



Ombudsman Report

**Investigation into a complaint
about closed meetings held by
the Municipality of Arran-Elderslie
on September 12 and 26, 2022**

**Paul Dubé
Ombudsman of Ontario
March 2023**

Complaint

- 1 My Office received a complaint that council for the Municipality of Arran-Elderslie (the “Municipality”) held meetings on September 12 and 26, 2022 that did not fit within the closed meeting exceptions in the *Municipal Act, 2001*¹ (the “Act”). The complaint alleged that council discussed a vacant municipal position while *in camera* contrary to the open meeting rules.

Ombudsman jurisdiction

- 2 Under the *Municipal Act*, all meetings of council, local boards, and committees of council must be open to the public, unless they fall within prescribed exceptions.
- 3 As of January 1, 2008, the Act gives anyone 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.
- 4 The Ombudsman is the closed meeting investigator for the Municipality of Arran-Elderslie.
- 5 In investigating closed meeting complaints, we consider whether the open meeting requirements of the Act and the municipality’s governing procedures have been observed.
- 6 Our Office has investigated hundreds of closed meetings since 2008. To assist municipal councils, staff, and the public, we have developed an online digest of open meeting cases. This searchable repository was created to provide easy access to the Ombudsman’s decisions on, and interpretations of, the open meeting rules. Council members and staff can consult the digest to inform their discussions and decisions on whether certain matters can or should be discussed in closed session, as well as issues related to open meeting procedures. Summaries of the Ombudsman’s previous decisions can be found in the digest: www.ombudsman.on.ca/digest.

¹ SO 2001, c 25.

Investigative process

- 7 On October 27, 2022 we advised the Municipality of our intent to investigate this complaint.
- 8 We reviewed relevant portions of the Municipality's by-laws and policies, the meeting records, and the Act. We interviewed members of council, the Clerk, and the Chief Administrative Officer (the "CAO"). We also spoke to the Economic Development Manager for Bruce County.
- 9 My Office received full co-operation in this matter.

Background

- 10 The CAO told my Office that prior to the September 12 meeting, the Economic Development Manager for Bruce County contacted her with a proposal to provide the Municipality with economic development support through a Regional Relief Economic Development pilot project (the "pilot project"). In this pilot project, municipalities would receive assistance, including services from County employees, for various economic development projects. The County was also approaching its other lower-tier municipalities to participate in the program.
- 11 According to the CAO, at that time, the Municipality's Community Development Coordinator position (responsible for promoting local economic growth) was vacant and the Municipality was in need of assistance for its economic development projects. The CAO worked with the County's Economic Development Manager to establish terms for the pilot project, such as determining which economic development initiatives should be prioritized. A draft memorandum of understanding between the County and the Municipality was also prepared by staff for the County's council and the Municipality's council to review.
- 12 My Office was told by the Economic Development Manager that the details and terms of the pilot project were supplied to the Municipality in confidence, in part because they contained labour relations and financial information. This was not an explicit arrangement. According to the Economic Development Manager, there was an implicit understanding between the County's staff and the Municipality's staff that the pilot project and the memorandum of understanding were not to be made public until they had been reviewed and approved by the County's council.

- 13 The CAO agreed and told our Office that she had also an implicit understanding that the information supplied by the County was confidential.
- 14 Once staff prepared the draft memorandum of understanding, it was placed on the Municipality's September 12, 2022 council meeting closed session agenda for council's review.

September 12, 2022 meeting

- 15 Council for Arran- Elderslie held a meeting on September 12, 2022. According to the meeting minutes, council proceeded into closed session to discuss three items. One of the items was described as a "Recruitment/Employee Matter". The clerk told our Office that the item referred to the pilot project. The resolution to proceed *in camera* indicated that council cited the "personal matters" exception in subsection 239(2)(b) of the Act to discuss this item.
- 16 We were told by council members and staff present during the closed meeting that, while *in camera*, staff presented the pilot project proposal and the draft memorandum of understanding. Council discussed and asked staff questions about the pilot project.
- 17 In addition to discussing the pilot project, council also discussed the Municipality's vacant Community Development Coordinator position. In particular, we were told that individual council members were concerned about the impact the pilot project would have on the role and responsibilities of the Community Development Coordinator.
- 18 According to the closed meeting minutes, the discussion was held in closed session because the pilot project and memorandum of understand had not been made public by the County. Council members also told us that they understood the County preferred that information about the pilot project remain confidential.
- 19 While in closed session, council provided direction to staff.

September 26, 2022 meeting

- 20 Council held a meeting on September 26, 2022. According to the meeting minutes, the County's Economic Development Manager attended the meeting and discussed the pilot project in open session. The minutes indicate that council approved the Municipality's participation in the pilot project and directed staff to finalize the memorandum of understanding.

- 21 The Economic Development Manager told my Office that at the time of the September 26 meeting, the County no longer considered the information confidential because the County's council had reviewed and approved the pilot project and memorandum of understanding.
- 22 Staff and council members confirmed that there was no closed session discussion on this topic at the September 26 meeting.

