



**Investigation into whether the
Councils for Armour Township and the
Village of Burk's Falls
held illegal closed meetings on January 16, 2015**

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Complaint

- 1 In March 2015, our Office received a complaint that the councils for Armour Township and the Village of Burk's Falls held one or more illegally closed meetings to discuss amalgamation.
- 2 The complainant told our Office that a local newspaper reported on January 28, 2015 that the two municipalities were in amalgamation talks. The article noted that the municipalities "got serious" about amalgamation talks "maybe three months ago".¹ The complainant alleged that the municipalities had discussed amalgamation in a closed session, contrary to the open meeting provisions in the *Municipal Act, 2001* [the Act] and the municipalities' procedure by-laws.

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 Armour Township and the Village of Burk's Falls.
- 6 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipal procedure by-laws have been observed.

Council procedures

Armour Township

- 7 Armour Township's procedure by-law² states that regular council meetings are held the second and fourth Tuesday of each month at 7:00 p.m. in council chambers.

¹ Kathryn Boyle, "Amalgamation talks start in earnest", *North Bay Nipissing News* (28 January 2015) online: <www.northbaynipissing.com/news-story/5289777-amalgamation-talks-start-in-earnest>.

² Township of Armour, by-law No 42-2007, *Being a by-law of the Corporation of the Township of Armour to govern the proceedings of Council and Committees and to repeal all former by-laws related thereto* (27 November 2007) [Armour Procedure By-law] online: <http://www.armourtownship.ca/pdf/Armour_By-law_Procedural.pdf>.

- 8** Notice of regular meetings and committee meetings is given by publication of the date in the agendas of earlier meetings, publishing the meeting agenda on the township website, and posting notice at the township office. For a special meeting, notice is to be posted on the township's website as soon as practicable.
- 9** Section 2.6 of the by-law states that, before holding a meeting or part of a meeting that is closed to the public, council shall state by resolution that it will be holding a closed meeting and the general nature of the subject matter to be considered.
- 10** Section 2.7 restricts voting to procedural matters or directions to staff during sessions that are closed in accordance with the exceptions in section 2.6.
- 11** All meetings of council are required to be open to the public unless the subject matter being considered falls within one of several exceptions listed in s. 2.5 of the by-law. These exceptions mirror those in s. 239 of the Act, except for two provisions. First, subsection "c" in the by-law refers only to an acquisition of land, omitting discussions about disposition of land (which are permitted in the Act). Second, the exception for discussions about a request under the *Municipal Freedom of Information and Protection of Privacy Act* where the municipality is the head of the subject institution is included with the other discretionary exceptions as subjects that "may" be discussed in camera. This exception is mandatory in s. 239(3) of the Act.
- 12** For the sake of clarity, the procedure by-law should be amended so that the exceptions accurately reflect those in the Act.

Village of Burk's Falls

- 13** Burk's Falls' procedure by-law³ states that regular council meetings are held on the fourth Tuesday of each month at 7:00 p.m. in council chambers, or the prior Tuesday where the fourth Tuesday is the 28th or later. Special meetings can be called by the Reeve at any time, or by the Clerk upon receipt of a petition from a majority of council. Special meetings shall not be held sooner than four hours after receiving the summons or petition, except in the case of a "bona fide" emergency.
- 14** Notice of all meetings, including special meetings, is to be posted on or adjacent to the municipal office door and recorded on the village's telephone answering machine. Notice shall be given the later of two weeks prior to the time of the meeting or "forthwith" after a date is set for the meeting. Public notice of meetings will be posted on the website at the same time.

³ Village of Burk's Falls, by-law No 8-2011, *Being a by-law to govern the proceedings of Council, the conduct of its members and the calling of meetings* (22 March 2011) [Burk's Falls Procedure By-law].

- 15** All council and committee meetings shall be open to the public unless the subject matter being considered falls within one of several exceptions, which mirror those in s. 239(2) of the Municipal Act.
- 16** Section 7(c) of the by-law states that, before holding a meeting or part of a meeting that is closed to the public, council shall state by resolution that it will be holding a closed meeting and the general nature of the subject matter to be considered.
- 17** Subsections 7(d) and (e) state that a meeting shall not be closed to the public during the taking of a vote, unless the meeting is closed in accordance with the Act and the vote is limited to a procedural matter or directions to staff.

Investigative process

- 18** My Office's Open Meeting Law Enforcement Team (OMLET) reviewed relevant portions of the municipalities' procedure by-laws and the Act. We spoke with the clerk of each municipality and determined that amalgamation was discussed during the meeting on January 16, 2015. No other closed meeting discussions about amalgamation were identified. We reviewed the agendas and minutes for the January 16 meeting and interviewed the clerks and all members of council for each of the municipalities, as well as the Deputy Clerk of Armour Township.
- 19** On a technical point, it should be noted that the two municipalities each treated the meeting on January 16 as a separate meeting of their respective councils, although the two councils met together to discuss matters of mutual interest. Because of this, there were two separate agendas and two sets of closed meeting minutes, and each council was required to abide by its respective by-laws, as well as by the rules of the Act. Further, council for Burk's Falls continued to meet after the adjournment of the meeting with Armour.
- 20** My Office received full co-operation in this matter.

