**A REPORT TO THE COUNCIL OF LOYALIST TOWNSHIP REGARDING THE INVESTIGATION OF:**

**CLOSED MEETINGS OF THE COUNCIL HELD ON:**

* **September 26, 2011**
* **November 28, 2011**
* **June 11, 2012**
* **July 9th, 2012**

**A. THE COMPLAINT**

Pursuant to Section 239.1 of the Municipal Act (“the Act”), Amberley Gavel Ltd. received a complaint dated June 12, 2012 relating to any closed sessions of the Township Council in which the “Bath Academy” or the proprietor of that academy was discussed. The Clerk of the Township subsequently confirmed with the investigator for Amberley Gavel Ltd. that issues relating to the Bath Academy (an art gallery) and/or its proprietor were discussed in closed sessions of Council on September, 26, 2011, November 28th, 2011, and June 11th, 2012. Subsequent to the date of the complaint a further closed session meeting was held relating to the Bath Academy and/or its proprietor on July 9th, 2012 and this meeting has consequently also been included as part of this investigation.

The letter of complaint does not allege any *specific* violations of the Municipal Act but rather alleges that since “there has been a number of clear and obvious failures to follow the legislation…in open sessions of Council…there is reason to believe similar conduct has occurred in closed sessions.” Further, the complainant alleges that “in previous dealings with Loyalist Township I found several elements of protocol incorrect and/or omitted by the Township…”

The complainant then goes on to allege that it has come to her attention that “defamatory and false information” has been “discussed” in these closed session meetings. As indicated below the jurisdiction of a closed session investigator is rather limited in scope and consequently does not include investigations to determine whether defamatory statements were actually made.

In light of the generality of the complaint filed the investigator examined the procedure followed to determine if there were any violations of the provisions of the Municipal Act. Inter alia, the investigator examined:

1. The resolution authorizing the Council to go into each closed session.

2. The resolution used in reporting out of closed session.

3. The nature of the discussion held *in camera –* whether the discussion involved matters that properly could be discussed in each closed session.

4. Whether council followed the procedure relating to votes that can be taken in closed session meetings.

5. That portion of the Township’s Procedure By-law relating to Closed Sessions

**B. JURISDICTION**

Loyalist Township has appointed Local Authority Services (LAS) to act as its closed meeting investigator pursuant to Section 239.2 of the Act. LAS has, in turn, delegated its powers and duties to Amberley Gavel Ltd. to undertake this investigation and report.

On August 20th, 2012 the investigator for Amberley Gavel Ltd. conducted an interview in Ottawa with a Township councillor attending the A.M.O. conference in that city and on August 21st the investigator conducted two telephone interviews to facilitate holiday and retirement plans of two individuals. Finally, on August 29th the investigator travelled to the villages of Odessa and Bath in the Township and conducted two further interviews. As well further information was obtained from the Township offices on that date.

**C. LEGAL BACKGROUND**

Closed Meetings:

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 is one of the elements of transparent, open government that the Act encourages. However the Act also provides for a limited number of exceptions that allow a local council or committee of council to meet in closed session (i.e. *in camera).*

Section 239 reads, in part, as follows:

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

**Exceptions**

[(2)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%20\%20s239s2) 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.

Section 239 also requires that before a council moves into closed session it shall pass a resolution at a public meeting indicating that there is to be a

closed meeting. The resolution must also include “the general nature of thematter to be considered at the closed meeting*”.*

Finally, subsections 239(5) and (6) limit the actions that may be taken by the Council at the closed session. Votes may be taken at the closed session only

for procedural matters or for giving direction or instructions to staff or persons retained by the municipality.

The role of an investigator of a complaint filed under Section 239.1 is fairly narrow. The investigator’s role is to determine “whether the municipality…has complied with section 239 or a procedure by-law under section 238(2) in respect of a meeting or part of a meeting that was closed to the public and to report on the investigation”. Accordingly, the role of the investigator is to examine the *process* followed and not the substance of any particular issue.

**FACTUAL BACKGROUND**

Since 2008 the owner of the Bath Academy has attempted to establish an art gallery in a large heritage building in the picturesque Village of Bath. After initialing dealing with a major insurance issue she then faced a series of issues with the Township including 1) property taxes, 2) water rates, 3) zoning, 4) parking and 5) the development of a skateboard facility on abutting lands. At the time of the investigation the gallery had closed and the property was for sale.

