



Ombudsman Report

**Investigation into complaints about meetings of council
and the Joint Police Advisory Committee
for the Town of Amherstburg in 2017 and 2018**

**Paul Dubé
Ombudsman of Ontario
June 2018**

Complaints

- 1 In November and December 2017, my Office received three complaints that several closed meetings held by council for the Town of Amherstburg and the Joint Police Advisory Committee (JPAC) did not comply with the open meeting rules in the *Municipal Act, 2001* (the “Act”).
- 2 The complaints alleged that the following meetings were improperly closed because they did not fit within any of the exceptions set out in the Act:
 - a. a closed session discussion of council on July 10, 2017, about a draft request for proposals (RFP) for policing services;
 - b. four closed session meetings of the JPAC to discuss the draft RFP for policing services held on June 1, June 22, July 6 and December 7, 2017; and
 - c. a closed session discussion of council on January 22, 2018, to discuss the composition of the JPAC.

Ombudsman jurisdiction

Closed meeting complaints

- 3 Under the Act, all meetings of council, local boards and committees of each of them must be open to the public unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, the *Municipal Act, 2001* 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. 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 Town of Amherstburg.
- 6 In investigating closed meeting complaints, my Office considers whether there has been compliance with the open meeting requirements in the Act and the municipality’s procedure by-law.¹

¹ *Ombudsman Act*, RSO 1990, c O6, s 14(3)(a).

General complaints about municipalities

- 7 In addition, my Office has the authority to investigate complaints about the administrative conduct of municipalities more generally. This includes investigating complaints that committees not subject to the Act's closed meeting requirements have not complied with relevant terms of reference, policies, and procedures.²

Investigative process

- 8 On January 12 and January 24, 2018, we advised the municipality of our intent to investigate the complaints.
- 9 My Office reviewed the relevant portions of the Act, the town's procedure by-law, and the Joint Police Advisory Committee's terms of reference. We also reviewed the written and audio records from the open and closed portions of the meetings in question, as well as supporting documentation. We commend the town for audio recording its council and committee meetings, as these recordings provided our Office with the most complete and accurate record possible. We interviewed the town's Mayor, Clerk, and Chief Administrative Officer (CAO).
- 10 My Office received full co-operation in this matter.

The facts

Joint Police Advisory Committee (JPAC)

- 11 In December 2014, council for the Town of Amherstburg resolved to go through a costing process to determine how much the Ontario Provincial Police (OPP) would charge the municipality for providing policing services. It also decided to draft an RFP and contact surrounding municipalities to see if there was interest in shared policing services.
- 12 In deciding how to carry out the costing process, the town referred to the Guidebook for the Review of Policing Options from the Ontario Association of Chiefs of Police. The guidebook recommends establishing a steering/advisory committee to ensure an open and transparent process for the review of policing options.

² *Ombudsman Act*, s 14(1) and s 13(2).

- 13 The Joint Police Advisory Committee (JPAC) was created for this purpose in April 2016 and was tasked with developing and managing the RFP process of policing options for the Town of Amherstburg.
- 14 The JPAC is governed by its own terms of reference, which state that it is an advisory committee to council and does not have any delegated authority.³ The terms of reference were adopted by council by resolution on April 25, 2017.
- 15 The JPAC consists of seven individuals appointed by council, including two councillors, the CAO, the Amherstburg Police Service chief, two members of the Amherstburg Police Services Board (non-council members) and one member of the Amherstburg Police Association. Pursuant to the terms of reference, the CAO chaired the committee and the town Clerk was the recording secretary.
- 16 The committee's terms of reference provide that its meetings must be held in accordance with the town's procedure by-law and the Local Boards/Committees – Terms of Reference.⁴
- 17 The town's procedure by-law⁵ sets out the rules of procedure for meetings of council. The by-law requires that council meetings comply with the open meeting rules in the *Municipal Act*. The procedure by-law states that the town's committees are not bound by, but will have regard for, the rules of procedure to assist in the conduct of the meeting and to the extent necessary to comply with provincial statutes.
- 18 The Local Boards/Committees – Terms of Reference state that all board and committee meetings must be open to the public unless an exception to the *Municipal Act* applies.
- 19 The terms of reference for the JPAC state that meetings of the committee shall be held in accordance with the procedure by-law and the Local Boards/Committees – Terms of Reference. The procedure by-law states that committees are not bound by the rules in the *Municipal Act* but the Local Boards/Committees – Terms of Reference require committees to follow the Act's open meeting requirements.

