



# Fax

To/À: MAYOR JOE FONTANA

From/ Expéditeur: André Marlin  
Ombudsman of Ontario

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Fax: 519-661-5308

Date: March 19, 2012

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Phone:

Pages: 11

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Re: OMBUDSMAN REPORT

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Comments/Remarques:

Ombudsman Report – Investigation into whether the City of London's Committee of the Whole improperly discussed "Occupy London" *in camera* on November 7, 2011.

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André Marin  
OMBUDSMAN

Via Facsimile and Courier

March 19, 2012

Mayor Joe Fontana  
City of London  
City Hall  
214 – 300 Dufferin Avenue  
London, Ontario  
N6B 1Z2

Dear Mayor Fontana:

Re: Ombudsman Report

I have completed my investigation into whether the Committee of the Whole for the City of London improperly discussed Occupy London *in camera* on November 7, 2011. My final report is enclosed.

The City of London should make my report available to the public. I will also be posting a copy of the report on my website at [www.ombudsman.on.ca](http://www.ombudsman.on.ca).

Yours truly,

A handwritten signature in black ink, appearing to be 'AM', with a long horizontal line extending to the right.

André Marin  
Ombudsman of Ontario

Encl.

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# Ombudsman

## **Ombudsman Report**

**Investigation into whether the  
City of London's Committee of the Whole  
improperly discussed "Occupy London" *in camera*  
on November 7, 2011**

**André Marin  
Ombudsman of Ontario  
March 2012**

## Complaint

- 1 On November 10, 2011, my Office received a complaint that the City of London's Committee of the Whole improperly discussed and voted on issues relating to Occupy London in a closed session on November 7, 2011. Over the course of the next few weeks, we received four additional complaints about this discussion.
- 2 The committee's stated reasons for considering this item *in camera* were that it concerned a matter subject to solicitor-client privilege and consideration of potential litigation affecting the City of London.

## Ombudsman Jurisdiction

- 3 Under the *Municipal Act, 2001*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.
- 4 As of January 1, 2008, changes to the *Municipal Act* give citizens the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.
- 5 The City of London appointed the Ontario Ombudsman as its investigator effective January 1, 2008.
- 6 In investigating closed meeting complaints, my Office considers whether the open meeting requirements of the *Municipal Act* and the relevant municipal procedure by-law have been observed.

## Investigative Process

- 7 After conducting an initial review, on November 28, 2011, my office notified the city that we would be investigating the Committee of the Whole's *in camera* consideration of Occupy London on November 7, 2011.

- 8 Consistent with our legislative authority and normal investigative process, we requested disclosure of relevant documents. Under the *Ombudsman Act*, municipalities may withhold documents and information on the basis of solicitor-client privilege. In recognition of this, we requested that the city provide an itemized list of any information and/or documents it intended to withhold on this ground.

## Information Subject to Solicitor-Client Privilege

- 9 On December 6, 2011, City of London Council considered the issue of disclosure to my office. Council instructed the City Clerk to provide my office with a redacted version of the November 7, 2011 closed session minutes, withholding material subject to solicitor-client privilege, and to withhold any confidential reports from the city's solicitors on the same basis. The City Clerk was also directed to disclose descriptions of documents considered at the closed meeting.
- 10 The redacted closed session minutes were subsequently provided to my office and reviewed along with other relevant municipal documents, including the city's Procedure By-law in effect on November 7, 2011.<sup>1</sup>
- 11 One of the limited and narrow exceptions to my general authority under the *Ombudsman Act* to require disclosure of information is that I cannot compel production of information or documents subject to solicitor-client privilege.<sup>2</sup> However, municipalities cannot shield closed meeting discussions from review by simply saying they involved privileged information. While I am not entitled to obtain and review the substance of solicitor confidences, I must exercise due diligence and inquire into the circumstances surrounding meetings closed to consider legal advice. For instance, it is important for me to determine whether a lawyer attended the meeting to provide legal advice verbally and/or whether legal advice in written form was reviewed during the meeting.
- 12 Some municipalities choose to waive solicitor-client privilege and provide my office with information relating to solicitor confidences, in order to demonstrate the propriety of their conduct in holding a closed meeting to consider legal advice. Such information is protected by the *Ombudsman Act*, which requires that any

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<sup>1</sup> The City's Procedure By-Law was amended effective December 1, 2011. References in this report to the Procedure By-Law correspond to the earlier version of the By-Law that governed the November 7, 2011 meeting.