The January 16 meetings

- 21** Both clerks created agendas for the January 16 meeting, for their respective councils. Neither agenda was ever posted publicly.

- 22** The Armour agenda stated that a closed session would be held January 16 at 12:30 p.m. It cited the *Municipal Act* exceptions for discussions about security of the property of the municipality and personal matters about an identifiable individual. It noted that council would be discussing municipal restructuring, the community emergency management co-ordinator (CEMC) position, and an anonymous letter regarding a municipal employee.
- 23** The Burk's Falls agenda stated that a special meeting would be held on January 16 at "the Armour Township Council Meeting". It stated that a closed session would be held regarding an identifiable individual and a proposed or pending acquisition or disposition of land. No general description of the matters for discussion was provided.
- 24** At 12:30 p.m. on January 16, 2015, councils for Armour Township and the Village of Burk's Falls met in Armour's council chambers. The meeting lasted approximately one hour and the councils moved out of closed session at 1:44 p.m.
- 25** In attendance from Armour were Clerk Wendy Whitwell, Deputy Clerk Melinda Torrance, Reeve Bob MacPhail, and councillors Rod Blakelock, Jerry Brandt, Marina Hammond, and Pat Hayes. The attendees from Burk's Falls were Clerk Nicky Kunkel, Reeve Cathy Still, and councillors Rex Smith, Lewis Hodgson, and Jarvis Osborne. Burk's Falls councillor Lisa Morrison was unable to attend the meeting.
- 26** Armour council passed a resolution to close the meeting by voting with a show of hands. The resolution was passed in closed session, as there was no open portion of the meeting. Burk's Falls council did not pass a resolution to close the meeting. Both clerks recorded minutes for their respective councils.
- 27** After the meeting between the two councils ended, the Armour council members left and the Burk's Falls council members remained in the room to continue their own meeting. According to the Burk's Falls minutes, council members then decided by consensus to appoint Armour Coun. Brandt (who had been present earlier), to the District of Parry Sound Social Services Administration Board.
- 28** The Armour council did not report back publicly about the meeting.
- 29** The Burk's Falls council reported publicly at its next council meeting – on January 27 – that it had met with Armour council and, following that meeting, passed a resolution to appoint Armour Coun. Brandt to the Parry Sound District Social Services Administration Board.

Separate or together?

- 30** The open meeting rules in the Act and in the municipalities' procedure by-laws include specific procedural requirements that serve to increase transparency, accountability, and public participation in local government. To determine which procedures should have been followed by Burk's Falls and Armour on January 16, our Office needed to determine whether they held a single joint meeting, with a single agenda, or if their meeting was actually considered to be two separate meetings.
- 31** Although all the attendees met in one room and discussed the issues as a group, because there were technically two meetings, each council had to meet certain procedural obligations.
- 32** Each clerk prepared her own agenda for the meeting and took her own minutes. Each clerk cited different exceptions under s. 239 of the Act to close the meeting. The clerks did not discuss or agree on a process for the meeting ahead of time.
- 33** Accordingly, each municipality was obligated to comply with its respective procedure by-law, and with the Act, as for any other special meeting.
- 34** Much of the confusion surrounding the process could have been avoided if the two municipalities had discussed the meeting in advance and agreed to follow the applicable procedures for an individual or joint meeting.

The meeting discussions

35 The two councils discussed three main topics in closed session:

- Amalgamation
- CEMC position
- Anonymous letter regarding a municipal employee

36 After the discussion of the three listed topics, Burk's Falls council discussed an appointment to the Parry Sound District Social Services Administration Board.

Amalgamation

37 According to the meeting documents and interviews, the two councils began the meeting with a discussion about the possibility of amalgamation (or "municipal restructuring") to facilitate economic development. We were told that the municipalities had been informally discussing the possibility of amalgamation for years, but were

prompted to consider it more seriously in January because of a local development proposal.

- 38** The councils had been approached by two companies interested in developing in the area. Each business had asked the councils to keep the possible developments confidential. Both developments required land, water, and sewage services. We were told that Armour Township has available land to facilitate development, but no water or sewage systems capable of supporting the projects. The Village of Burk's Falls has water and sewage systems, but no available land. The possibility of combining resources to facilitate development prompted the discussion about amalgamation on January 16.
- 39** Burk's Falls and Armour share certain services with a third municipality in the area, Ryerson Township. These include a landfill and an arena, and the arrangement is governed by a shared services agreement. Members of council for both municipalities told us that they met in closed session to discuss whether to proceed with discussions about amalgamation, and if so, whether those talks would include Ryerson, or be limited to Burk's Falls and Armour.
- 40** During the meeting, the councils agreed by consensus to proceed with amalgamation discussions between the two municipalities, and to arrange a meeting with the Ministry of Municipal Affairs and Housing to further discuss possible amalgamation.
- 41** As part of the discussion about amalgamation, the councils considered whether water resources in the area were sufficient to support the proposed developments. They agreed to consider allotting funding for a study of the area's aquifers in Armour's 2015 budget. They also agreed that Burk's Falls would look into the cost of a study on the capacity of its sewage lagoons.