³ Town of Amherstburg, "Council Meeting Supplementary Agenda" (April 25, 2016) at page 5, online: <<http://weblink8.countyofessex.on.ca/WebLink/11/edoc/6703/2016%2004%2025%20-%20Supplementary%20Agenda%20Packet.pdf>>.

⁴ Town of Amherstburg, "Local Boards/Committees – Terms of Reference", (2015) online: <<https://www.amherstburg.ca/en/town-hall/resources/2015-10-05---2014-2016---Committee-Terms-of-Reference.pdf>>.

⁵ Town of Amherstburg, BY-LAW NO. 2014-91, online: <<https://www.amherstburg.ca/en/town-hall/resources/2014-91---Procedural-By-law-signed-copy.pdf>>.

- 20 Having committees refer to two documents (i.e. procedure by-law and terms of reference) with different directions about open meeting requirements can potentially lead to confusion and inconsistency. To improve the accountability and transparency of its open meeting practices, the town should ensure that the procedure by-law and Local Boards/Committees – Terms of Reference establish consistent standards for committees’ meeting practices.
- 21 One of the complaints to my Office raised concerns that the JPAC improperly met in closed session on June 1, June 22, July 6 and December 7, 2017.

June 1, June 22 and July 6, 2017 JPAC meetings

- 22 At its meetings on June 1, June 22 and July 6, 2017, the JPAC proceeded in camera to discuss the draft RFP for policing services. Each meeting was closed to the public under section 239(2)(a) of the *Municipal Act*, which allows discussions related to the “security of the property of the municipality or local board” to occur in private.
- 23 During each closed session, the committee reviewed the draft RFP and made edits to reflect its discussions. An external consultant was present and guided committee members through the clause-by-clause review.

December 7, 2017 JPAC meeting

- 24 Following the July 6, 2017 JPAC meeting, the RFP was finalized and made available for potential bidders. The proposal deadline was October 2017 and only one proposal was received. The committee met again on December 7, 2017, to discuss the proposal, relying on the “security of the property” closed meeting exception.
- 25 According to the audio recording, the committee discussed the proposal from the Windsor Police Service to determine if it was a viable option for policing in Amherstburg.
- 26 Following this discussion, the committee returned to open session and passed the following motion:

That the Chair of the Joint Police Advisory Committee BE DIRECTED to PREPARE a report to Amherstburg Town Council identifying that the submission of Windsor Police Services is viable and meets the requirements of the RFP and Joint Police Advisory Committee; and

That the Joint Police Advisory Committee recommends the process move forward with public consultation.

Council meeting on July 10, 2017

- 27** On July 10, 2017, at 6 p.m., council met in council chambers for a regular meeting. At 7:45 p.m., council passed the following resolution to move in camera:

That Council move into an In-Camera Meeting of Council directly following Regular session pursuant to Section 239 of the Municipal Act, 2001, as amended, for the following reason: ...

ITEM B – DRAFT Policing Request for Proposal – Section 239(2)(a) – the security of the property of the municipality or local board

- 28** Once in camera, council was provided with the draft policing RFP and a report from the JPAC regarding next steps in the policing RFP process. The audio recording indicates that council members had an opportunity to ask questions and the CAO provided clarifications on behalf of the committee.

- 29** Council returned to open session at 8:08 p.m. and resolved that:

Administration BE AUTHORIZED to proceed with the issuance of PP-PS-17-15 Request for Proposal Police Services inviting the Town of LaSalle, City of Windsor and the Ontario Provincial Police (OPP) to participate.

- 30** The meeting adjourned at 8:12 p.m.