<sup>2</sup> In *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] S.C.J. No. 45, the Supreme Court of Canada confirmed that, in the absence of express language allowing a statutory official to have access to materials which are subject to solicitor client privilege, such materials are protected from disclosure.

information provided to my office be kept confidential unless, in the opinion of the Ombudsman, it ought to be disclosed in order to establish grounds for the Ombudsman's conclusions or recommendations.<sup>3</sup> My office does not have the authority, however, to require any municipality to waive solicitor-client privilege in any given case.

## Interviews

- 13** A two-person team conducted in-person interviews with the City Clerk, the former City Manager, and 14 of the 15 members of council, including the Mayor.

## Preliminary Report

- 14** In accordance with our normal process, the City and members of council were given an opportunity to review a report containing preliminary investigative findings and analysis, to ensure the accuracy of factual details and to make any relevant representations before the report was finalized. Municipal officials had the option of receiving a copy of the preliminary report for review upon signing a confidentiality undertaking or of attending at our Office to review the report.
- 15** Two individual councillors were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. They did not have any comments on the preliminary report.

## Investigative Findings

### Occupy London

- 16** The "Occupy" movement is an international protest generally focused on economic and social disparity. According to news reports, "Occupy London" protesters occupied Victoria Park in downtown London, around October 22, 2011. By late October, it was reported that approximately 50 "occupiers" had erected tents, contrary to the city's by-laws, and were ignoring the Mayor's request that they be removed.<sup>4</sup>

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<sup>3</sup> *Ombudsman Act*, R.S.O. 1990, c. O.6, s. 12.

<sup>4</sup> "Occupy protesters' tents removed by police in London, Ont." *CBC News* (9 November 2011), online: <http://www.cbc.ca/news/canada/story/2011/11/09/occupy-national-wrap-vancouver-london.html>; Chip Martin & Norman De Bono "Protesters split on where to go" *The London Free Press* (27 October 2011), online: [The London Free Press](http://www.londonfreepress.com)

- 17 A special public meeting of the Committee of the Whole was held on October 28, 2011. At that meeting, representatives of the Occupy London movement were given the opportunity to speak.
- 18 On November 7, 2011, the Committee of the Whole considered Occupy London during an *in camera* session. The next day, the city reportedly gave the occupiers until 6 p.m. to remove their tents, and just after midnight November 9, 2011, police and city officials dismantled the Victoria Park encampment.<sup>5</sup> London was the first Canadian jurisdiction to evict Occupy protesters.

## The November 7, 2011 Closed Meeting

### **Meeting Agenda**

- 19 In accordance with the city's Procedure By-Law, material must be received by 9 a.m. on the Thursday before a meeting to be included on the regular agenda. Although the by-law does not expressly refer to giving notice to the public of municipal meetings, the city follows a practice of releasing meeting agendas to council members and the public around 4:30 p.m. on the Friday before the week the meetings are to be held. Agendas are circulated to members of the public and media who have requested copies, as well as made available at City Hall and posted on the city's web site.
- 20 The agenda for the November 7, 2011 council meeting, which was released on November 4, 2011, did not refer to the fact that Occupy London would be discussed *in camera*. No one we interviewed could explain why the item was not identified on the regular agenda. However, the Procedure By-Law in place at the time provided that additional material might be added to the agenda, if it was received by 9 a.m. on the day of a meeting. The City Clerk confirmed the materials for the *in camera* discussion of Occupy London were received in accordance with this provision.

