



Ombudsman Report

**Investigation into closed meetings held by
Council for the City of Greater Sudbury
on October 3 and 12, November 9 and
December 14, 2011**

**André Marin
Ombudsman of Ontario
August 2012**

Complaints

- 1 Our Office received a complaint in February 2012 that Council for the City of Greater Sudbury went *in camera* to discuss ordering an audit/peer review of the city's Auditor General's office at meetings in October, November and December 2011. These meetings were closed under the "personal matters about an identifiable individual" exception set out in the *Municipal Act, 2001*, section 239.
- 2 The complaint alleged that the subject matter of these closed meetings was inappropriate for *in camera* discussion because it involved a review of the two-person office of the Auditor General, and not of the Auditor General in his personal capacity.

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* 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 Council for the City of Greater Sudbury voted to appoint the Ontario Ombudsman as its investigator on November 14, 2007.
- 6 In investigating closed meeting complaints, our Office considers whether the open meeting requirements of the Act and the relevant municipal procedure by-law have been observed.

Council meeting procedures

- 7 Article 7 of the city's procedure by-law (2011-235) outlines the dates, time, and location of regular council meetings. Special meetings may be called upon receipt of a petition signed by the majority of the members of council. Notice of a meeting is provided to council members by distribution of the meeting agenda at least three days prior to the meeting. The agenda is also made available to the public on the city's website three days prior to the meeting.

Investigative process

- 8 On May 2, 2012, after a preliminary review of the complaints, our Office notified the City of Greater Sudbury that we would be conducting an investigation.
- 9 During the course of our investigation, we obtained and reviewed relevant municipal documents, including minutes, agendas, emails and other municipal records, as well as a copy of a slide presentation that was presented by the director of human resources at one of the meetings. We also considered the city's procedure by-law and applicable legislation and case law.
- 10 In accordance with s. 19(1) of the *Ombudsman Act*, members of council and city staff are required to provide our Office with any documents or information requested in our investigations. Not all members of council co-operated with our investigation.
- 11 Three members of our Open Meeting Law Enforcement Team (OMLET) conducted face-to-face interviews in Sudbury with all members of council, except for one who was unable to attend. That councillor was interviewed via videoconference. The city Clerk was also interviewed.

Lawyering up

- 12 Under section 18(2) of the *Ombudsman Act*, my investigations must be carried out in private. In order to protect the integrity of our process, we do not permit municipal representatives, including legal counsel acting on behalf of a municipality, to be present during our witness interviews. Our interview practice encourages witnesses, including those wishing to "blow the whistle" on questionable closed meetings, to be candid and open with our investigators, and

also minimizes the potential for outside influence of testimony, whether consciously or unconsciously.

- 13 When we first began the process of arranging interviews, Sudbury's City Solicitor advised our Office that a lawyer from his office likely would be present for interviews of council and staff, to protect the interests of the municipality. At that time we explained our process and advised that city solicitors would not be permitted to be present at the interviews. This was confirmed in a series of letters exchanged with my Office's Senior Counsel.
- 14 We were advised that the City Solicitor's office would be seeking direction from council on this at a meeting of June 12. Before this meeting, staff from my Office provided information about our process directly to Sudbury council members; they were advised that counsel for the city would not be permitted in the interview room. I understand that at the June 12 meeting, council directed staff from the City Solicitor's office to attend the interviews.
- 15 When we contacted them to arrange our interviews, some councillors made it known that they planned to have someone from the City Solicitor's office with them at their interviews. We explained our investigative process to them directly via email. Our procedure was made clear to all members of council and staff whom we planned to interview. None contacted us to discuss any concerns they might have.
- 16 Between June 26 and 28, three OMLET members conducted interviews in Sudbury with the Clerk and 12 of the 13 members of council (the 13th was contacted later via videoconference). All of them brought counsel from the City Solicitor's office with them to their interview – and the member interviewed by videoconference asked to do likewise. They were advised, as we had stated previously, that the interviews would not proceed with a city lawyer present. Only four interviewees – out of 14 – agreed to proceed with the interview in the absence of counsel from the city. The Mayor and Clerk agreed to be interviewed with their own outside legal counsel present, and two councillors agreed to proceed without any legal representation. The OMLET members were particularly impressed by the professionalism and knowledge demonstrated by the Clerk in relation to the city's meeting practices.
- 17 In my view, it is completely unnecessary for witnesses to be represented by lawyers during Ombudsman investigations. I hasten to add, as well, that councillors have no inherent right to counsel in such circumstances. This is consistent with the approach my Office takes in investigating all complaints, be

they about closed municipal meetings or the more than 18,500 complaints we handle each year about more than 500 Ontario government organizations.