Council meeting on January 22, 2018

- 31** On January 22, 2018, at 5 p.m., council met for a special meeting in council chambers. After convening in open session, council passed the following resolution at 5:01 p.m. to proceed in camera:

That Council move into an In-Camera Meeting of Council at 5:00 p.m. pursuant to Section 239 of the Municipal Act, 2001, as amended, for the following reasons ...

ITEM E – Joint Police Advisory Committee Composition (JPAC) – Section 239(2)(b) - Personal matters about an identifiable individual, including municipal or local board employees.

32 The audio recording of the meeting indicated that, once in closed session, council discussed an incident relating to members of the committee. The CAO explained the incident to council and discussed concerns about certain individuals. These individuals were identified by name.

33 Council discussed and asked questions about the incident identified as well as the individuals. The discussion involved council providing opinions and speaking about the alleged conduct of the named individuals. Those interviewed told my Office the discussion focused on the conduct of those individuals, including allegations and opinions about that conduct. This was confirmed by the audio recording of the meeting.

34 The closed session adjourned at 6:38 p.m.

Analysis

35 This investigation involves two distinct types of meetings: meetings of the JPAC and meetings of council. The analysis begins with an explanation of the source of my Office's investigative authority regarding the two types of meetings.

36 Following this, the report analyzes the closed meeting exceptions cited by the JPAC and council to justify their in camera discussions, including:

- security of the property – s. 239(2)(a); and
- personal matters – s. 239(2)(b).

The report also analyzes other exceptions that were brought up during interviews with my Office, including:

- permissible under another Act – s. 239(2)(g); and
- information supplied in confidence – s. 239(2)(h).

JPAC meetings investigated under s. 14(1) of the *Ombudsman Act*

37 For the reasons that follow, the investigation into the four JPAC meetings was conducted under my Office's broad mandate to investigate public sector bodies set out in s. 14(1) of the *Ombudsman Act* and not under the open meeting provisions.

38 Section 14.1(3)(a) of the *Ombudsman Act* gives my Office the authority to investigate whether a municipality has complied with s. 239 of the *Municipal Act* and the procedure by-law adopted pursuant to s. 238(2) of that Act.

- 39** Section 239 of the *Municipal Act* requires that municipal councils, as well as their committees and local boards, hold open meetings subject to listed exceptions. Section 238 of the *Municipal Act* defines “committee” as any advisory or other committee, sub-committee or similar entity of which at least 50 percent of the members are also members of one or more councils or local boards.
- 40** As only two of seven members of the JPAC are councillors, it is not a “committee” as defined in the *Municipal Act*.⁶ It is therefore not required to hold open meetings under s. 239 of the Act, nor is the JPAC required to hold open meetings under the town’s procedure by-law. However, the JPAC’s terms of reference require its meetings be open to the public unless an exception under the *Municipal Act* applies.
- 41** Accordingly, my Office has considered whether the JPAC closed its meetings in violation of its terms of reference, pursuant to s. 14(1) of the *Ombudsman Act*.

Council meetings investigated under s. 14.1(3)(a)

- 42** Section 14.1(3)(a) of the *Ombudsman Act* gives my Office the authority to investigate whether a municipality has complied with s. 239 of the *Municipal Act* and the procedure by-law adopted pursuant to s. 238(2) of that Act. Council’s closed session meetings on July 10, 2017 and January 22, 2018 were investigated pursuant to this mandate.

Closed meeting exception: Security of the property

- 43** Section 239(2)(a) of the *Municipal Act* allows a municipality to proceed in camera to discuss matters regarding “the security of the property of the municipality or local board.” The Act does not define “security” for the purposes of this section, but previous investigations conducted by my Office have found that “security of the property of the municipality” should be given its plain meaning. Accordingly, the phrase applies to protecting property from physical loss or damage (like vandalism or theft), and the protection of public safety in relation to that property.⁷
- 44** My Office, like the Information and Privacy Commissioner (IPC), has found that when there is no threat to a municipality’s property, either corporeal or incorporeal,

⁶ The JPAC has members from the Amherstburg Police Services Board that serve on the committee but police services boards are not considered local boards for the purposes of the open meeting rules in the Act.