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<<http://www.lfpress.com/news/london/2011/10/26/18883216.html#news/london/2011/10/26/pf-18880831.html>>.

<sup>5</sup> "Chronology" *The London Free Press* (9 November 2011), online: The London Free Press

<<http://www.lfpress.com/news/london/2011/11/08/18942556.html>>.

### **Notice of the Occupy London Item**

- 21 The City Clerk confirmed that copies of “added communications,” which included reference to the *in camera* Occupy London item, were made available to councillors as well as the public at the outset of the November 7, 2011 meeting.
- 22 The stated purpose for considering this item *in camera*, set out in the “added communications” document, was that it was: “A matter pertaining to advice that is subject to solicitor-client privilege, including communications necessary for the purpose and consideration of potential litigation affecting the municipality with respect to the activities of Occupy London.”
- 23 The City Clerk and four of the councillors we interviewed recalled that the addition of Occupy London to the *in camera* agenda was announced at the beginning of the council meeting.

### **Resolution Authorizing Closed Session**

- 24 The *Municipal Act* requires that before council moves *in camera*, there must be a resolution authorizing the closed session, including reference to the general nature of the matter to be considered.
- 25 The City Clerk as well as four members of council advised that the Occupy London matter was referred to as part of the resolution to move into closed session on November 7, 2011. One councillor stated that reference was made to a “legal matter,” while the remaining witnesses were unable to recall the specific motion.
- 26 The meeting minutes posted to the city’s website indicate that Occupy London was identified in the resolution authorizing the November 7, 2011 closed session along with five other matters for *in camera* consideration. The Occupy London item is described as:

A matter pertaining to advice that is subject to solicitor-client privilege, including communications necessary for the purpose and consideration of potential litigation affecting the municipality with respect to the activities of Occupy London.

- 27 All of those we interviewed confirmed that the reason the Committee of the Whole went *in camera* to discuss Occupy London was to receive solicitor-client advice. The City Clerk also indicated that consideration of potential litigation was to be included in this discussion.



### ***Closed Session***

- 28** According to the redacted *in camera* session minutes, all members of council attended the November 7, 2011 closed session. A number of City officials also participated in the session, including the City Solicitor, the City Clerk and the City Manager.
- 29** The *in camera* minutes indicate that the committee received advice that was subject to solicitor-client privilege in the form of a written report and attachments, as well as verbal advice from the City Solicitor. The documents considered by the committee included reference to potential legal action, including the laying of charges and applying for an injunction, to address the occupation of Victoria Park.
- 30** All of the individuals we interviewed confirmed that the City Solicitor was in attendance throughout the closed session and provided advice relating to Occupy London. The City Clerk also confirmed that potential litigation concerning Occupy London was discussed. Directions to counsel relating to potential litigation are apparently contained in redacted portions of the *in camera* meeting minutes. Witnesses recalled that materials relating to Occupy London, including a confidential legal report were made available for the meeting.
- 31** The *in camera* session minutes also indicate that the committee voted on directions and instructions to city staff as well as a procedural matter relating to Occupy London. The witnesses all confirmed that no other votes were taken *in camera* relating to this item.
- 32** One witness advised that, during the closed session, he had concerns about whether some of the matters to be discussed relating to Occupy London should be discussed in an open meeting instead. However, he explained that he raised this matter with the City Solicitor, who confirmed that the discussion was properly being held *in camera*.
- 33** All of the witnesses confirmed that no matters other than those referred to in the resolution authorizing the closed session were discussed behind closed doors. In fact, many referred to the general practice of the City Solicitor and the City Clerk of closely monitoring *in camera* discussions to ensure they do not stray into areas that should be considered in open session.

### ***Reporting Back into Open Session***

- 34** There is no indication in the minutes for the open portion of the November 7, 2011 meeting that the Committee of the Whole reported back publicly concerning the Occupy London matter when open session resumed. However, the City Clerk

advised that when the committee returned to open session, it repeated the information contained in the motion to go *in camera*, which included reference to Occupy London. She explained that the meeting minutes would be amended to reflect this.