Analysis

- 42** Many councillors told us this issue was discussed in camera because it wasn't something they wanted to disclose to the public until the amalgamation process was further along. Local Authority Services (LAS), the closed meeting investigator for a number of Ontario's municipalities, has found that meetings cannot be closed to the public simply because the subject matter is "sensitive".⁴ As our Office noted in a 2014 report about closed meetings in the City of Welland:

...council cannot bring a matter in camera simply because it is considered sensitive or confidential or potentially against the city's interests to discuss it publicly.

⁴ Local Authority Services, *A Report to the Council of the Village of Sundridge* (February 2015) online: <[http://www.sundridge.ca/pdfs/misc/2015/website-closed investigation report.pdf](http://www.sundridge.ca/pdfs/misc/2015/website-closed%20investigation%20report.pdf)>.

Matters can only be discussed in camera if they fit squarely within the exceptions to the open meeting requirements.⁵

43 The municipalities did not agree on which of the exceptions to the open meeting rules they had used to discuss this matter in closed session. Burk's Falls told us the discussion took place in accordance with the exception for personal matters about an identifiable individual, and the exception for a proposed or pending acquisition or disposition of land by the municipality. Armour told us that the discussion was held in accordance with the exception regarding the security of the property of the municipality.

Applicability of the "personal matters" exception

44 We were told in interviews that the amalgamation discussion was closed using the "personal matters" exception because it involved the owners of the businesses considering developments in the area.

45 In order to qualify as "personal information," the information must reveal something about an individual personally. This can include information about someone in his or her professional capacity, but only where something personal is revealed.⁶

46 Information associated with an individual in a professional, official, or business capacity is not considered to be "about" the individual.⁷ In a 2008 decision, the Information and Privacy Commissioner determined that a two-part test established by the IPC to distinguish personal information from business information can be applied to determine whether a discussion constituted personal matters for the purposes of the open meeting rules.⁸ The test is as follows:

1. In what context do the names of individuals appear? Is it in a personal or business context?
2. Is there something about the particular information that, if disclosed, would reveal something of a personal nature about the individual?

⁵ Ombudsman of Ontario, *Investigation into multiple closed meetings by council for the City of Welland from June 2012 to May 2014* (November 2014) online: <<https://ombudsman.on.ca/Resources/Reports/City-of-Welland.aspx>>.

⁶ See Order MO-2204 (22 June 2007), online: IPC <https://www.ipc.on.ca/images/Findings/up-mo_2204.pdf>.

⁷ See Orders P-257, P-427, P-1412, MO-1550-F, online: IPC <www.ipc.on.ca>.

⁸ PO-2225 (12 January 2004) online: IPC <https://www.ipc.on.ca/images/Findings/Attached_PDF/PO-2225.pdf>; Order MO-2368 (26 November 2008) online: IPC <<https://www.ipc.on.ca/images/Findings/mo-2368.pdf>>.

- 47** The Commissioner found that information outside the scope of the personal sphere and within the scope of profit-motivated business activity does not constitute personal information. In order for the information to be considered personal in the second stage of the test, one must consider what the information reveals. Information that speaks to a business arrangement (e.g., that an individual is a landlord and owes money to a tribunal), is not considered personal information.
- 48** In the case at hand, the councils were discussing proposals made by various companies to expand their businesses in the area. While the individual owners were named in the meeting, it was strictly in a business context and any mention of them was limited to their roles as business owners. Even if the information became public, it wouldn't reveal anything of a personal nature about them.
- 49** Accordingly, the discussion was limited to business information and did not fit within the personal matters exception under the Act.

Applicability of the "acquisition or disposition of land" exception

- 50** Burk's Falls council cited the exception for "acquisition or disposition of land" in relation to the amalgamation discussion. At the time of the meeting, no land transactions were in progress. Any discussions about land were limited to future possibilities. Staff from Armour told us that the municipalities were "nowhere close" to purchasing or selling any land at the time of the meeting.
- 51** The acquisition or disposition of land exception allows councils to discuss the sale, lease, or purchase of land in a closed session. Both my Office and LAS have emphasized that this exception is discretionary and should only be used to close a meeting where a public discussion about a pending acquisition or disposition of land has the potential to harm the municipality, financially or otherwise.⁹ The primary purpose of discussing a land acquisition or disposition in camera should be to protect the municipality's bargaining position in property negotiations.¹⁰
- 52** In this case, the discussion of land was preliminary and general. The municipalities were not in the process of acquiring or disposing of land, and no bargaining was ongoing. Accordingly, the discussion did not fit within this exception.