⁷ *Port Colborne (City of)*, 2015 ONOMBUD 32 (CanLII), <<http://canlii.ca/t/gtp7c>>.

the security of the property exception does not apply.⁸ Although we are not bound by decisions of the IPC, its decisions can be informative.

- 45** In my Office's October 2017 investigation into closed meetings in the Town of Deep River,⁹ we considered whether discussions related to police costing requests came within the "security of the property of the municipality" closed meeting exception. In that case, the town was going through the costing process with the OPP in order to decide whether to contract with them for its policing services. During closed meetings of council, the town discussed a consultation plan to get public feedback on the future of Deep River's policing services. Council members told my Office that the security of the property exception applied because the discussion involved police services and staffing, which in their view implicated safety and security throughout the town, including of municipal property. Council also felt the exception applied because the discussion implicated potential uses of the current police headquarters, which are located in a building owned by the town.
- 46** My Office found that these discussions did not deal with potential threats, loss or damage to municipal property and were not appropriately closed under the "security of the property of the municipality" exception, or any exception, to the *Municipal Act's* closed meeting requirements.

Committee meetings on June 1, June 22, July 6, and December 7, 2017

- 47** In this case, the audio recordings of the JPAC meetings indicate the discussion at the June 1, June 22 and July 6, 2017 meetings involved reviewing the RFP – ultimately, a public document – clause by clause. The committee discussed the service levels provided by the Amherstburg Police Service and its expectations and requirements for proponents.
- 48** Those interviewed told my Office that in discussing the town's current police services, information was revealed about staffing levels, roles of officers, and other details of the police model. My Office was told that this information would pose a safety risk if released to the public.
- 49** Regarding the December 7, 2017 meeting, the audio recording indicates that the committee discussed the results of the RFP process and the proposal from the Windsor Police Service. Those interviewed told my Office that the proposal

⁸ *Grimsby (Town of) (Re)*, 2016 ONOMBUD 19 (CanLII) <<http://canlii.ca/t/h2st7>>and Order MO-2683-I (30 December 2011).

⁹ *Deep River (Town of) (Re)*, 2017 ONOMBUD 17 (CanLII) <<http://canlii.ca/t/hqspf>>.

contained information about the Windsor Police Service that was confidential and sensitive in nature and would pose a threat to public safety if released.

- 50** The “security of the property” exception is narrowly construed and applies only to discussions about protecting the municipality’s property from physical loss or damage, and public safety related to that property.¹⁰ A review of the audio recording, as well as our interviews, did not identify any potential threats, loss or damage to municipal property in the committee’s closed session discussions.
- 51** While those interviewed indicated that sensitive information about the Amherstburg and Windsor police services was discussed during the committee meetings, my Office has previously found that discussions of sensitive information do not fall within the “security of the property” exception.¹¹ Accordingly, the committee’s discussions about the police costing RFP on June 1, June 22, July 6, and December 7, 2017 did not fit within the “security of the property” closed meeting exception.

Council meeting on July 10, 2017

- 52** Similarly, council cited the “security of the property” closed meeting exception to discuss the RFP in closed session on July 10, 2017.
- 53** As discussed above, my Office has found that when there is no threat to a municipality’s property, either corporeal or incorporeal, the “security of the property” exception does not apply.¹²
- 54** During interviews, those we spoke with said that the “security of the property” exception was relied on because sensitive and confidential intellectual property and financial records of the police services were discussed. For instance, council discussed information about police service levels that are key to carrying out policing duties. Those we spoke with said they were concerned that the information discussed could pose a threat to the public if released.
- 55** However, the “security of the property” exception only applies when council is discussing the narrow issue of a threat to the municipality’s corporeal or incorporeal property. In this case, council was instead discussing next steps involved with publicly issuing a particular RFP for policing services in the municipality. As there was no discussion about a threat to the municipality’s

¹⁰ Order MO 2468-F (27 October 2009) < <https://decisions.ipc.on.ca/ipc-cipvp/orders/en/133522/1/document.do>>.

¹¹ *Grimsby (Town of) (Re)*, 2016 ONOMBUD 19 (CanLII) <<http://canlii.ca/t/h2st7>>.

