**REPORT**

**TO**

**THE COUNCIL OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA REGARDING THE INVESTIGATION OF CLOSED MEETINGS COUNCIL HELD ON JUNE 27, OCTOBER 11 AND OCTOBER 21, 2011**

**Complaint**

The Municipality received a complaint on or about November 16, 2011 regarding closed meetings of Council held on June 27, October 12, and October 27, 2011.

The complainant alleged that the municipality is interpreting Section 239 of the Municipal Act 2001 (the Act) too broadly and that “refusal to provide general information of a general nature to the public about the nature of its closed session discussions amounts to a breach of its duty under the Municipal Act to be transparent and accountable.”

The complaint was forwarded to the offices of Amberley Gavel Ltd. for investigation.

**Jurisdiction**

The Municipality of Northern Bruce Peninsula appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the Municipal Act 2001 as amended by Bill 130 (Municipal Act). LAS delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council.

Section 239.1 provides that the role of the closed meeting investigator is to report to council on “whether a municipality or 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”.

**Background**

Section 239 of the Municipal Act 2001 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 does set forth exceptions to this open meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public.

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).*

*Other criteria*

*[(3)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s3)  A meeting shall be closed to the public if the subject matter relates to the consideration of a request under the Municipal Freedom of Information and Protection of Privacy Act if the council, board, commission or other body is the head of an institution for the purposes of that Act. 2001, c. 25, s. 239 (3).*

*Educational or training sessions*

*[(3.1)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s3p1)  A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:*

*1. The meeting is held for the purpose of educating or training the members.*

*2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee. 2006, c. 32, Sched. A, s. 103 (1).*

Section 239 also requires that before a council, local board or committee moves into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution also must include the general nature of the matter(s) to be deliberated at the closed meeting.

No matter or item other than the matter(s) expressly referred to in the public resolution may be discussed or otherwise dealt with at the closed meeting.

Subsections 239 (5) and (6) limit the actions that the council, committee or local board may take at the closed meeting. Votes may be taken only for procedural matters or for giving direction to staff or persons retained by the municipality.

**Investigation**

The investigation into the complaint began on December1, 2011. Those interviewed were the Municipal Clerk, The Deputy Mayor, the Mayor, and the Chief Administrative Officer.

The agendas for the Council meetings in question were prepared by the Municipal Clerk and her staff. Documents provided by the Municipality and reviewed during the course of the investigation included agendas, minutes, correspondence, reports, the Township’s Procedural By-law, Notice Policy and applicable legislation.

**Observations**

1. **The Municipality’s Procedural By-law**

Subsection 238 (2) of the Municipal Act requires that every municipality and local board pass a procedural by-law for governing the calling, place and proceedings of meetings. Subsection 238 (2.1) was added by Bill 130 and provides that the procedural by-law shall provide for public notice of meetings.

The Township’s Procedural By-law Number 2009-56 was passed on June 22, 2009 and was found to be current with respect to closed meeting procedures and notice of meetings.

Public notice was found to have been given with respect to the meetings in question in accordance with the By-law.

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1. **Meeting Agendas**

Although not required by the Act, the agendas for the Council meetings of June 27 and October 11 did anticipate closed portions within those meetings. The October 21 session was anticipated to be held as a closed session when public notice of the meeting was given.

**Findings**

**1.** At the June 27, 2011 meeting Council passed the following resolution:

“That Council move into closed meeting pursuant to Section 239 of the Municipal Act 2001, as amended, at 3:42 pm for the following reasons:

Personal matters about an identifiable individual including municipal or local board members; litigation or potential litigation including matters before administrative tribunals affecting the Municipality or local board.”

Council reconvened at 4:10 pm and reported out with a resolution in open session to congratulate the CAO on his successful completion of his probationary period and to confirm his status as a permanent employee. There was no reference to litigation matters in open session.

Amberley Gavel is of the opinion that the matters discussed were appropriate for a closed session in accordance with Section 239 of the Act.

However, the Council did direct the CAO in closed session to proceed with a charge pursuant to the Township zoning by-law as a result of the discussion on the potential litigation matter in the closed session. It would have been reasonable for the Council to report at least the general nature of that direction out when the public session resumed since it would be a matter of public record when the charge was laid.

For example, the Mayor might have reported out following the resumption of the open portion of the meeting that “As authorized by the resolution preceding the closed session, Council discussed two matters related to specific municipal employees, about one of which we will be entertaining a motion shortly, and Council also directed staff to proceed with a charge with respect to a zoning by-law infraction.”

In light of what was intended to be discussed during the closed meeting, the authorizing resolution could properly have been expanded to refer to “litigation, more specifically a zoning by-law enforcement issue.”

**2.** At the October 11 and 21 meetings Council passed appropriate resolutions authorizing the closed sessions. The topics discussed in closed session were limited to those matters contemplated by the resolutions. Parts of those discussions might have been held in public session but also might have added to public confusion as well as transparency as they would have been out of context for the most part.

The resolutions authorizing those closed sessions could have been more fulsome with respect to the general nature of the matters to be discussed, for instance, not just citing “advice subject to solicitor client privilege”, but “advice subject to solicitor client privilege, more specifically regarding what falls under the purview of litigation”.

**3.** From discussions with the Municipal Clerk it was learned that there are instances of resolutions that authorize closed sessions that do disclose more than the minimum requirements of the Act, both before the meetings subject to this report and since.

**Conclusions and Recommendations**

Municipalities have an obligation to conduct their business in a transparent manner, and this includes, when the public is to be excluded from council deliberations, citing not only the specific subsection(s) of the Act authorizing the closed session, but also some greater specificity about the matter to be discussed as long as in doing so it does not impair the interests of the municipality or of the individuals involved.

There are situations where greater detail than what the Act requires is not appropriate or the consequences of its disclosure is not clear to members of Council when considering the motion to go into closed session.

In those latter circumstances, to attempt to be as transparent as possible, a Council could consider at the end of its closed session what components of its closed session can actually be reported out at that time and formalize that with a resolution providing appropriate direction to do so.

With respect to this complaint and the Municipality of Northern Bruce Peninsula, it is our finding that the Municipality met the minimum requirements of the Act with respect to the closed sessions subject to the complaint.

However, it is our recommendation that best practice would have involved greater disclosure in both authorizing resolutions and in reporting out to the public after those closed sessions. We understand this to already be the more common practice for the municipality with respect to authorizing resolutions.

Councillors and staff are advised to regularly ask themselves when considering a closed session pursuant to the Act, and when reporting out, in order to be as transparent as possible and maintain public confidence at a high level: “How much of the issue(s) at hand can be disclosed without impairing the interests of the parties involved and how can that disclosure be best achieved?”

We wish to thank the Clerk for her cooperation in providing us with appropriate records and to all of those that we interviewed for their complete cooperation as well.

We recommend that this report be placed on the agenda of the next public meeting of the Council.

August 2012

Amberley Gavel Ltd