- 18 My investigations are not adversarial in nature, but fact-finding exercises. My Office's authority does not extend to finding individuals personally at fault or issuing sanctions for any procedural or substantive violations. I can only issue recommendations, and in the closed meeting context, my recommendations normally address future best practices for holding closed meetings. Typically, there is no individual interest at stake in an Ombudsman investigation that would warrant legal representation.
- 19 During interviews with us, some councillors also expressed concerns that I had referred to this investigation on Twitter. Shockingly, one councillor even went so far as to attempt to use this as an excuse not to co-operate with my investigation. As I address in the "Conclusion" section of this report, council members' co-operation with our investigations is a legal obligation, a breach of which is punishable by fine or jail, or both.
- 20 My Office's Twitter account, @Ont_Ombudsman, has been in use since 2009 and is clearly identified as my account: "Ombudsman André Marin tweets personally unless otherwise noted." Twitter is a valuable communications tool used extensively by our Office to inform and engage the public, including general, non-confidential information about our work. On June 25, I tweeted a link to an article in the Sudbury media regarding our investigation, and indicated that I hoped members of our staff who would be in Sudbury that day would receive co-operation. I also tweeted a link on June 26 to my previous report regarding the City of Greater Sudbury, *Don't Let the Sun Go Down on Me*.¹
- 21 In the past few years, my Office has embraced the use of social media – even as a tool to gather information in investigations, as was the case with our investigation of the Ontario government's decision to expand the use of police powers for the 2010 G20 summit in Toronto.² I believe an important part of our work is the promotion of open government, and I have found that social media – including Twitter – is the best means to ensure that information is shared quickly and in the most transparent and accessible fashion.

¹ Office of the Ombudsman of Ontario, *Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal*, April 25, 2008. <http://www.ombudsman.on.ca/Resources/Reports/City-of-Greater-Sudbury-br--Don't-Let-the-Sun-Go-D.aspx>

² Office of the Ombudsman of Ontario, *Caught in the Act: Investigation of the Ministry of Community Safety and Correctional Services' conduct in relation to Regulation 233/10 under the Public Works Protection Act*, December 2010. <http://www.ombudsman.on.ca/Investigations/SORT-Investigations/Completed/G20-summit--Caught-in-the-Act-br---December-2010.aspx>

- 22 Interestingly, some council members appeared to be offended not by a particular tweet, but by the very fact that this Office uses Twitter. I would strongly encourage council members who may be unfamiliar with modern communication and engagement tools to educate themselves on their potential. Good governance in 2012 is intrinsically tied to the ability to communicate and engage effectively with citizens.

Preliminary report

- 23 In accordance with our normal procedures, the city was given an opportunity to review a report containing preliminary investigative findings and analysis, and to make any relevant representations before the report was finalized. Council and staff had the option of receiving a copy of the preliminary report for review upon signing a confidentiality undertaking.
- 24 Two members of council were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. We did not receive any written comments on the preliminary report.

Background – the Auditor General’s Office

- 25 Mr. Brian Bigger was hired as Sudbury’s first Auditor General for a three-year contract, beginning in June 2009. The Auditor General is independent from the rest of city staff and reports directly to council. The Auditor General’s office is made up of Mr. Bigger and one senior auditor.
- 26 The conflicts between Mr. Bigger and members of council and staff were well known. While conducting an audit of Greater Sudbury Transit in the fall of 2011, Mr. Bigger sought files outlining the city’s efforts to recover more than \$580,000 from a local businessman whose company had a contract to sell transit tickets on behalf of the city³. The city refused to provide the documents to Mr. Bigger, citing solicitor-client privilege. The City Solicitor argued that the documents belonged to council, and advised council not to provide them to Mr. Bigger.

³ Whitehouse, Mike, “Department Legal Battle Expensive,” *The Sudbury Star*, November 2, 2011.