⁹ Local Authority Services, *A Report to the County of Brant* (February 2011) online: <http://www.agavel.com/wp-content/uploads/2013/09/County_of_Brant_2010_Final_08_07_11.doc>. See also Local Authority Services, *A Report to the City of Kingston* (January 2010) online: <http://www.agavel.com/wp-content/uploads/2013/09/Kingston_Report_Jan_7_2010.doc>.

¹⁰ Order MO 2468-F (27 October 2009) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2468-F.pdf>>; see also Letter from Ombudsman of Ontario to Town of Ajax (28 March 2014) online: <<https://ombudsman.on.ca/Resources/Reports/Town-of-Ajax.aspx>>.

Applicability of the “security of the property of the municipality” exception

- 53** Armour council told us that it cited s.239(2)(a), security of the property of the municipality, because amalgamation would benefit the township’s assets.
- 54** The Act does not define “security” for the purposes of section 239. In 2009, the Information and Privacy Commissioner found that “security of the property of the municipality” should be given its plain meaning, in that it applies to protecting property from physical loss or damage (like vandalism or theft), and the protection of public safety in relation to that property.¹¹ In 2011, the Commissioner clarified that the term can apply to both “corporeal” and “incorporeal” property, as long as it is owned by the municipality and the discussion is about preventing its loss or damage.¹²
- 55** The discussion about amalgamation of two municipalities and potential development projects in the area did not relate to specific property owned by the municipalities, either corporeal or incorporeal. While it was related to land in a general sense, there is a distinct exception for land acquisition or disposition in s. 239(2)(c), which is considered above. As the councils were not discussing the protection of municipal property, this exception did not apply to the amalgamation discussion.

CEMC position

- 56** Council next discussed a vacant position for a community emergency management co-ordinator (CEMC). The CEMC role is part of the emergency services shared by Armour, Burk’s Falls, and Ryerson.
- 57** At the January 16 meeting, Armour and Burk’s Falls decided they would each appoint a CEMC, and use each other’s appointee as their backup co-ordinator. Each municipality identified a staff member who would be qualified to hold the position and decided to offer the position to those individuals. Council members discussed the hours of work and pay for each position, and decided to approach the two individuals to determine if they were interested in the role.

¹¹ Order MO-2468-F, *ibid*.

¹² Order MO-2683-I (30 December 2011) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2683-I.pdf>>.

Analysis

Applicability of the “personal matters” exception

- 58** Section 239(2)(b) of the Act permits closing a meeting to the public if the subject matter being considered relates to “personal matters about an identifiable individual, including municipal or local board employees”.¹³ Information in job applications and resumés, such as information relating to education and employment history, is considered personal for the purposes of the Act.¹⁴
- 59** While council members for Armour and Burk’s Falls were not discussing job applications received from staff, they were discussing the same type of information, including the two individuals’ employment history and qualifications for the CEMC position. These discussions fell within the “personal matters” exception to the open meeting requirements.

Applicability of the “labour relations” exception

- 60** Although not cited by either municipality, this discussion could also have fit within the exception in s.239(2)(d) for “labour relations or employee negotiations,” as council was discussing position changes for identified employees. The labour relations exception extends beyond collective bargaining agreements to include the relations and conditions of work.¹⁵ The discussion about whether to extend the duties of specifically identified municipal employees to include the CEMC responsibilities fit within this exception.

Anonymous letter regarding a municipal employee

- 61** The councils next discussed an anonymous letter, received by Armour Township and shared with Burk’s Falls council, about a specific municipal employee. Our Office reviewed a copy of the letter, which was not circulated publicly. It makes negative allegations about the employee’s conduct with respect to official duties.

¹³ *Municipal Act, 2001*, SO 2001, c 25, s 239(2)(b).

¹⁴ See Order MO-1909 (3 March 2005) online: IPC <https://www.ipc.on.ca/images/Findings/Attached_PDF/MO-1909.pdf>, and Order MO-3177-I (30 March 2015) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-3177-I.pdf>>.

¹⁵ Order MO-2997 (15 January 2014) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2997.pdf>>. See also Order PO-2057 (29 October 2002) online: IPC <https://www.ipc.on.ca/images/Findings/Attached_PDF/PO-2057.pdf>.

- 62** We were told during our interviews that councillors expanded on the discussion about the letter to discuss other aspects of the employee's conduct, including this person's actions outside the confines of the job description.
- 63** After a short discussion, the council members decided they would not respond to or act on the letter because the complaint was anonymous.

Analysis

Applicability of the "personal matters" exception

- 64** The IPC has found that information only qualifies as personal if it pertains to the individual in his or her personal capacity, rather than his or her professional capacity. However, information about a person in his or her professional capacity may still qualify if it reveals something personal.¹⁶ Specifically, information about an employee's job performance and scrutiny of the person's conduct is considered personal information.¹⁷ As the IPC explained in Order MO-2519:

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].¹⁸

- 65** The letter discussed by the councils included negative and unproven allegations about the employee's conduct and job performance. It went beyond professional information about the individual's duties. Accordingly, the discussion fit within the exception for personal matters in the Act.