Analysis

Applicability of the exception for personal matters

- 23 The Municipality cited section 239(2)(b), personal matters about an identifiable individual, when it moved into closed session to discuss the pilot project on September 12, 2022.
- 24 The Information and Privacy Commissioner (IPC) has found that information will only qualify as personal for the purposes of the Act if it pertains to an individual in their personal capacity, rather than their professional capacity. However, information about a person in their professional capacity may still qualify if it reveals something personal about the individual.² My Office has consistently found that discussions relating to an identifiable individual's employment history and qualifications for a particular job fit within the exception for personal matters.³ Discussions about an individual's conduct will generally be considered personal.⁴
- 25 We were told that council relied on the exception for personal matters to discuss the pilot project in camera because the discussion could have included information about an identifiable individual, the person who was previous employed as the Community Development Coordinator. However, our investigation confirmed that the closed session discussion did not involve any personal information about any identifiable individuals, including the previous Community Development Coordinator.

² *Aylmer (Town) (Re)*, 2007 CanLII 30462 (ON IPC), online: <<http://canlii.ca/t/1scqh>>.

³ *Burk's Falls / Armour (Village of / Township)*, 2015 ONOMBUD 26, online: <<http://canlii.ca/t/gtp6w>>.

⁴ *Madawaska Valley (Township) (Re)*, 2010 CanLII 24619 (ON IPC), online: <<http://canlii.ca/t/29p2h>>.

- 26** Members of council and the clerk also told my Office that the “personal matters” exception applied because the discussion involved information about the Community Development Coordinator position, including the general responsibilities and duties, salary, other employment details, and how this role could have potentially been impacted by the pilot project.
- 27** Information about an individual in their professional capacity, such as salary, may qualify as personal information if it reveals something of a personal nature. In this case, the Community Development Coordinator position was vacant at the time of the meeting, so the discussion did not involve an identifiable individual. Council’s discussion was general in nature and only pertained to the position itself, rather than an individual in that role. Accordingly, the “personal matters” exception did not apply to the discussion on Sept. 12, 2022.

Applicability of the exception for information supplied in confidence by a third party

- 28** Council did not cite the “information supplied in confidence by a third party” exception found in section 239(2)(l) of the Act in its resolution to proceed into closed session on Sept. 12, 2022. However, my Office considered during our review whether council’s discussion fit within this exception.
- 29** The purpose of the exception is to protect confidential information about third parties which has been provided to the municipality.⁵ The exception applies to “a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]”⁶
- 30** In a 2021 report about the City of Greater Sudbury, my Office found that information provided by a third party to staff regarding a development proposal fit within the exception.⁷ In that case, the third parties were concerned that if details of the proposal were made public, they could be pressured to provide funding to other municipalities for similar projects on similar terms.

⁵ *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10, online: < <https://canlii.ca/t/jfvt3>>.

⁶ *Municipal Act, 2001*, SO 2001, c 25 s 239(2)(l).

⁷ *Greater Sudbury (City of) (Re)*, 2021 ONOMBUD 10, online: < <https://canlii.ca/t/jfvt3>>.

- 31 In this case, council received labour relations and financial information from Bruce County during a closed session. The Economic Development Manager and the CAO confirmed that this information had been implicitly supplied in confidence and belonged to Bruce County, a third party.
- 32 Those we interviewed explained that discussions between Bruce County and the Municipality related to the pilot project were ongoing at the time of the Sept. 12 meeting. If details regarding the pilot project or the draft memorandum of understanding were disclosed, this information could have significantly interfered with ongoing discussions of similar projects between the County and other lower-tier municipalities.
- 33 Accordingly, the closed session discussion about the pilot project on Sept. 12, 2022 fit within the “information supplied in confidence by a third party” exception.

Parsing the discussion

- 34 During interviews, we were told that the discussion about the pilot project also included a discussion about the Municipality’s vacant Community Development Coordinator position. Those we interviewed said that council would not have been able to separate the discussion about the Community Development Coordinator position from the broader pilot project topic.
- 35 In *St. Catharines v. IPCO, 2011*, the Divisional Court found that it is unrealistic to expect municipal councils to split up discussions to ensure that nothing which can be discussed in open session is ever discussed in a closed meeting.⁸ This applies to discussion on a single topic, where splitting the information would require interrupting the conversation.
- 36 In this case, the portions of the closed session discussion about the vacant Community Development Coordinator position did not fit within the open meeting exceptions. However, this information was discussed in relation to the pilot project, including the project’s impact on the responsibilities and role of the Community Development Coordinator. The information was necessary for council to assess the Municipality’s participation in the pilot project in a meaningful way and could not have been parsed from the closed session discussion.

⁸ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346, online: <<https://canlii.ca/t/fkqfr>>.

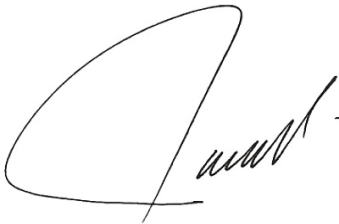
- 37 Accordingly, council’s closed session discussion regarding the Community Development Coordinator position on Sept. 12, 2022 did not contravene the open meeting rules.

Opinion

- 38 Council for the Municipality of Arran-Elderslie was permitted to discuss the Regional Relief Economic Development pilot project in closed session on September 12, 2022. While the discussion did not fit within the cited exception under the *Municipal Act, 2001* for “personal matters”, my review found that the exception for “information supplied in confidence by a third party” applied to the discussion.
- 39 Council did not discuss the Regional Relief Economic Development pilot project in closed session on September 26, 2022.

Report

- 40 The Municipality of Arran-Elderslie was given the opportunity to review a preliminary version of this report and provide comments. No comments were received.
- 41 My report should be shared with council for the Municipality of Arran-Elderslie. My report should be made available to the public as soon as possible, and no later than the next council meeting.



Paul Dubé
Ombudsman of Ontario