- 27 Mr. Bigger sought legal advice at a cost of about \$20,000. The city also hired an outside law firm⁴. The hiring of outside counsel caused the Auditor General's office to exceed its budget by more than \$17,000 that year. According to the local media, Councillor Barbeau – the head of the transit committee – “took Mr. Bigger to task” for the expenditure, noting that it was “unacceptable that the man charged with making sure the city is spending its money wisely should exceed his budget”⁵.
- 28 In the end, the audit committee chair, Councillor Berthiaume, declared that all city employees were expected to provide the auditor with unfettered access to all city documents⁶. Mayor Matichuk noted to the media that the “real regret was that the dispute between two city departments had reached the point where one needed to retain a lawyer to deal with the other.” She commented: “Such disputes do not engender the confidence of taxpayers.”⁷
- 29 Mr. Bigger's transit audit uncovered that transit employees were engaged in shift trading and shift selling. The audit also revealed that the city renewed the contract of the bus ticket kiosk operator several times, despite the fact that he owed the city hundreds of thousands of dollars. Eventually, the contractor fell more than \$1 million in arrears, half of which the city had yet to recoup at the time of Mr. Bigger's report⁸.
- 30 Subsequent to the release of Mr. Bigger's findings, Councillor Kett stated at a council meeting that he was “offended both personally and professionally” that Mr. Bigger had overstepped his bounds, and Councillor Kilgour accused Mr. Bigger of making the transit situation look worse than it was.⁹
- 31 Greater Sudbury Transit, which was the subject of four audits in 18 months, refused to accept Mr. Bigger's recommendations and conclusions.¹⁰ Transit management dismissed all 22 recommendations as “unnecessary or impractical.”¹¹

⁴ Macleod, Brian, “Auditor was right to seek expensive legal advice,” *The Sudbury Star*, November 5, 2011.

⁵ *Ibid.*

⁶ Whitehouse, Mike, “Council covers auditor's tab,” *The Sudbury Star*, November 3, 2011.

⁷ *Ibid.*

⁸ Mulligan, Carol, “All eyes on city auditor,” *The Sudbury Star*, December 31, 2011.

⁹ *Ibid.*

¹⁰ Whitehouse, Mike, “City auditor gets audited,” *The Sudbury Star*, January 18, 2012.

¹¹ Whitehouse, Mike, “Transit needs workers,” *The Sudbury Star*, May 15, 2012.

- 32 In January 2012, the local media reported that council had hired the Institute of Internal Auditors to conduct an external quality assessment review of Mr. Bigger’s office. At the time, Mr. Bigger was two years into a three-year contract, which expired in December 2012, although the decision on whether to renew his contract had to be made in June.¹²
- 33 At a council meeting on May 22, it was announced that Mr. Bigger’s office received a rating of “full compliance” as a result of the external peer review.¹³ At a meeting on June 26, council voted to renew Mr. Bigger’s contract.

Investigative findings

- 34 The information provided to my Office indicates that council discussed the Auditor General’s employment in a series of *in camera* meetings. The purpose of these meetings appears to have been to find a way to evaluate Mr. Bigger’s performance with an eye to deciding whether or not to renew his contract. Prior to each of these meetings, council passed a resolution in open session to proceed *in camera* to discuss a “personal matter relating to an identifiable individual” under s. 239(2)(b) of the *Municipal Act*.
- 35 On October 3, 2011, council considered legal advice relating to this matter. There was also a slide presentation from the director of human resources. Our investigators obtained and reviewed this presentation, although some portions that were covered by solicitor-client privilege were redacted.
- 36 At its October 12 meeting, council discussed conducting a peer review of the Auditor General’s office. Council voted to direct the Mayor to report back to council with a selection of firms to conduct the peer review. Although voting is generally not permitted during an *in camera* session, this vote was permissible under 239(6) of the Act, which provides that a meeting may be closed to the public during a vote if the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality. As the Mayor is an officer of the municipality, council is authorized to direct the Mayor during a closed session.

¹² *Supra*, note 8.

¹³ Whitehouse, Mike, “Auditor general in full compliance,” *The Sudbury Star*, May 23, 2012.

- 37 On November 9, council considered which of the identified organizations would be best able to conduct the review. At its December 14 meeting, council considered which evaluation process (independent assessment or self assessment with independent validations) would be preferable and voted to direct the Mayor to arrange an independent assessment.
- 38 The complaint to our Office alleged that it was not appropriate for council to discuss the peer review of the Auditor General’s Office at these four meetings under the “personal matters about an identifiable individual” exception, as it was not the Auditor General personally who was being discussed, but his office.
- 39 The four individuals we were able to interview told us the discussions related to the performance of the Auditor General personally, rather than the Auditor General’s office generally. It was also noted that since the office has only one other employee, who is directed by the Auditor General, it is difficult if not impossible to separate the Auditor General’s personal performance from the overall performance of the office.

Analysis

- 40 The *Municipal Act* does not define “personal matters.” However, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* contains a similar phrase – “personal information” – that is defined. This definition has been considered by both the Information and Privacy Commissioner and the courts. While the definition of “personal information” in *MFIPPA* does not dictate how the phrase “personal matters” in the *Municipal Act* should be interpreted, it does provide a useful reference point.
- 41 Section 2(1) of *MFIPPA* defines “personal information” as follows:

“personal information” means recorded information about an identifiable individual, including,

- information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- any identifying number, symbol or other particular assigned to the individual,
- the address, telephone number, fingerprints or blood type of the individual,
- the personal opinions or views of the individual except if they relate to another individual,
- correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- the views or opinions of another individual about the individual, and
- the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

42 A 2007 decision of the Information and Privacy Commissioner¹⁴ noted that in order to qualify as personal information, the information “must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.” This decision also stated that information relating to an individual in a professional, official or business capacity, “may still qualify as personal information if the information reveals something of a personal nature about the individual.”