Burk's Falls board appointment

- 66** After the meeting with Armour, Burk's Falls council remained in the room and continued its meeting, discussing an appointment to a shared social services board. The Clerk informed council that it needed to appoint, by resolution, a representative to the Parry Sound District Social Services Administration Board. The councillors present decided to appoint Armour Coun. Jerry Brandt to the position. According to our

¹⁶ *Supra* note 6.

¹⁷ See Order MO-2368, *supra* note 8, and MO-2519 (29 April 2010) online: IPC <<https://www.ipc.on.ca/images/Findings/MO-2519.pdf>>.

¹⁸ Order MO-2519, *ibid*, at 5.

interviews, the matter was not discussed beyond determining that all members of council present supported his appointment.

- 67** Although the clerk did not cite a particular exception for this discussion, we considered whether the exception for personal matters applied in this case.

Applicability of the "personal matters" exception

- 68** As discussed, the exception in s. 239(2)(b) for "personal matters about an identifiable individual" can include discussions about a person in their professional capacity, if something personal is revealed.
- 69** In many instances where a council is considering appointments to boards or committees, personal information about individual applicants is discussed. This may include resumés, applications, or cover letters that reveal an individual's home address, qualifications, or employment history.
- 70** However, in the case at hand, Burk's Falls' council did not discuss any personal information about Coun. Brandt. Councillors told us that there was no need to review any information about him because everyone already knew him and was familiar with his qualifications.
- 71** As no personal information was discussed about Coun. Brandt, and no other candidates were considered, this discussion did not fit within the exception for personal matters in the Act.
- 72** The discussion does not appear to have fit within any other exception to the open meeting requirements in the Act.

Procedural matters

- 73** Our investigation revealed several procedural issues with the closed meeting practices of the two councils.

Notice

- 74** As discussed above, for the purposes of the law, Armour and Burk's Falls each held a meeting on January 16, although they met together. Accordingly, each was obligated to provide notice in accordance with the Act and the respective council procedure by-laws.

75 The agenda for Armour’s regular council meeting on January 13, 2015 lists “January 16 – Burk’s Falls / Armour – 12:30 p.m. – 1:30 p.m.” under the heading, “Dates to Remember”. According to the Deputy Clerk, this agenda was posted on Armour’s website before January 10.

76 Burk’s Falls provided no notice to the public about the January 16 meeting.

Analysis

Armour

77 Armour’s procedure by-law requires notice of special meetings to be posted on its website as soon as practicable. Generally, the township provides notice by posting meeting agendas online, but this practice is not specified in the by-law.

78 Armour included a reference to the January 16 meeting on a list of “Dates to Remember” that was published as part of the agenda for its January 13 council meeting. That agenda was posted on Armour’s website on January 9. The listing did not include a location, but the meeting was held in the regular council chamber. Accordingly, Armour complied with the notice requirement in its by-law.

79 However, Armour failed to post notice of the meeting in accordance with its normal practices. As a best practice, Armour should be consistent when providing meeting notices, in order to ensure the public does not miss a notice posted in an unusual fashion.

Burk’s Falls

80 Section 238(2.1) of the Act requires municipalities to provide for public notice of meetings in their procedure by-laws. Burk’s Falls’ procedure by-law states that notice of all meetings, including special meetings, must be posted at the municipal office, recorded on the village’s telephone answering machine, and posted on its website the later of two weeks prior to the meeting, or “forthwith” after a meeting date is set.

81 Burk’s Falls provided no public notice of the January 16 meeting.

82 In interviews, we were told that the portion of the Burk’s Falls meeting held after the Armour council departed (at which Coun. Brandt was appointed to a local board) was an open meeting. However, the failure to provide public notice means the public had no way of knowing a meeting would be taking place and anyone wishing to attend the meeting would not have had the opportunity to do so. As LAS noted in a 2015 report

regarding the Village of Sundridge, “lack of notice means that the municipality is effectively holding closed meetings”.¹⁹

- 83** We were told that the need for council to appoint someone to the vacant board position was an emergency, since the appointment deadline was the next day. The village’s procedure by-law states that special meetings can only be called by the head of council, or by way of a petition of a majority of council. Special meetings are not to be held sooner than four hours after they are called, except in the case of a bona fide emergency.
- 84** “Emergency” is not defined in either the by-law or the Act. The *Oxford English Dictionary* states that the ordinary modern use of “emergency” is “a juncture that arises or ‘turns up’, esp. a state of things unexpectedly arising, and urgently demanding immediate action”.²⁰ The *Black’s Law Dictionary* entry for “emergency circumstances” points to “exigent circumstances,” defined as a “situation that demands unusual or immediate action and that may allow people to circumvent usual procedures...”²¹
- 85** The commonality in these definitions appears to be unexpected circumstances requiring immediate or urgent action. Although council for Burk’s Falls faced time pressure to appoint an area representative to the board, it does not appear to have been urgent. The board meeting that we were initially told was the deadline for the appointment had actually already occurred on January 15, the day before the closed council meeting. According to the board’s minutes, the next scheduled board meeting was not until February 12, 2015.
- 86** We were also told that council was supposed to have made the appointment a month earlier, but “hadn’t got to it.” We obtained emails that show staff knew on December 22, 2014, that council would have to appoint someone to the board. There is no apparent reason why council could not have scheduled a special meeting to consider the appointment prior to January 16, after giving public notice in accordance with the Act and the village’s procedure by-law.
- 87** By failing to provide public notice of the meeting, Burk’s Falls violated both its procedure by-law and the Act. Burk’s Falls should take care to provide public notice of all meetings in accordance with its by-law.

