**REPORT TO**

**THE CORPORATION OF THE TOWNSHIP OF HAMILTON**

**REGARDING THE INVESTIGATION OF THE CLOSED MEETINGS OF COUNCIL FOR THE TOWNSHIP OF HAMILTON**

**HELD ON MARCH 12, 2015 AND APRIL 21, 2015.**

1. **COMPLAINT**

The Corporation of the Township of Hamilton (“Township”) received a complaint about Closed Meetings of the Township Council (“Council”) on March 12 and April 21, 2015. The essence of the complaint is that the closed meetings 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 Township 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" \l "s239s1)**[(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" \l "s239s2)  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* is silent about what must be reported out from a closed session to an open session of the council, board, committee, or other body. All that the *Act* requires is that a record, without note or comment, be kept of all resolutions, decisions, and other proceedings, whether closed to the public or not (section 239(7)).

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 Closed Meetings of Council on March 12, 2015 and on April 21, 2015, the Procedural By-Law and Notice By-law, and other relevant documentation. The Mayor, the Municipal Clerk (“Clerk”), and the Acting Municipal Clerk (“Acting Clerk”) were also consulted during the course of the investigation.

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

The complaint alleges that a vote took place at the Closed Meeting of Council on March 12, 2015 to terminate the employment of the Township’s Director of Public Works and Infrastructure. The complaint alleges that it was an improper vote in that it was not one of a procedural nature or one which gave directions or instructions to an officer, employee, or agent of the municipality.

1. **The Closed Session of the Special Council Meeting of March 12, 2015**

The Agenda for the Special Meeting of Council on March 12, 2015 indicates that portions of the meeting would be held in closed session under section 239(2)(b), (d), and (f) of the Municipal Act to discuss, among other items, the “Director – Public Works Position”. Council moved into Closed Session near the end of the Special Council Meeting and resolved back into Open Session before enacting its confirmatory by-law and then adjourning.

The Minutes of the Closed Session of Council for March 12, 2015 indicate that the Executive Director was asked to leave the meeting and the Acting Clerk was not present for the portion of the meeting.

During our review, the Clerk advised that she was scheduled to be absent from this particular meeting and delegated her duties in writing to another employee to act as the Municipal Clerk at the Council Meeting of March 12, 2015 (“Acting Clerk”). The Acting Clerk reported to us being asked to leave a portion of the closed session meeting in order to seek out some information for Council.

The Mayor indicated that he and the Deputy Mayor brought forward information to Council from the Township’s solicitor that they had received in the course of a meeting with the solicitor relating to options for the Director position. The information being conveyed to Council was in oral form and, according to the Mayor, summarized the solicitor’s advice regarding various options under consideration.

The Mayor confirmed that Council had asked the Acting Clerk to step out of the meeting to seek information for Council. While the Acting Clerk was out of the room, the Mayor and the Deputy Mayor discussed the options relating to a matter.

In the closed session Council directed the Mayor to proceed with two alternative options and report back to Council. This direction was not recorded and no vote was taken. Rather, the Mayor indicated that he went “around the table” and sought consensus on the options from the Members of Council.

There was no reporting out to the Open Session of Council about the matters discussed in Closed Session.

1. **Minutes of the Council Meeting of April 21, 2015**

The Minutes for the Meeting of Council on April 21, 2015 indicate that the Council went into Closed Session under Section 239(2)(b), (d), and (f) of the *Municipal Act* regarding “Employee agreement Negotiations”, as follows:

THAT Council adjourn to a closed session to discuss matters pertaining to Section 239(2) of the Municipal Act, in particular subsections (b) personal matters about an identifiable individual, including municipal or local board employees; (d) labour relations or employee negotiations; (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

Re: Employee agreement Negotiations

There were two matters to be discussed in Closed Session, one which involved the appointment of a new CAO and one which dealt with the Director of Public Works Position. On the latter matter, Council received a letter from the solicitor of a Township employee and was considering a draft response to that letter, as prepared by the Township’s solicitor, for signature by the Mayor on behalf of Council. We understand that this latter letter was not included with the agenda package but was handed out at the meeting on April 21, 2015.

The Minutes of the Open Session of Council indicated that Council reported out to Open Session only on its conclusion respecting the CAO appointment.

The Minutes of the Closed Session indicated that, with respect to the matter that is the subject of this complaint, Council gave the Mayor a direction to “sign the letter” and to have the letter sent out immediately.

During our review, the Mayor indicated that he reported back to Closed Session on the status of the particular employee matter in light of the alternatives previously discussed by Council. The “letter” cited in the Closed Session vote related to a letter, prepared by the Township’s solicitor for signature by the Mayor.

1. **ANALYSIS AND FINDINGS**
2. **The Closed Session of the Council Meeting of March 12, 2015**

The subject matters discussed at the Closed Session of the Special Council Meeting on March 12, 2015 clearly fit within the exception under the *Municipal Act* respecting personal information about an identifiable individual (section 239(2)(b)). Further, since Council was discussing potential employee negotiations during the meeting, the subject matter also fit within the exception in section 239(2) (d).

