

O  
Ombudsman  
ONTARIO

ONTARIO'S WATCHDOG  
CHIEN DE GARDE DE L'ONTARIO

November 28, 2011

His Worship Mayor Joe Fontana  
City of London  
P.O. Box 5035  
London, ON  
N6A 4L9

RECEIVED NOV 29 2011

Referred to  
Subsequent Referrals  
 For Action  
 For Information  
 For Report  
 For File

Dear Mayor Fontana:

**Re: Our Files 247135-001; 247047-001; and 179284-003**

As you are aware, the Ombudsman is the closed meeting investigator for the City of London, pursuant to s. 239.1(b) of the *Municipal Act*. This is to notify you, in accordance with s. 18(1) of the *Ombudsman Act*, that our Office will be investigating complaints regarding a closed session held during the November 7, 2011 Council meeting. Specifically, our Office is  
→ investigating allegations that two votes improperly took place *in camera* pertaining to the eviction of "Occupy London" protesters from a local park.

Would you please provide copies of the following documentation to assist with our investigation, by **December 9, 2011**:

- The closed session agenda for the November 7, 2011 meeting.
- The closed session minutes from the November 7, 2011 meeting.
- Any documents (letters, reports, etc.) that were considered during the closed session.
- Any other documents related to the matter being investigated.

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If the City intends to withhold or redact information on the basis of solicitor-client privilege, we require that you provide us with an itemized list of the information and/or documents being withheld, including the date, the nature of the document, and the name of its creator and addressees, as well as the reason for not disclosing this information in response to our request.

Please do not hesitate to contact Michelle Bird at (416) 586-3464, should you have any questions.

Thank you for your cooperation with our Office during this investigation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura Pettigrew', written over the typed name and title.

Laura Pettigrew, Senior Counsel  
Open Meetings Law Enforcement Team

## Saunders, Cathy

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**From:** Saunders, Cathy  
**Sent:** Thursday, November 24, 2011 10:10 AM  
**To:** 'mbird@ombudsman.on.ca'  
**Subject:** Ombudsman review - City of London - November 7, 2011 Meeting of Municipal Council - City of London



November 7, 2011  
Agenda.pdf



November 7 2011  
public minutes...



council\_procedure.  
pdf

Good Morning Ms. Bird:

This will acknowledge receipt of your email requesting the voluntary submission of various documents. Please find attached those documents which are **not** subject to solicitor-client privilege and communications necessary for that purpose. You will note that the reason for going into closed session was as follows

“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.”

My understanding is that confidential advice subject to solicitor-client privilege, including communications necessary for that purpose, and minutes of the Committee of the Whole which contain confidential advice subject to solicitor-client privilege, including communications necessary for that purpose, are subject to solicitor-client privilege. The solicitor-client privilege has not been waived to date by the City Council. My understanding is that the City Clerk has no authority to waive solicitor-client privilege.

My understanding is that the Supreme Court of Canada has stated as follows concerning the scope of the right of an Ombudsman to access any record of deliberations or any advice subject to solicitor-client privilege in the case of *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44

“It is well established that general words of a statutory grant of authority to an office holder such as an ombudsperson or a regulator, including words as broad as those contained in s. 12 of *PIPEDA*, do not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. That role is reserved to the courts. Express words are necessary to permit a regulator or other statutory official to “pierce” the privilege. Such clear and explicit language does not appear in *PIPEDA*.”

My understanding is that the Ombudsman Act provides in section 19(5) as follows:

### **Privileges**

(5) Every person has the same privileges in relation to the giving of information, the answering of questions, and the production of documents and things as witnesses have in any court. R.S.O. 1990, c. O.6, s. 19 (5).

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I have been advised that the Ombudsman has indicated as follows concerning privileged communications in other circumstances involving a municipal investigation concerning Oshawa:

## **Investigative Findings**

Relevant statutory background

**21** Under the *Ombudsman Act*, we are obliged to treat as privileged all information received during an investigation. Specifically, Subsection 24(3) says:

(3) Anything said or any information supplied or any document or thing produced by any person in the course of any inquiry by or proceedings before the Ombudsman under this Act is privileged in the same manner as if the inquiry or proceedings were in a court.

**22** This means that we are statutorily obliged to hold confidential what we learn during our investigations. The reason is obvious. Our effectiveness in resolving complaints depends on the candid receipt of information. Many of our informants and witnesses are government insiders who must furnish unflattering information about their superiors and institutions. The law must therefore give as much comfort as possible to those who supply information that they will be protected from reprisal.

**23** While under subsection 12(1) I am required to swear an oath not to disclose information received as Ombudsman, at the same time, I am statutorily obliged to report my findings so that any problems that have been identified can be rectified. Subsection 12(2) therefore provides:

(2) The Ombudsman may disclose in any report made by him or her under this Act such matters as in the Ombudsman's opinion ought to be disclosed in order to establish grounds for his or her conclusions or recommendations.

**24** In effect, the statutory promise of confidentiality to informants and witnesses is subject to the principle that permits disclosure, in a non-confidential report, of information that is necessary to explain or support the positions we ultimately take. In other words, the confidentiality obligation is subject only to what is contained in a Final Report issued under the authority of either section 21 or subsection 14(2.5) of the *Ombudsman Act*.

**25** Meanwhile, it is important that the Ombudsman be as accurate as possible in the findings that are made. It is therefore prudent for me to give the affected governmental organization an opportunity to see what I have made of the evidence. This is done in the interests of the institution, as this process can result in any errors we may have made being identified and removed, and it allows for explanations to be inserted. It is a process that can save the responding governmental organization needless embarrassment. Indeed, where it appears that there may be sufficient grounds for me to make a report or recommendation that may adversely affect any governmental organization or person, I am obliged by subsection 18(3) to give that governmental organization or person an opportunity to make representations. The only way to give affected institutions and individuals a meaningful opportunity to respond is to share a preliminary version of the report with such persons in advance of its finalization.

**26** How, then, can the confidentiality obligation and these consultation and representation mandates be accommodated? We in the Office of the Ombudsman follow a practice adopted by other Officers of the Legislature who face the same dilemma. We prepare Preliminary Reports and we release them on conditions designed to secure their confidentiality to the maximum degree possible. This practice is grounded statutorily in subsection 15(3), which authorizes me to determine my own procedures. Not only is my authority to impose confidentiality conditions supported by law, it is an authority I must jealously guard. If I could not follow this practice, my ability to balance the important competing interests I am charged with under the Act would be undermined. It is with this background in mind that the events leading to this report should be understood.

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My understanding is that questions surrounding the Ombudsman's jurisdiction to require solicitor-client privileged documents can be submitted to the Divisional Court by the Ombudsman.

I would be pleased to receive the Ombudsman's position with respect to advice subject to solicitor-client privilege prior to making any further voluntary production as requested.

The following is the link to obtain all the documents that were part of the public agenda at the November 7, 2011 meeting. If you wish to receive hard copies of this public agenda, please do not hesitate to contact me.

<http://sire.london.ca/mtgviewer.aspx?meetid=45&doctype=AGENDA>

Cathy Saunders

*Cathy Saunders, MPA, RPP  
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