¹⁹ Local Authority Services, *A Report to the Council of the Village of Sundridge* (February 2015) online: <[http://www.sundridge.ca/pdfs/misc/2015/website-closed investigation report.pdf](http://www.sundridge.ca/pdfs/misc/2015/website-closed%20investigation%20report.pdf)>. See also Ombudsman of Ontario, *Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008* (6 February 2009) at para. 33, online: <<https://ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>>.

²⁰ *The Oxford English Dictionary*, Compact ed., *sub verbo* “emergency”.

²¹ *Black’s Law Dictionary*, 8th ed., *sub verbo* “exigent circumstances”.

Resolution to proceed in closed session

- 88** Each municipality held a council meeting on January 16. Each was obligated to pass a resolution to close the meeting in accordance with the Act and its respective procedure by-laws.
- 89** The Armour and Burk's Falls clerks each recorded a set of closed session minutes for the meeting. Neither recorded open session minutes. Each clerk told us she did not record open session minutes because there was no open meeting prior to the closed session on January 16.
- 90** Armour Township's minutes for the closed session indicate that a resolution was passed to move into closed session in accordance with subsections 239(2)(a) – security of the property of the municipality, and (b) personal matters about an identifiable individual. Only the Armour councillors voted on the resolution. The resolution was passed in the closed session. We were told that, whenever an Armour council meeting starts with a closed session, the resolution is included in the closed session minutes, although the door is physically open and the public can attend to observe the resolution.
- 91** Burk's Falls did not pass a resolution to go into closed session.

Analysis

- 92** The Act requires that councils pass a resolution, stating the fact of holding a closed meeting and the general nature of the matter to be considered, **before** holding a closed session. This requirement is echoed in the Armour and Burk's Falls procedure by-laws.²²
- 93** In *Farber v. Kingston*, the Court explained that the resolution to go into closed session should provide a general description of the matters to be discussed in a way that maximizes information available to the public without undermining the reason for closing the meeting.²³ If the resolution to close a meeting is passed when council is already in closed session, it does not provide any information to the public, disclosing neither the fact of the closed meeting nor the general nature of the matter(s) to be considered.

²² See Burk's Falls Procedure By-law, *supra* note 3, s. 7(c), and Armour Procedure By-law, *supra* note 2, s. 2.6.

²³ [2007] O.J. No. 919 at 151.

- 94** The resolution to close a meeting must be passed in open session, while members of the public still have the opportunity to attend.²⁴ Even if council plans to hold a meeting where a closed session is the only agenda item, the meeting must begin in open session and the public must be invited to attend that portion of the meeting.
- 95** Armour council members violated the Act and the township’s procedure by-law when they failed to pass a resolution in open session to close the meeting on January 16.
- 96** Burk’s Falls prepared an agenda and took minutes in the closed session, but also violated the Act and its own procedure by-law when council members failed to pass a resolution to close the meeting.

Minutes

- 97** Both municipalities took minutes of the closed session on January 16. Neither recorded open session minutes.
- 98** Armour council members told us they did not believe there was an open session that day, so there were no minutes to record. However, any resolution to proceed into closed session must be passed in an open meeting, and recorded in open session minutes.
- 99** Burk’s Falls council continued to meet in closed session after the meeting with Armour concluded, but council and staff told us they believed they were meeting in open session. Despite believing this to be an open session, the Clerk recorded the board appointment decided by council as a “Note” at the end of her closed session minutes, instead of recording separate open session minutes.

Analysis

- 100** Subsection 239(7) of the Act requires municipalities to “record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not”.
- 101** Section 5 of the Armour procedure by-law requires the Clerk or a designate to record all proceedings of Council without note or comment, in accordance with the Act.

²⁴ See Local Authority Services, *What you need to know about closed meetings* (2013) at 12, online: <<https://www.las.on.ca/PDFs/Services/Closed-Meeting-Investigator/Resources/2013ClosedMeetingBooklet-FINAL.aspx>>. See also Ombudsman of Ontario, *Investigation into Council of the Township of Baldwin Closed Meeting of July 14, 2008* (23 March 2009) online: <<http://www.ombudsman.on.ca/Resources/Reports/Township-of-Baldwin-br--Investigation-into-council.aspx>>.