Although Amberley Gavel Ltd. recognizes the importance of the above issues to the complainant, we reiterate that the jurisdiction granted to an investigator under the Municipal Act is narrow in scope and the comments in this report must accordingly be limited to *the procedural* issues that fall within the jurisdiction of a closed meeting investigator. We cannot opine on the background issues.

*The Closed Session Meetings*

The regular practice in Loyalist Township is for Council to go into closed session, if necessary, at 6 P.M. prior to the regular open session Council meeting which normally is scheduled to commence at 7 P.M. The four closed session meeting in which the Bath Academy and/or its proprietor were discussed followed this regular practice:

*September 26, 2011*

The Minutes of Council for September 26th, 2011 indicate that a resolution was moved at the commencement of Council “to proceed into Closed Session as permitted under the Municipal Act to consider:

1. A proposed or pending acquisition or disposition of land
2. Litigation or potential litigation
3. Personal matters about an identifiable individual

The first and third issues itemized above related to the potential acquisition of a piece of Township property and the appointment of individuals to a municipal committee, matters unrelated to the complaint filed. The second issue – “litigation or potential litigation” involved the consideration of a legal opinion received from the Township’s legal counsel. This legal opinion had been sought after the Mayor had received an email from the owner of the Bath Academy alleging that the construction of a skateboard facility in the park abutting the Academy would “negatively impact” her property.

Following the completion of the closed session portion of the council meeting the Minutes of September 26, 2011 then indicate that Council passed a motion to rise and report .

No mention was made of the “litigation” matter discussed *in camera.*

*November 28, 2011*

At this Council meeting issues relating to the Bath Academy were discussed both in open session and during the closed session portion of the meeting.

Prior to going into the closed session portion of this meeting a motion was passed “to proceed into Closed Session as permitted under the Municipal Act to consider:

i)personal matters about an identifiable individual, including municipal employees

ii)litigation or potential litigation

During the closed session Council considered a legal opinion relating to the Green Energy Act and a matter involving the Fire Department. Council then considered a report from the C.A.O. of the Township relating to three issues raised by the proprietor of the Bath Academy: 1) property taxes, 2) water and sewer rates and 3) a MFIPPA (Municipal Freedom of Information and Protection of Privacy) application. During the interview process the evidence indicated that this report was considered in camera under the “litigation or potential litigation” exemption listed above. Evidence was also provided to the investigator that the owner of the Bath Academy had advised that she was considering legal proceedings to resolve one or more of her grievances with the Township.

After the conclusion of the closed session portion of the Council meeting Council rose and reported as follows:

Mayor Lowry advised that two legal matters were discussed during the Closed Session portion of the meeting and two personnel matters were deferred.”

*June 11, 2012*

On this date Council moved into closed session to consider a matter involving “litigation or potential litigation”. The discussion of this item was not completed by 7 P.M. when the open session portion of the meeting was scheduled so Council “suspended” the closed session meeting at 7 P.M. and reconvened the discussion at 8:40 P.M. following the conclusion of the regular Council meeting.

During the closed session portion of the meeting Council first discussed two agreements with two separate companies establishing wind energy projects on Amherst Island. Council then reviewed a letter received from the owner of the Bath Academy earlier that day in which she requested an amendment to the Minutes of the Council meeting dated May 28th, 2012 which she had attended. The letter then proceeded to allege that a councillor had failed to declare a conflict of interest at that May 28th meeting and that disparaging remarks had been made against her in prior closed session meetings.

At the completion of the closed session Council rose and reported “that during the Closed Session portion of the meeting three legal matters were discussed”.

*July 9th, 2012*

On July 9th, 2012 the Council went into closed session to discuss matters involving:

1. Litigation or potential litigation
2. A personal matter including an identifiable individual including municipal employees

During the *in camera* session Council discussed several items including a brief report from the Chief Administrative Officer of the Township which outlined the contents of a letter received from the proprietor of the Bath Academy dated June 12th, 2012 (a separate letter from the one of the same date in which the proprietor asked for this investigation of closed sessions of Council). In the second letter dated June 12th, 2012 the proprietor requested that the municipality conduct an investigation of “the conduct of municipal staff, Members of Council and appointees to subcommittees and/or ad hoc committees of Council…” under the Township’s Code of Conduct Policy. The C.A.O then provided advice to the Council on the appropriate disposition of the request.

On reporting out of the closed session the Mayor reported that “two legal matters and two personnel matters were discussed” in closed session.