¹² *Grimsby (Town of) (Re)*, 2016 ONOMBUD 19 (CanLII) <<http://canlii.ca/t/h2st7>>.

property, the discussion did not fit within the s. 239(2)(a) exception for “security of the property of the municipality.”

Closed meeting exception: Permissible under another Act

56 During her interview with my Office, the town Clerk also indicated that s. 239(2)(g) of the *Municipal Act* would have allowed the committee to discuss the RFP in closed session. Section 239(2)(g) allows a municipality to discuss “a matter in respect of which a council, board, committee, or other body may hold a closed meeting under another Act” in closed session. While the committee never relied on this exception, the Clerk said the exception might have applied because the town’s police services board would have been entitled to discuss the RFP in private at a police services board meeting under s. 35(4) of the *Police Services Act*.

57 Section 35(4) of the *Police Services Act* provides that meetings and hearings of a police services board shall be open to the public except in the following circumstances:

(4) The board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

- (a) matters involving public security may be disclosed and, having regard to the circumstances, the desirability of avoiding their disclosure in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public; or
- (b) intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public. [emphasis added]¹³

Committee meetings on June 1, June 22, July 6, and December 7, 2017

58 There is no indication in the meeting documents or meeting recording that the committee considered whether this section would apply to its discussion and my Office has not been provided with any evidence to suggest that the police services board discussed the RFP in closed session under s. 35(4) of the *Police Services Act*. Accordingly, I am not satisfied that the committee was entitled to discuss the RFP in closed session under the “permissible under another Act” exception.

¹³ *Police Services Act*, RSO 1990, c. P.15, s. 35.

Council meeting on July 10, 2017

- 59** As with the meetings of the JPAC, the Clerk also told my Office that the “permissible under another Act” closed meeting exception in s. 239(2)(g) of the *Municipal Act* would have allowed council to discuss the draft RFP in closed session. She said that if the same discussion had occurred at a meeting of the Police Services Board, it could have been conducted in camera under s. 35(4) of the *Police Services Act*.
- 60** As discussed above, the *Police Services Act* lists two exceptions allowing for closed meetings of the police services board, each requiring that the desirability of avoiding disclosure outweigh the desirability of holding open meetings.
- 61** Like with the committee’s meetings, there is no indication in the meeting documents or meeting recording that council considered whether this section would apply to its discussion. In addition, my Office has not been provided with any evidence to suggest that the police services board discussed the RFP in closed session under s. 35(4) of the *Police Services Act*. Accordingly, I am not satisfied that council was entitled to discuss the RFP in closed session under the “permissible under another Act” exception.

Closed meeting exception: Information supplied in confidence

- 62** During her interview, the Clerk also told my Office about a confidentiality clause that was included in the proposal from the Windsor Police Service.
- 63** The Clerk said that due to this confidentiality clause, the December 7, 2017 meeting had to be held in closed session. The Clerk further indicated that similar confidential information about the Amherstburg Police Service was discussed at previous committee meetings.
- 64** While I appreciate the municipality’s concerns about complying with this confidentiality clause, at the time of the committee’s meetings, there was no closed meeting exception that generally allowed a municipality to proceed in camera to protect the confidential information of a third party. However, new exceptions to the *Municipal Act*’s closed meeting requirements came into force on January 1, 2018, including exceptions related to information supplied in confidence. It is possible this matter may have fallen under one of the new exceptions, but they were not yet in force when the committee met.

Closed meeting exception: Personal matters

- 65** Council cited s. 239(2)(b) of the *Municipal Act* to discuss issues related to the composition of the JPAC in closed session during the January 22, 2018 meeting. Section 239(2)(b) provides that a municipality can discuss “personal matters about an identifiable individual” in closed session.
- 66** Generally, information that pertains to an individual in their professional capacity will not fit within the personal matters exception.¹⁴ However, in some cases information about a person in their professional capacity may still fit within the exception if it reveals something personal¹⁵ or relates to scrutiny of an individual’s conduct. My Office has also found that discussions about the conduct of private citizens fit within the personal matters exception.¹⁶
- 67** In this case, council discussed its opinion of the conduct of various identified individuals, as well as allegations that these individuals acted improperly. This discussion fit within the exception in s. 239(2)(b) for personal matters about an identifiable individual.

