

January 28, 2013

Ms. Carol McKenzie, Clerk  
Mayor Bill Weber  
The Municipality of Lambton Shores  
7883 Amtelecom Parkway  
Forest, ON  
N0N 1J0

Dear Mayor Weber and Ms. McKenzie,

**Re: Ombudsman Review of November 13, 2012 meeting**

I am writing further to our telephone conversation with both of you, on January 24, 2013 regarding the results of the Ombudsman's preliminary review of complaints made to our Office about a November 13, 2012 closed meeting. The complainants alleged that council improperly discussed terminating or suspending the Chief Administrative Officer (CAO) at this closed session. The complaints also alleged that some members of council met informally prior to the November 13 council meeting to discuss council business.

As you are aware, in assessing closed meeting complaints our Office is restricted to reviewing whether a meeting was closed to the public in accordance with the relevant provisions of the Act and the municipality's procedure by-law. Although some complaints to our Office alleged that the CAO was not treated fairly as a result of the November 13 meeting, our mandate does not allow us to review the substance of council's decision making, including whether a particular decision was justified. Accordingly, our comments are limited to whether council was entitled to discuss this matter *in camera* and whether all procedural requirements were followed.

As part of our Office's review we considered relevant sections of the *Municipal Act, 2001* (the Act), and the municipality's procedure by-law. We also listened to the audio recording of the November 13, 2012 closed session and reviewed the open and closed meeting materials.

### The November 13, 2012 council meeting

The agenda for the November 13 meeting indicated there would be two closed sessions at that meeting: one at 1:00 p.m. to discuss a business development proposal under the acquisition or disposition of land exception, and one at 4:00 p.m. to discuss a personal matter about an identifiable individual. The 4:00 p.m. closed session was the subject of the complaints to our Office.

According to the minutes, Council proceeded *in camera* at 4:19 p.m. to discuss a personal matter about an identifiable individual under section 239(2)(b) of the Municipal Act. The meeting adjourned at 5:18 p.m.

The materials provided, including the audio recording of the meeting, indicate that during the *in camera* session council discussed the performance of an identifiable member of staff.

As discussed on January 24, 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. 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.

Section 2(1) of *MFIPPA* defines “personal information” as follows:

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

- 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.

A 2007 decision of the Information and Privacy Commissioner<sup>1</sup> 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

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<sup>1</sup> Order MO-2204; (Town of Aylmer) (June 22, 2007)

professional, official or business capacity, “may still qualify as personal information if the information reveals something of a personal nature about the individual.”

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.

From the information provided to our Office it appears that the discussion on November 13 included an examination of an identified employee’s performance, as well as personal views and opinions expressed about this individual. As such, the discussion fit within the personal matters exception.

The complaint to our Office also alleged that members of council met prior to the meeting to discuss and make decisions on council business. Our review did not substantiate that such a gathering took place.

Votes taken:

The materials from the November 13 meeting indicate council took six votes while *in camera*. As you are aware, under s. 239(5) of the Act voting in closed session is prohibited except in limited circumstances, outlined in s. 239(6). This section states a vote may be closed to the public if the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, and if the meeting is otherwise properly held *in camera*.

We were advised that after the November 13 closed meeting council became aware that one of the *in camera* votes – to appoint the treasurer as acting CAO - was improperly taken in closed session, as this vote was not for a procedural matter, or a direction to staff. This vote was repeated in open session at the November 19 meeting.

We also discussed two other votes taken during the session. Firstly, council voted to appoint three members of council to a “transition team” to facilitate the departure of the CAO. This decision was neither procedural nor a direction to staff, and accordingly the vote was taken *in camera* in violation of s. 239(5) of the Act.

Secondly, council voted to direct the transition team to seek legal advice. During our conversation of January 24 we discussed that, although the mayor is considered an officer of the municipality, other councillors generally are not. As noted in the *Handbook for Municipal Councillors*<sup>2</sup>, “Membership in a municipal council does not make the member an employee, officer or agent of the municipality, or create a contractual relationship with the municipal corporation...” (p. 33) (emphasis added) Accordingly, it does not appear that council’s “direction” to the transition team, which was made up of three council members, fit within the allowable exception to voting *in camera*.

When we spoke we requested that you share our comments with council and with the public as soon as possible, and in any event no later than the next council meeting. We will also provide the complainants with the outcome of our review.

We would also like to acknowledge that the municipality has begun recording its closed meetings, as suggested by the Ombudsman in his recent annual report on open meetings. Being able to listen to this recording greatly facilitated our review and ensured that we had access to the most accurate information. We encourage the municipality to continue its practice of audio recording closed session meetings.

I would like to thank you for the cooperation our Office received during this review.

Sincerely,

Michelle Bird  
Legal Advisor  
Open Meeting Law Enforcement Team

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<sup>2</sup> George Rust-D’Eye, *Handbook for Municipal Councillors*, (Carswell, 2010)