During the meeting the Mayor and Deputy Mayor conveyed information to Council that they received from the Township’s solicitor. Although the subject matter might have otherwise fit within the exception in section 239(2)(f) as advice subject to solicitor/client privilege, as cited in the authorizing resolution, we do not believe that this exemption would apply to the facts of this particular situation. If the solicitor is not going to be present in a meeting, the information to be conveyed under solicitor/client privilege should be in writing from the solicitor. A major concern with conveying advice from a solicitor to a client through a third party (in this case, the Mayor and the Deputy Mayor) which is not in written form is that the advice itself might be subject to misunderstanding, innocent misinterpretation, or potential bias by the third party conveying the information. Hence, this exemption in the *Municipal Act* does not apply to the subject matter under consideration.

Furthermore, the Council should have recessed its meeting in the absence of the Acting Clerk, and refrained with discussing any Council matter, permitted under the Act or not, as the meeting could not properly continue when the Acting Clerk left the meeting. The closed meeting could have resumed upon the return of the Acting Clerk and the minutes should have reflected the recess.

1. **The Closed Session of the Council Meeting of April 21, 2015**

The subject matter discussed at the Closed Session of the Special Council Meeting on April 21, 2015 fit within the exception under the *Municipal Act* respecting personal information about an identifiable individual (section 239(2)(b)). In addition, since Council was considering a written response from the Township’s solicitor on an issue, the subject matter fit within the exception in section 239(2)(f) as advice subject to solicitor/client privilege.

Council provided instructions to the Mayor regarding the advice of the Township’s solicitor as contained in a letter. As the Mayor is an officer of the municipality, and the *Municipal Act* provides that a vote to provide direction or instructions in closed session to an officer is permitted, this was an appropriate vote for Council to take with respect to this particular matter.

While there is no legislative requirement to report out in the public meeting following a closed meeting, it does foster the principles of openness and transparency. However, when the issue is a sensitive employee issue requiring direction on a substantive employment decision we appreciate that the matter may involve employee privacy considerations. Council in this instance should have reported out in public session only the fact of the closed meeting held pursuant to the application of subsection 239 (2)(b) and (d).

**VII. CONCLUSION**

Amberley Gavel has concluded that Council for the Township of Hamilton breached the open meetings requirement of the *Municipal Act* and the provisions of the Township’s Procedure By-law when meeting in Closed Session under section 239 of the *Municipal Act* on March 12, 2015, specifically when it continued to meet in the absence of the Acting Clerk and failed to properly allow for a record of the full proceedings of the Closed Session. Also, the information presented orally to Council did not fit within the exemption under section 239(2) (f) of the *Municipal Act* dealing with solicitor/client privilege for the reasons cited earlier.

We have concluded that Council did not breach the open meetings requirement of the *Municipal Act* when meeting in Closed Session under section 239 of the *Municipal Act* on April 21, 2015, as it was properly in closed session under section 239(2)(b) or (d) and 239(2)(f) of the *Municipal Act*.

As a result of our review, we have certain recommendations to Council in the interests of enhancing openness and transparency.

1. **Setting and Giving Notice of Closed Session Items**

We note the municipality indicates on its agenda all of the exceptions under the *Municipal Act* that it is invoking in order to proceed into closed session and then lists the items it will be considering. It is a better practice to list each *Municipal Act* exemption(s) separately for each matter to be discussed and the general nature of the matter to which *that* particular exemption applies whenever possible.

1. **Making Decisions by Consensus**

Decisions of council cannot be made by a consensus regardless of whether or not the meeting is open or closed to the public. Votes must be taken on motions that then become resolutions, whether or not that vote is substantive, procedural, or for giving directions or instructions to officials, employees, or agents of the municipality.

**(c) Record of Proceedings**

The Clerk, or designate, must always be present when Council is discussing the business of Council, whether or not they are in open or closed session.

It is never appropriate to continue to discuss council business in the absence of the Clerk or designate. All of the topics that Council discusses are to be recorded by the Clerk, most notably decisions, directions, instructions and also any other matters discussed even if they do not lead to decision, direction or instruction.

The minutes of a properly closed meeting prepared by the Clerk, Deputy Clerk or Acting Clerk are not to be made public unless Council chooses to do so. If they are to be adopted they should be adopted at the next closed meeting.

1. **Reporting Out**

Although not stipulated in the *Municipal Act*, it is appropriate – and a best practice - for council to report out from its closed session. At minimum, the reporting out should include:

(i) the fact that council met in closed session (with the time that it resolved into closed session and the time that it adjourned back into open session noted);

(ii) the specific exemption under the *Municipal Act* for which council was permitted to meet in closed session;

(iii) the general nature of the item discussed in sufficient detail to inform the public but not detrimentally impact the municipality or a third party.

**VIII. PUBLIC REPORT**

We received full co-operation from all individuals that we spoke to and we thank them.

This report is forwarded to the Council of the Township of Hamilton. 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

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**AMBERLEY GAVEL LTD.**

**March 2016**

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)