Opinion

- 68** I acknowledge that council and the JPAC operated in good faith in closing these meetings to the public and understand their concerns about public discussion of sensitive policing information. However, at the time of these meetings, there was no exception that would have allowed council or the JPAC to hold these discussions in closed session.
- 69** The JPAC violated the town’s Local Boards/Committees – Terms of Reference when it discussed the police costing RFP in closed session on June 1, June 22, July 6 and December 7, 2017. Failing to comply with these terms of reference was wrong under s. 21(1)(d) of the *Ombudsman Act*. The discussion about the request for proposals did not fit within the “security of the property” exception or any of the exceptions provided in the Local Boards/Committees – Terms of Reference.
- 70** Council for the Town of Amherstburg contravened the *Municipal Act* when it discussed the police costing RFP in closed session on July 10, 2017. The

¹⁴ IPC Order MO-2204 and Township of Russell, 2014:

<<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Russell-Twp-Closing-Letter-FINAL-EN.pdf>>

¹⁵ Ombudsman of Ontario, *Complaint regarding the October 25, 2014 council meeting* (2014) online: <<https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake-Sept-8-2014.pdf>>.

¹⁶ *South Huron (Municipality of) (Re)*, 2015 ONOMBUD 6 (CanLII), <<http://canlii.ca/t/gtp80>>.

discussion about the request for proposals did not fit within the exceptions to the open meeting requirements of the Act.

- 71 Council for the Town of Amherstburg did not contravene the *Municipal Act* when it discussed the JPAC composition in closed session on January 22, 2018. The discussion on that date fit within the Act's "personal matters about an identifiable individual" exception.

Recommendations

- 72 I make the following recommendations to assist the Town of Amherstburg in fulfilling its obligations under the Act and enhancing the transparency of its meetings.

Recommendation 1

All members of council for the Town of Amherstburg 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

Committee members for the Town of Amherstburg should be vigilant in complying with the Local Boards/Committees – Terms of Reference.

Recommendation 3

The Town of Amherstburg should ensure that no subject is discussed in closed session unless it clearly comes within one of the statutory exceptions to the open meeting requirements.

Recommendation 4

The Town of Amherstburg should clearly set out the rules for committees around holding closed meetings. The procedure by-law should be consistent with the committee's terms of reference in setting out open meeting rules.

Report

- 73 The town was given the opportunity to review a preliminary version of this report and provide comments to our Office. Comments received were considered in the preparation of this final report.
- 74 In its response, the town committed to revising its procedure by-law to reflect the recent amendments to the *Municipal Act's* closed meeting requirements. In

response to my recommendations, it also indicated that the revised by-law would create consistent closed meeting requirements for bodies governed by the Local Boards/Committee – Terms of Reference.

- 75** Regarding the “security of the property” closed meeting exception, the town stated that council referred to reference material from Local Authority Services (LAS) – which provides closed meeting investigation services to more than 150 of Ontario’s municipalities – in deciding to use this exception. Specifically, the town referenced a document from LAS that explains that the “security of the property” closed meeting exception “covers more than the locks on the doors and municipal facilities.” The town said that the information discussed regarding staffing levels, roles of officers, and other details of the police model raised “incorporeal threats” to the municipality’s property and required closed session consideration.
- 76** As noted above, my Office, consistent with the Information and Privacy Commissioner, has determined that the “security of the property” closed meeting exception is not limited to threats against a municipality’s facilities. However, there must be a potential threat to the municipality’s corporeal or incorporeal property discussed by council. My review of the meeting recordings indicates that there was no such threat discussed.
- 77** My report should be shared with council for the Town of Amherstburg and should be made available to the public as soon as possible, and no later than the next council meeting. In accordance with s. 239.2(12) of the *Municipal Act, 2001*, council should pass a resolution stating how it intends to address this report.



Paul Dubé
Ombudsman of Ontario