**REPORT TO THE COUNCIL OF**

**THE TOWNSHIP OF CRAMAHE REGARDING THE INVESTIGATION OF A CLOSED MEETING OF COUNCIL FOR THE TOWNSHIP OF CRAMAHE**

**ON DECEMBER 15, 2015**

1. **COMPLAINT**

Amberley Gavel Ltd. received a complaint about a closed session of Council for the Township of Cramahe (“Council”) held on December 15, 2015. The essence of the complaint is that the subject matter of one of the items discussed in this closed session did not fit the exemptions to the open meetings requirements of the *Municipal Act, 2001*[[1]](#footnote-1),as amended by Bill 130[[2]](#footnote-2) (“Municipal Act” or “Act”). Hence, it was alleged that Council’s closing the meeting to the public during discussion of that matter was in contravention of the Municipal Act.

1. **JURISDICTION**

The Township of Cramahe (“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%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).

1. **INVESTIGATION**

Documents provided by the Township and reviewed during the course of the investigation included the Agenda and Minutes of the Open and Closed Sessions of Council on December 15, 2015, documents received during the Closed Session, and other relevant documentation. The Township’s Director of Corporate Services/Clerk (“Clerk”) was consulted during the course of the investigation.

**BACKGROUND**

1. **The Colborne Wastewater Treatment Plant**

The Township operates the Colborne Wastewater Treatment Plant (“WWTP”). Provincial Regulations mandate that a WWTP must be operated by an “overall responsible operator” (“ORO”). At the time of this investigation this role was filled by non-employees of the Township, although some of the Township employees worked in various capacities at the WWTP. However, Township employees were not qualified to be the ORO or the Operator-in-Charge of the WWTP. The Township must have an ORO and Operator-in-Charge in place at all times otherwise it may be subject to compliance orders and penalties levied by the Ministry of the Environment.

1. **Agenda for the Council Meeting of December 15, 2015**

Council (“Council”) was scheduled to have its regular meeting on December 15, 2015. Council was scheduled to have a closed session in Committee at 6:00 p.m. “pursuant to the Ontario Municipal Act, 2001, Section 239(2)(a) to discuss the security of the property of the municipality or local board; and Section 239(2)(b) personal matters about an identifiable individual, including municipal or local board employees”.

1. **Minutes of the Council in Committee Meeting on December 15, 2015**

The Minutes for the Council in Committee Meeting of December 15, 2015 indicate that the meeting commenced at 6:00 p.m. and went into Closed Session at 6:00 p.m. It returned to the regular session at 6:40 p.m. The Minutes do not indicate the general nature of the items that were discussed in Closed Session and do not indicate any direction that was given while in Closed Session.

1. **Agenda for the Closed Session of Council in Committee on December 15, 2015**

The Agenda listed two matters to be discussed in Closed Session. Although the Open Session Agenda refers to Section 239(2)(a) and Section 239(2)(b) of the Municipal Act in moving into closed session, the Closed Session Agenda does not indicate which legislative provision is being used as the reason for closing the discussion to the public for each item and the general nature of the items to be discussed.

1. **Minutes of the Closed Session of Council in Committee on December 15, 2015**

The Minutes for the Closed Session of Council in Committee on December 15, 2015 indicate that Council discussed a Proposal from Lakefront Utility Services Inc. (“LUSI”) and the Operations Manager position. It is the discussion related to the Proposal from LUSI that is the subject matter of the complaint.

Council provided direction to staff as a result of its discussion about the Proposal from LUSI.

**ANALYSIS AND FINDINGS**

The Clerk advised Amberley Gavel that Council discussed the Proposal from LUSI in closed session believing it to be a matter dealing with the “security of the property of the municipality”. She had listed the item on the Agenda without actually having yet received the Proposal from LUSI and had done so on the basis of prior discussion that Council had with respect to the need to operate the WWTP in full regulatory compliance. In retrospect, she indicated that the exemption in the Municipal Act dealing with “labour relations” may have been more appropriate and applicable given that the proposal could have been perceived by the Township’s unionized employees as a potential contracting out of bargaining unit work.

For completeness of our investigation, each of those exemptions will be canvassed in light of the Municipal Act.

1. **Section 239(2)(a) of the *Municipal Act***

The Clerk indicated that it was believed that the subject matter of the closed meeting dealt with the security of the property of the municipality or local board and, therefore, could be exempt by virtue of section 239(2)(a) of the Municipal Act. It was put forth that had the municipality not complied with the regulations to have the facility operated in accordance with Ministry of Environment standards, harm might have befallen the municipality given the implications of potentially being in non-compliance with environmental standards.

The Municipal Act does not define the phrase “security of the property of the municipality”. However, the Information and Privacy Commissioner (“IPC”) considered the meaning of this phrase in a 2009 decision involving the City of Toronto and stated in part that:

“The City takes the position that a closed meeting that deals with the financial matters pertaining to the sale of street and expressway lights is a meeting authorized by section 239(2)(a), as this subject matter can be characterized as “the security of the property of the City”. The City also argues that disclosure of the records would harm its financial and economic interest and that such a harm “falls squarely within the intent and meaning of ‘security of the property’ as contemplated in section 239(2)(a).”