102 The Burk's Falls procedure by-law does not address record-keeping at meetings.

103 In a July 2010 report on a closed meeting in the Town of South Bruce Peninsula, the Ombudsman noted that a meeting record should indicate:

- When 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, what time this occurred;
- A detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- Any motions, including who introduced the motion and seconders; and
- All votes taken and all direction given.

104 Of the listed items, Armour's closed session minutes do not include:

- Who chaired the meeting;
- Whether any participants left or arrived while the meeting was in progress, and if so, what time this occurred;
- A record of motions, including who introduced the motion and seconders; and
- A record of all votes taken and all direction given.

105 Burk's Falls closed session minutes do not include:

- Who chaired the meeting;
- Who was in attendance (neither councillors nor staff are listed);
- Whether any participants left or arrived while the meeting was in progress, and if so, what time this occurred;
- A record of motions, including who introduced the motion and seconders; and
- A record of all votes taken and all direction given.

106 Both municipalities should ensure they keep a complete record of all meetings, especially any decisions made during a meeting, regardless of form.

107 Burk's Falls council should also amend its procedure by-law to address record keeping.

108 I strongly encourage municipalities to make audio or video recordings of both open and closed council meetings. This provides the most clear, accessible record for closed meeting investigators to review, saving municipal time and resources. It also increases transparency and accountability in local decision-making, bolstering public confidence in municipal governments.

109 More and more municipalities are opting to digitally record closed sessions for the sake of accuracy. These include: the Townships of Tiny, Adelaide Metcalfe, Brudenell, Lyndock & Raglan, and McMurrich-Monteith; the Towns of Midland and Fort Erie; the Municipalities of Lambton Shores, and Brighton; and the Cities of Oshawa, Sault Ste. Marie, Brampton, Niagara Falls, Port Colborne, and Welland.

Voting in closed session

- 110** During the closed meetings, Armour and Burk's Falls councils made several decisions:
- To continue exploring the possibility of amalgamation, to the exclusion of Ryerson Township;
 - To each appoint an identified staff person to the CEMC position, and ask each to act as the other's back-up; and
 - To take no further action with respect to an anonymous complaint received about a municipal employee.
- 111** The councils also gave directions to staff:
- To arrange a meeting with the Ministry of Municipal Affairs and Housing regarding amalgamation; and
 - To prepare by-laws to hire the selected candidates for the CEMC position.
- 112** All decisions were reached by consensus.
- 113** After the meeting, Burk's Falls continued on its own, deciding to appoint Coun. Brandt to a local board. Unlike the other decisions, the clerk recorded this decision as a resolution and it was reported at the next Burk's Falls council meeting.

Analysis

- 114** Subsections 239(5) and (6) of the Act prohibit councils from voting in a closed session unless the meeting is permitted to be closed under one of the exceptions listed in the Act, and the vote is for a procedural matter or for giving directions to staff. This requirement is echoed in Armour and Burk's Falls' respective procedure by-laws.
- 115** The discussion about amalgamation did not fit within any of the permitted exceptions to the open meeting rules in the Act, and so the subsequent votes to proceed with amalgamation discussions and to direct staff to arrange a meeting with the Ministry were also not permitted.
- 116** Further, even if the discussion had been permitted, the decision to proceed with discussions about amalgamation to the exclusion of Ryerson Township was a

substantive decision made through a vote in closed session. It was not procedural or a direction to staff, and was therefore an illegal vote.

- 117** The decisions regarding the CEMC position and the anonymous letter about a municipal employee were made in the context of subjects permitted in closed session. It is not clear if they were substantive decisions or directions to staff. Based on information obtained in interviews, it appears more likely that these were directions to staff, but this confusion could have been avoided had Armour and Burk's Falls made all decisions by resolution, and recorded all resolutions in the meeting minutes.
- 118** I also considered if the appointment decision made by Burk's Falls was permissible in a closed meeting. According to the minutes from the village's January 27 meeting, council passed a resolution at the January 16 meeting, "That Jerry Brandt be appointed as the Area Representative for the Parry Sound District Social Services Administration Board".
- 119** This discussion did not fit within any of the permitted exceptions in the Act. Further, this matter was not procedural or a direction to staff; it was a substantive resolution. A vote on a substantive resolution binding the municipality to a course of action should only take place in open session.
- 120** Council for Burk's Falls violated subsection 239(5) by passing a resolution to appoint Councillor Brandt in a closed session.

Reporting back

- 121** Armour council did not report back publicly about the discussions or decisions made at the closed meeting.
- 122** At its next regular meeting, Burk's Falls reported on the fact of the meeting and that it had made a board appointment. However, the report did not include any information about the rest of the meeting with Armour.

Analysis

- 123** All municipalities are encouraged to report back on what occurred in camera. Douglas R. Wallace, closed meeting investigator for the City of Ottawa, has explained that council should conclude each in camera meeting with a motion to rise and report, and the Chair should report in open session the fact that Council had met in camera, the matters which were considered, and that no votes were taken other than to give

direction to staff or to deal with procedural matters, and the Chair's report should be noted in the open session minutes.²⁵

- 124** In some cases, public reporting might consist of a general discussion in open session of subjects considered in closed session. This might be similar to the information in the resolution authorizing the session, together with information about any decisions, resolutions, and directions given to staff. In other cases, the nature of the discussion might allow for considerable information about the closed session to be provided publicly.
- 125** As a best practice, Armour and Burk's Falls should report back to the public regarding the fact of a closed session and the general nature of the discussions after each closed meeting.

