appointments to various committees. The meeting adjourned at 8:08 p.m.

Analysis

- 53** As noted by the Office of the Information and Privacy Commissioner in Order MO-1909⁷, discussion of applications for volunteer positions can fit within the parameters of “personal information”. On January 5, the discussions involved a detailed review of each individual’s resume and work history, and a discussion of their qualifications for various boards and committees. These discussions fit within the “personal matters” exception to the open meeting requirements.

The February 9, 2015 meeting

- 54** The February 9 meeting was a regular council meeting that began at 7:00 p.m. in council chambers. There was no closed session business on the agenda for the meeting.
- 55** At the meeting, council voted to suspend the usual notice requirements of the procedure by-law to allow an item to be added: the committee membership of the White Mountain Academy Board. The city’s procedure by-law allows for items of business to be added with the approval of council.
- 56** Council passed a resolution to consider the added matter in camera under the personal matters exception. The closed session began at 7:45 p.m.
- 57** While in camera, council discussed the citizen members of the White Mountain Board, including personal opinions of certain actions taken by these individuals.
- 58** The open session resumed at 8:25 p.m. According to the open session minutes, council voted to re-establish the White Mountain Academy Board of Directors with the three current members of council serving as the sole members of the Board.
- 59** The complaint to my Office alleged that this vote did not actually take place in open session, as recorded in the minutes. Rather, the complainant contends that members of council returned from closed session and merely stated their decision.

⁷ Order MO-1909, Temiskaming Shores (City) (Re), 2005 CanLII 56561 (ON IPC)

This would indicate that the decision had been made in camera in violation of section 239(6) of the Act, which states that voting can only take place in camera if the vote is for a procedural matter or to direct staff.

- 60** The complainant alleged that individuals present at the meeting could confirm this; however, we were not provided with the names of these individuals, and they did not contact my Office.
- 61** My Office obtained a copy of the video recording for the meeting. Unfortunately, the tape ends as council proceeded in camera and does not capture the portion of the meeting after the closed session. Staff advised my Office that, to their recollection, the vote took place in open session as recorded in the minutes.

Analysis

- 62** In order to qualify as “personal information”, the information usually must be about an individual in their personal capacity, rather than their professional, official or business capacity. However, information about an individual in a professional capacity may still qualify as personal information, if it reveals something of a personal nature.⁸
- 63** Information about a person in their professional capacity can take on a more personal nature if it relates to scrutiny of that individual’s conduct.⁹ If the discussion involves expressions of opinion about an individual,¹⁰ this can also fall within the definition of personal information.
- 64** The discussion on February 9 involved the personal opinions of council members about the conduct of citizen members of the White Mountain Board. This discussion fit within the “personal matters” exception to the open meeting requirements.
- 65** The complaint alleged that council improperly voted in camera to change the composition of the White Mountain Academy Board. The information provided to my Office by municipal staff, and recorded in the open and closed session minutes, indicates that this vote took place in open session. Unfortunately, the videotape did not capture the relevant portion of the meeting. The clerk advised my Office that it is the city’s practice to have the entire meeting recorded, including in the portion

⁸ See, for example, Order MO-2368 of the Office of the Information and Privacy Commissioner (November 26, 2008)

⁹ See, for example, Order MO-2519 of the Office of the Information and Privacy Commissioner (April 29, 2010)

¹⁰ *Supra*, Note 7.

after the closed session, but in this case she believed there was a malfunction during the recording.

- 66** While I find that the balance of the evidence indicates that council did not illegally vote in camera, it would certainly have been useful to be able to review the best possible evidence of this, namely the videotape.
- 67** As noted in my 2011-2012 Annual Report on open meetings, I also strongly encourage municipalities to make audio or video recordings of in-camera 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.
- 68** More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include: the Townships of Tiny, Madawaska Valley and McMurrich/Monteith, the Town of Midland, The Municipality of Lambton Shores, and the Cities of Oshawa and Welland.

Opinion

- 69** My investigation found that council for the City of Elliot Lake did not contravene the *Municipal Act, 2001* during in-camera meetings on December 1 and December 15, 2014 and January 5 and February 9, 2015. However, council did contravene the Act when it considered a matter in camera at its December 22, 2014 meeting that did not fit within the “personal matters” exception, or any exception to the open meeting requirements.
- 70** I am making the following recommendation to assist the City in fulfilling its obligations under the Act, and in enhancing the transparency of its meetings.

Recommendations

Recommendation 1

The City of Elliot Lake 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

The City of Elliot Lake should amend its procedure by-law to reflect its current practice for providing notice of special meetings.

Recommendation 3

The City of Elliot Lake should ensure that the entire meeting is captured on the video recording of its open meetings, including any portion of an open meeting that takes place after an in-camera session has concluded.

Recommendation 4

The City of Elliot Lake should implement a practice of audio or video recording its closed sessions.

Report

- 71** OMLET staff spoke with the Mayor and the clerk on April 16, 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.

- 72** 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.



André Marin
Ombudsman of Ontario