43 The Commission’s adjudicator found that some of the information in question did qualify as “personal information”, based on the fact that it included “an examination of identifiable individuals’ job performance, which has been found to be ‘personal information.’ ” The adjudicator noted:

Information about an employee does not constitute personal information where the information relates to the individual’s employment responsibilities or position. Where, however, the information involves an examination of the employee’s performance or an investigation into his or her conduct, these references are considered to be the individual’s personal information.

¹⁴ Order MO-2204; (Town of Aylmer) (June 22, 2007)

Conclusion

- 44 The information obtained in our investigation indicates that during the four closed meetings under investigation, Sudbury council's discussions involved an examination of, as well as an expression of views and opinions about, the auditor's performance and conduct in his position. I am satisfied, based on the nature of the discussions, that they fell within the realm of "personal matters about an identifiable individual."
- 45 In my opinion, based on the evidence obtained in my investigation, council for the City of Greater Sudbury did not contravene the *Municipal Act* or its procedure by-law when it discussed the Auditor General's conduct and performance during *in camera* sessions on October 3 and 12, November 9 and December 14, 2011.
- 46 I must comment, however, that the reluctance of the majority of council to co-operate with my Office's established investigative process made it very difficult for OMLET staff to collect the necessary information to complete this investigation. The City of Greater Sudbury chose to appoint my Office as its closed meeting investigator, was the subject of an investigation in 2008, and should have become well aware of my Office's processes and the applicable law. Council could have chosen to appoint a different closed meeting investigator at any time since, but it has not done so.
- 47 The fact that only four of the 14 individuals we asked to interview were prepared to co-operate with my Office is an affront to the citizens of Sudbury, who have elected the council to run local government in a way consistent with the law. The abysmal co-operation level of this city council has offended the *Ombudsman Act*.
- 48 The *Ombudsman Act* s. 27(b) provides that: "Every person ... who, without lawful excuse, refuses or willfully fails to comply with any lawful requirement of the Ombudsman ... is guilty of an offence and liable to a fine of not more than \$500 or to imprisonment for a term of no more than three months." Sudbury council members cannot cherry-pick the cases in which they choose to co-operate. The law imposes the legal duty to do so in each and every case. In the 37-year history of the Office of the Ombudsman of Ontario, there has never been a prosecution for failing to comply with a lawful requirement of the Ombudsman. We have been particularly patient in our investigations of closed municipal meetings – a relatively new area of our jurisdiction (since 2008). We have gone

to great lengths to inform and educate municipalities about the operations of our Office.

- 49** Council for the City of Greater Sudbury now has the dubious distinction of being the least co-operative body we have ever investigated. Our office will not tolerate municipal officials engaging in legal gamesmanship or political gymnastics in order to evade accounting for their actions when we investigate complaints that they met secretly and illegally to conduct city business. We expect elected representatives to have respect for the rule of law. In future, we expect greater maturity from council members under investigation. We will not hesitate to avail ourselves of the legal tools at our disposal to ensure that the Sudbury council co-operates fully. The credibility of the investigative process depends on it.
- 50** I have one further comment. Several jurisdictions in the United States require that municipal closed meetings be electronically recorded or videotaped, and many others have also adopted this practice to enhance the accountability and transparency of their proceedings. For example, the Illinois *Open Meetings Act* states that all public bodies must keep a verbatim record of all their closed meetings in the form of an audio or video recording.¹⁵ Similarly, Iowa's legislation¹⁶ requires that audio recordings be made of all closed sessions, and Nevada requires that public bodies record audio of open and closed meetings or use a court stenographer to transcribe the proceedings.¹⁷
- 51** Having audio and/or video recordings of closed meetings would significantly reduce the time and resources necessary to respond to a closed meeting complaint investigation, and would also provide the citizens of Sudbury with a measure of assurance that there is a complete record of what transpires behind closed doors. Furthermore, in cases such as this, having access to a complete recording of the closed session would likely have eliminated the need to conduct in-person interviews with council and staff to verify what was discussed *in camera*.

¹⁵ 5 ILCS 120/2.06

¹⁶ Iowa Code § 21.5(4)

¹⁷ N.R.S 241.035(4)

Report

- 52 My report should be made available to the public as soon as possible, and no later than the next council meeting.



André Marin
Ombudsman of Ontario