This was followed by a motion moved by Councillor Ibey that the letter from the proprietor of the Bath Academy dated June 12th (relating to the request for an investigation under the municipality’s Code of Conduct) “…be received and that Ms. Teare [the proprietor] be advised that no action was taken with regard to her request.” The motion was carried unanimously.

**G. FINDINGS**

In this section we will review the major procedural requirements of closed session meetings as set out in the Municipal Act and the Township’s Procedure By-law to ensure that these requirements were met in the four *in camera* meetings investigated.

1. *The resolution used to authorize the closed session meeting*

Section 239(4) of the Municipal Act requires that, prior to going into closed session, council or a committee of council must pass a resolution stating “the fact of the holding of the closed meeting and *the general nature of the matter to be considered at the closed meeting”*[emphasis added]. It is the experience of Amberley Gavel Ltd. that many municipalities in the province do not *fully* comply with this provision to disclose “the general nature” of the item to be discussed. It is not uncommon for municipalities to simply reference one of the enumerated exemptions set out in Section 239 of the Act (e.g. litigation or potential litigation). Alas, this is also the approach taken by Loyalist Township. Using this approach an interested citizen could have no idea what the specific subject matter of the discussion involved.

It is the view of Amberley Gavel Ltd. that it is “a best practice” to include greater specificity in the resolution authorizing the closed session meeting. This can be done without compromising the confidentiality of the issue to be discussed and would be in keeping with the policy behind the provisions in the Act – to encourage as much transparency as possible in the decision-making process.

An *example* of the form of resolution that should be used that not only includes greater specificity but respects the confidentiality of an issue would be as follows:

Be It Resolved that the Council move into closed session under Subsection 239(e) of the Municipal Act to consider a matter involving “litigation or potential litigation” relating to the Bath Park Development Plan

With this wording, it is suggested, any member of the public attending the meeting or reading the minutes of the meeting would have a much better idea of what their elected officials would be discussing “behind closed doors”.

*2. The procedure used to report out following the closed session*

The Municipal Act is silent regarding reporting out procedure. Accordingly, the Township council cannot be considered in breach of the Act.

However the Township’s Procedure By-law (By-law 1212-040) does include the following provision:

4.7.2 d) At the conclusion of each Closed Session meeting, Council will Rise and Report to the Open Council Session. The Open Council Session Minutes will provide a generic outline of what was discussed during the Closed Session

Following the closed session meetings held on September 26th, 2011 and July 9th, 2012 motions were approved in open session confirming certain actions that had been discussed in the closed session meetings – the appointments to the Waste Management Review Committee and an extension to an Agreement of Purchase and Sale (September 26th, 2011) and the decision to take no further action on Ms. Teare’s request for a Code of Conduct investigation (July 9th, 2012). This procedure confirming certain actions emanating from the closed session discussion is in accordance with the Municipal Act but is not specifically referenced in the Township’s Procedure By-law quoted above. Accordingly, the Township may wish to consider amending Section 4.7.2 d) to specifically state that any actions emanating from the closed session that are to be ratified in open session will also be moved when Council rises and reports.

*3. The nature of the closed session discussion*

The investigator closely examined all of the politicians and staff interviewed to ensure that all of the discussions that occurred in the four closed sessions of Council reviewed in this investigation fell within the exceptions set out in Section 239 (2) of the Municipal Act that allow such discussions to be held in closed sessions.

These discussions and the exemptions used are summarized below:

*September 26, 2011*: a review of a legal opinion obtained on the law of nuisance relating to the skateboard facility – “litigation or potential litigation”

*November 28, 2011*: a report from the C.A.O. on the legal position of the municipality in regard to certain M.F.I.P.P.A and tax/water rate requests of the owner of the Bath Academy – “litigation or potential litigation”

*June 11, 2012*: a review of a letter dated the same date from the owner of the Bath Academy in which she alleges a failure to declare a conflict of interest and “illegal conduct” on the part of a councilor – “litigation or potential litigation”

*July 9, 2012*: a review of a letter dated June 12, 2012 from the owner of the Bath Academy in which she requested an investigation of staff and councilors under the Township’s Code of Conduct By-law – “a personal matter regarding an identifiable individual including municipal employees” and “litigation or potential litigation”

Although the investigator was hampered by not being able to review any closed session minutes (see #5 below) he did thoroughly question both staff and council members who participated in these closed session meetings on the ambit of the discussions held behind closed doors. As a result, Amberley Gavel Ltd. is satisfied that in all four cases the discussions were properly authorized to be conducted in closed session under the exemptions set out in Section 239 of the Act. However, if another exception, such as “advice subject to solicitor-client privilege” is a better fit, such as it appeared to be on September 26, 2011, it should be used.

