**REPORT TO**

**THE CORPORATION OF THE MUNICIPALITY OF CLARINGTON REGARDING THE INVESTIGATION OF THE CLOSED MEETING OF COUNCIL FOR THE MUNICIPALITY OF CLARINGTON**

**ON FEBRUARY 26, 2015**

1. **COMPLAINT**

The Corporation of the Municipality of Clarington (“Municipality”) received a complaint about a Closed Meeting of the Municipal Council (“Council”) on February 26, 2015. The essence of the complaint is that the closed meeting did not meet the requirements of the *Municipal Act, 2001*[[1]](#footnote-1),as amended by Bill 130[[2]](#footnote-2) (“*Municipal Act*” or *“Act*”).

This request was sent to the offices of Amberley Gavel Ltd. (“Amberley Gavel”) for investigation.

1. **JURISDICTION**

The City appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act*.

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to Township Council.

1. **BACKGROUND**

Section 239 of the *Municipal Act* provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government.

The section sets forth exceptions to this open meetings rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public. The section confers discretion on a council or local board to decide whether or not a closed meeting is required for a particular matter. That is, it is not required to move into closed session if it does not feel the matter warrants a closed session discussion.

Section 239 reads in part as follows:

Meetings open to public

**[239.](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s1)**[(1)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s1)  Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

[(2)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s2)  A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(a) the security of the property of the municipality or local board;

(b) personal matters about an identifiable individual, including municipal or local board employees;

(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

(d) labour relations or employee negotiations;

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

The *Act*, under subsections 239(5) and 239(6), does not permit a council, committee, or local board to vote while in closed session unless the *Act* requires or permits the meeting to be closed by virtue of one of its exceptions and the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

The *Act* authorizes the municipality to appoint an investigator who has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a local board has complied with section 239 or a procedure by-law under subsection 238(2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation (section 239(2)).

1. **INVESTIGATION**

Documents reviewed during the course of the investigation included the Agenda and Minutes and Supporting Documents for the General Purpose and Administration (GPA) Committee Meeting of Council on February 27, 2015, emails and correspondence related to the 2014 and 2015 Municipal Budgets, the Procedural By-Law and Notice By-law, and other relevant documentation. The Municipal Clerk (“Clerk”) was also consulted during the course of the investigation.

1. **BACKGROUND**
2. **The Complaint**

The complaint alleges that Council held an improper meeting on February 26, 2015, through email correspondence, prior to its GPA meeting on February 27, 2015. The complaint alleges that this correspondence “amounted to a meeting of council during which the Budget was deliberated, and from which the public was excluded, contrary to Section 239(2) of the Municipal Act”.

1. **The Email Correspondence**

At approximately 10:29 p.m. on February 26, 2015 the Mayor sent an e-mail to all Members of Council with respect to the Municipality’s 2015 budget, the content of which provided “some thoughts on the budget”. The Mayor sent a minor clarification to his original email at approximately 10:36 p.m. In the original email, he outlined several proposals to “hit 3.75%” (increase). The message asked the Members of Council to “Please send me yours” (thoughts). Of the seven-member Council, only two of the six Councillors responded. The Mayor suggested that those members bring forward their suggestions to staff – presumably at the February 27, 2015 GPA Committee meeting. In a message addressed to both responding Councillors, the Mayor said “Be sure to bring those up, I’d ask staff, based on the answers move forward or not.”

1. **ANALYSIS AND FINDINGS**
2. **The Definition of a Meeting**

“Meeting” is not defined in the *Municipal Act.* However, we have previously defined it as a gathering of a quorum of members of council who enter into discussions that materially advance the business of the municipality or that set the foundation for decisions that would materially advance the business of the municipality at a future date.

This “gathering” does not have to involve the physical presence of Members of Council in a meeting place. Given the technological age, meetings can take place by serial or sequential email correspondence, telephone, text, or through online programs such as Skype or “Go To Meetings”. The defining factor, in our opinion, is that a *quorum* of members of a council has *discussions* that either materially advance the business of the municipality or that set a *foundation* for decisions which will be made at a future date.

1. **The Email Correspondence as a “Meeting”**

The email correspondence as it occurred between the Mayor and Members of Council cannot be elevated, in our opinion, to the status of a “meeting”. The Mayor appears to merely be asking for the Members’ thoughts in preparation for the following day’s meeting. He does not attempt to influence them towards a specific decision or decisions, although he makes it clear by virtue of his proposals (as he had done publicly in the past, as we were told) that he would support only a 3.75% increase. He asks the Members of Council to “share their thoughts”; he does not ask them to agree with one or more of the proposals, or even his target of 3.75%. He does not ask them or invite them to share their thoughts with each other. Although the message was sent to a “group address” (Councillors Office) but he does not suggest they “reply all”).

Further, the Mayor does not engage in any substantive subsequent correspondence with the two Councillors who did respond. He simply invites them to table their thoughts to staff and proceed forward on the basis of that information from staff. And, he does not forward the thoughts expressed in the response e-mail from the two Councillors to other Members of Council.

To say that Members of Council cannot communicate with one another on important issues would be to add an unnecessary chilling effect. It is expected that a Mayor would communicate with individual Members of Council outside of a Council meeting as one of the ways in which he or she would “provide leadership to the council” as required under the Act. It is only when a quorum of council in the absence of the public, is making *a decision or is setting the groundwork for future decisions* without following proper process under the Act will be in contravention of the *Municipal Act* or their own procedure by-law.

A quorum of the Members of Council was not engaged in the email correspondence. Only two of the six Councillors responded and there was no sequential or serial correspondence among those who engaged in their “thoughts”. Hence, this cannot be deemed to be a meeting of Council.

**VII. CONCLUSION**

Amberley Gavel has concluded that Council for the Municipality of Clarington did not have a closed meeting of council or its committee on February 26, 2015.

However, we would caution Members of Council that group emails can quickly and inadvertently, become a “meeting” of council, a committee of council, or a local board. Had the comments of any member been sent to “all” through a reply all response then our conclusion would likely have been different.

Members of Council must be extremely cautious in this era of email and other assorted communication “apps” in ensuring that their technological exchanges are not, or will not be perceived to be, a quorum of council furthering the business of a council or laying the groundwork for future decision making of council, in breach of the Act or Council’s its Procedure By-law.

**VIII. PUBLIC REPORT**

We received full co-operation from the Clerk and we thank her.

This report is forwarded to the Council of the Municipality of Clarington. The *Municipal Act* provides that this report be made public. It is suggested that the report be included on the agenda of the next regular meeting of Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.

 Nigel Bellchamber

for

**AMBERLEY GAVEL LTD.**

**December 2015**

1. S.O. 2001, c. 25. [↑](#footnote-ref-1)
2. *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”). [↑](#footnote-ref-2)