Opinion

- 126** My investigation found that, in spite of meeting together in the same council chambers on January 16, 2015 to discuss issues of mutual interest, the meetings between Armour Township and the Village of Burk's Falls were separate meetings for the purposes of the *Municipal Act, 2001*. Both municipalities were bound by the Act and by their respective procedure by-laws.
- 127** Councils for Armour Township and the Village of Burk's Falls both contravened the *Municipal Act, 2001* and each municipality's respective procedure by-law by discussing amalgamation in a closed session, when the subject did not fit within any of the exceptions to the Act's open meeting requirements.
- 128** Burk's Falls' council also violated the Act when it discussed a board appointment in closed session, as this discussion did not fall within any of the exceptions to the open meeting requirements.
- 129** However, councils for Armour and Burk's Falls did not violate the Act when they discussed filling a vacant CEMC position in each municipality or when they considered an anonymous letter regarding a municipal employee. These discussions fell within the permitted exceptions to the open meeting requirements.

²⁵ D. R. Wallace, *Report to the Council of the City of Ottawa regarding the investigation of the closed meetings of Ottawa City Council held on December 19, 2008, January 6, 2009, and January 14/15, 2009*, online: <<http://ottawa.ca/en/city-hall/accountability-and-transparency/accountability-framework/december-19-2008-january-6-2009>>.

130 Burk's Falls council violated the Act and its procedure by-law when it failed to provide notice of the meeting on January 16, 2015. It also violated the Act and its procedure by-laws when it voted on a board appointment in closed session.

131 Armour and Burk's Falls violated the Act and their procedure by-laws by failing to pass a resolution in open session before closing the meeting on January 16, and when they voted in closed session to continue amalgamation talks.

Recommendations

Armour Township

132 I make the following recommendations to assist council for Armour Township to improve its practices with respect to open meetings.

Recommendation 1

All members of council of Armour Township should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

Armour Township 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 3

Armour council should pass a resolution in open session stating the fact of a closed meeting and the general nature of the subject(s) to be discussed before going into a closed meeting.

Recommendation 4

Armour council should ensure that votes in closed session are limited to procedural matters and directions to staff.

Recommendation 5

Council for Armour should report back to the public after every closed session.

Recommendation 6

Armour should ensure it creates a complete record of all meetings, both open and closed.

Recommendation 7

Armour Township should amend its procedure by-law to accurately reflect the exceptions in s. 239 of the Act. Specifically, the by-law should allow for meetings to be closed to discuss a proposed or pending acquisition or disposition of land by the municipality or local board. The by-law should also indicate that meetings *shall* be closed where the subject matter is a request under the *MFIPPA* where the council, board, or commission is the head of an institution for the purposes of that Act.

Recommendation 8

As a best practice, when Armour council plans to meet with members of another body, including another municipal council, it should first clarify the nature of the meeting and the applicable procedures.

Recommendation 9

Armour Township should implement a practice of audio or video recording both open and closed session meetings.

Village of Burk's Falls

133 I make the following recommendations to assist council for the Village of Burk's Falls to improve its practices with respect to open meetings.

Recommendation 1

All members of council for the Village of Burk's Falls should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the *Municipal Act, 2001* and its own procedure by-law.

Recommendation 2

The Village of Burk’s Falls 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 3

Burk’s Falls council should post public notice of all meetings in accordance with its procedure by-law.

Recommendation 4

Burk’s Falls council should pass a resolution in open session stating the fact of a closed meeting and the general nature of the subject(s) to be discussed before going into a closed meeting.

Recommendation 5

Burk’s Falls council should ensure that votes in closed session are limited to procedural matters and directions to staff.

Recommendation 6

Burk’s Falls council should report back to the public after every closed session.

Recommendation 7

Burk’s Falls council should ensure it creates a complete record of all meetings, both open and closed.

Recommendation 8

As a best practice, when council for Burk’s Falls plans to meet with members of another body, including another municipal council, it should first clarify the nature of the meeting and the applicable procedures.

Recommendation 9

The Village of Burk’s Falls should implement a practice of audio or video recording both open and closed session meetings.

Report

- 134** On September 1, 2015, both municipalities were given the opportunity to review this report and provide comments. Councillors and staff from Armour Township declined the opportunity to review the preliminary report. The Reeve, Clerk and three councillors from Burk's Falls reviewed the preliminary report, but no comments were received.
- 135** My report should be shared with councils for the Village of Burk's Falls and Armour Township, and made available to the public as soon as possible, and no later than the municipalities' next council meetings.



Barbara Finlay
Acting Ombudsman of Ontario