- 35** The witnesses indicated that whether council reports back in public about what was considered in closed session depends on the nature of the matter and the point to which it has progressed.

## Analysis

- 36** The Occupy movement captured the public's interest and the eviction of the protesters from Victoria Park garnered considerable media attention. It is not surprising that the committee's consideration of Occupy London behind closed doors sparked speculation and led to complaints to my office.
- 37** The issues I must determine as a closed meeting investigator are whether the Committee of the Whole properly considered the Occupy London issue in closed session under one of the exceptions to the open meeting requirements, and whether the voting that took place *in camera* was authorized by the *Municipal Act*.

## Exceptions to the Open Meeting Requirement

- 38** The *Municipal Act* allows councils and their committees to consider matters relating to litigation or potential litigation affecting them in closed session (s. 239(2)(e)). They may also consider advice that is subject to solicitor-client privilege *in camera* (s. 239(2)(f)).
- 39** All of the witnesses we interviewed confirmed that the Committee of the Whole discussed the Occupy London matter *in camera* because it involved obtaining legal advice. The City Clerk also confirmed that potential litigation relating to Occupy London was considered.
- 40** While the Occupy London issue was a late arrival to the agenda for the *in camera* portion of the November 7, 2011 meeting, it appears to have been added in accordance with the City's Procedure By-Law. The "added communications" item described the general nature of the matter and confirmed that it involved consideration of advice subject to solicitor-client privilege and potential litigation affecting the municipality. These were also the grounds set out in the resolution authorizing consideration of the Occupy London matter in closed session.

## Consideration of Occupy London *In Camera*

- 41** Based on the information gathered during our investigation, it appears that the Committee of the Whole only considered legal advice and potential litigation relating to Occupy London when it met behind closed doors to consider this item. I am satisfied that the committee was entitled to exercise its discretion to discuss this matter *in camera* under the exceptions relating to advice that is subject to solicitor-client privilege (s. 239(2)(f)), and potential litigation affecting the municipality (s. 239(2)(e)).

## Voting *In Camera* Relating to Occupy London

- 42** The *Municipal Act* provides that voting is not permitted behind closed doors unless it is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality (s. 239(6)). After reviewing the redacted version of the closed meeting minutes, and the evidence about *in camera* voting provided by witnesses, it appears to me that the voting that took place on November 7, 2011 came within the exceptions permitted by the Act.

## Conclusion

- 43** In my opinion, based on the evidence obtained in my investigation, the City of London did not contravene the *Municipal Act*, or its Procedure By-law, when it considered the Occupy London matter *in camera* and voted to give directions and instructions, and on a procedural matter, behind closed doors.
- 44** However, I would like to make a couple of observations about the city's closed meeting procedures illustrated by this case.
- 45** As a best practice, I encourage municipalities to provide notice of open and closed meeting agenda items at the earliest opportunity. Late additions should only be considered if they are urgent. I was concerned about the last-minute addition of the Occupy London matter to the *in camera* meeting agenda for November 7, 2011, although it met the City's procedural requirements. During the investigation, however, I was pleased to learn that the city has taken steps to give better public notice of agenda items.

- 46 Since December 2011, the Procedure By-Law has been amended to require that in order for materials to be added to a meeting agenda after the regular agenda has been published, they must be provided to the City Clerk one full business day earlier than under the previous By-Law. In addition, the city is now using electronic agendas that are updated online when materials are filed with the City Clerk.
- 47 While the City of London in practice provides advance public notice of its meetings and agendas, technically, there is no explicit reference to the requirement for public notice in its Procedure By-Law. I believe that the city should consider adding express reference to the notice requirement at the earliest opportunity.

## Report

- 48 My report should be shared with Council and made available to the public.



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André Marin  
Ontario Ombudsman