*4. Votes taken in camera*

Under Subsections 239 (5) and (6) of the Act votes are only to be held in closed sessions for two reasons –if the vote is “for a procedural matter” or “for giving directions or instructions” to officers of the corporation. Amberley Gavel Ltd. cannot be satisfied that any votes taken at the four closed session meetings fell within the parameters of the above provisions because there were no minutes to examine.

*5. Closed Session Minutes*

The investigator was provided with extensive material relating to this investigation including all of the documents that were reviewed or discussed in closed sessions. However he was not provided with any closed session minutes for the simple reason that none existed. The lack of closed session minutes was in keeping with the provisions of subsection 4.7.2 b) of the Township’s Procedure By-law which succinctly states “Closed Session minutes will not be prepared”.

However this provision in the Township’s By-law is in breach of the requirements of the Municipal Act. Subsection 239(7) of the Act states as follows:

A municipality…shall record without notes or comment all resolutions, decisions and other proceedings at a meeting of the body *whether it is closed to the public or not* [emphasis added]

Accordingly, the Township’s By-law should be amended as soon as possible if it has not already been amended and the Township should be keeping minutes of all closed session proceedings. A by-law cannot supersede provincial legislation. These minutes should include reference to the attendees at the closed session including members of council and staff and outside advisors.

The minutes would, of course, remain confidential and should be kept in a secure location.

Under Section 228(1) of the Municipal Act it is the duty of the Clerk to record all resolutions, proceedings, and decisions of Council. This would include all closed session proceedings. The Act also contemplates special circumstances in which the Clerk would be absent from meetings (e.g. illness or vacation leave). In these situations Section 228 (4) provides the following procedure:

The clerk may delegate in writing to any person, other than a member of council, any of the clerk’s powers or duties under this or any other Act.

*6. Procedure By-law Provisions*

Besides the required amendment set out in the preceding section, the Procedure By-law of the Township also requires amendment to eliminate the confusion contained in subsection 4.7.2 a) which currently reads as follows:

…A meeting may be closed to the public:

i)if the subject matter is as defined in Clause 4.6.1 of this by-law;

and

ii)during the taking of a vote unless the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality or persons retained by or under contract with the municipality…

Clearly the intent of this provision is twofold – to only authorize closed session meetings that are permitted under the Municipal Act and to limit the occasions when votes can be taken in closed session also pursuant to the provisions of the Municipal Act. However the drafting of the by-law does not accomplish these two goals. Section 4.7.2 a) requires review and re-drafting.

**H. CONCLUSIONS**

In summary, Amberley Gavel Ltd. makes the following findings on the complaint filed:

1. The Township appropriately went into closed session for the issues that were discussed at all four closed session meetings that were examined as part of this investigation
2. The procedure used at these closed session meetings was generally in keeping with the provisions of the Municipal Act except for:
3. the lack of specificity in the resolution used to go into closed session.
4. the failure to keep minutes of the closed session meetings

In an attempt to put into action the transparency and accountability policy behind the closed meeting provisions set out in the Municipal Act Amberley Gavel Ltd recommends that the council of the Township implement the following improvements and amendments:

1. That the resolutions used to move into a closed session more clearly specify “the general nature” of the matter to be discussed as per the example set out above in this report.
2. That the Township take minutes of closed session meetings as per the requirements of the Municipal Act and tThe Procedure By-law re amended accordingly..
3. That subsection 4.7.2. a) of the Procedure By-law be reviewed and re-drafted to eliminate the confusion presently contained therein.

Finally, Amberley Gavel Ltd. would like to thank both councilors and staff of the municipality who all co-operated fully during the course of this investigation.

During the investigation process both the members of council and staff interviewed expressed a desire that the investigation and the report to follow be a learning process for the Township. Hopefully this has been the case.

A thank you should also be given to the complainant. Extensive background information accompanied by numerous pieces of correspondence was provided to the investigator by the complainant. Although the investigator read and reviewed all of this information to understand the background to this complaint the relatively narrow jurisdiction given to an investigator under the Municipal Act does not allow Amberley Gavel Ltd. to adjudicate on these background issues. However her complaint has uncovered certain weaknesses in the Township’s procedure relating to the conduct of closed sessions of Council as outlined above and will result in a greater degree of transparency and accountability in Township proceedings.

AMBERLEY GAVEL LTD.

Per: Nigel Bellchamber