After considering the arguments put forward by the City and the appellant, I conclude that the plain meaning of the phrase “security of the property of the municipality”, when used in the context in which it is employed in section 239(2) of the *Municipal Act, 2001*, is very different from the meanings the City wishes to give this phrase. I agree with the appellant that to give the phrase the meanings that the City urges is to distort its meaning. In my view, “security of the property of the municipality” should be interpreted in accordance with its plain meaning, which is the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property...”[[3]](#footnote-3)

Since the legislative aims of the *Municipal Freedom of Information and Protection of Privacy Act (“MFIPPA”)* are similar to the open meetings provision of the Municipal Act, in that the public has a right to open and transparent government, Amberley Gavel is guided in this instance by the meaning advanced by the IPC relating to the “security of the property of the municipality or local board”.

For the purposes of this investigation, the Council must be found to have discussed in closed session considerations related to **protection of property from physical loss or damage (such as vandalism or theft) or the protection of public safety in relation to this property** in order to comply with section 239(2)(a) of the Municipal Act.

A review of the Minutes of the Closed Session of Council indicates that the matters discussed did not relate to the protection of the municipality’s property from loss or damage or to the protection of public safety relative to the property. The discussion related to whether or not Council would contract with Lakefront Utility Services Inc. to provide ORO and management services. While it is true that not properly operating a WWTP might ultimately lead to loss or damage to municipal property or public safety issues, that is not what Council was discussing in this Closed Session. Council was receiving a proposal to have another third party fill the role of ORO for the WWTP and to assess the infrastructure and resources of the facility. There is nothing in the discussion that directly relates to loss or damage to municipal property or the protection of public safety.

Hence, section 239(2)(a) of the Municipal Act does not apply to the discussion in question. Therefore, Council was in breach of the Municipal Act when it closed its meeting to the public during discussion of the Proposal from LUSI.

1. **Section 239(2)(d) of the *Municipal Act***

The Clerk also offered that the subject discussion could have been closed to the public under Section 239(2)(d) of the Municipal in that the Council would be dealing with a matter involving labour relations. Since the union might argue that its work was being contracted out, the decision by Council would have labour relations implications. Staff had received professional advice that they needed to consult with the union on the matter prior to a decision being made on the Proposal from LUSI. Staff did consult with the union prior to the Closed Session on December 15, 2015 and we understand the union advised them that they would not have an issue with third-party ORO services and consulting services.

The term “labour relations” is not defined in the Municipal Act. The term usually refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation but it can have an application in a non union setting as well. However, we do not believe that “labour relations” can be extended in its broadest sense to cover all matters dealing with the relationship between a council, as the employer, its union(s), and its employees.

We can appreciate that management staff felt they needed to have discussions with the union which represented the employees who were potentially affected by the WWTP decisions prior to Council adopting the Proposal from LUSI. However, Council was not being asked to make a decision about the Proposal from LUSI. It was merely receiving the information and price quotation and asking questions of Lakefront Utility Services’ representatives. It made the decision to contract with Lakefront Utility Services Inc. in an Open Session of Council on January 12, 2016. The only “decision” that it made on December 15, 2015 was to direct staff to bring the matter forward to Council’s January 12, 2016 meeting for consideration.

This exemption in the Municipal Act cannot be invoked merely because Council is discussing matters which might have implications for its employees, whether or not those employees are unionized or non-unionized. Otherwise, the exemption could be used to cover a very wide range of discussions since decisions of a council, committee, or local board often have staff resource implications. Ultimately, the overarching goals of openness and transparency of decision-making at the municipal level would be sacrificed to an overly broad interpretation or application of legislative terms such as “labour relations”.

We questioned whether indeed this was contracting out of bargaining unit work and, despite the advice that the municipality received, would have disagreed that it was work currently being done by the bargaining unit members. Current employees are not ORO certified and are not responsible for the key management responsibility of assessing infrastructure or resources. If our interpretation is correct, the exemption would not have been necessary to invoke in the first place since the issue was not one which involved labour relations implications or negotiations.

In any event, even if the exemption were available, the consultation took place with the union **prior** to Council closing its meeting to the public. It is our view that, with the consultation that took place, there was no longer any need to have the discussion in closed session. Even if the agenda had already been established with this as a closed session item, staff could have advised Council on the day of the meeting that it was no longer necessary to discuss the item in Closed Session.

**VI. CONCLUSION**

Amberley Gavel has concluded that Council for the Township of Cramahe breached the open meetings requirement of the *Municipal Act* in closing its meeting to the public on December 15, 2015 during discussion of the Proposal from Lakefront Utility Services Inc.

**VII. RECOMMENDATIONS**

As a result of the investigation, we offer several recommendations:

1. **Disclosing the General Nature of the Matter to be Discussed**

The Agenda for the Open Session of the Council Meeting and the resolution to move into Closed Session cited the exemptions under the Municipal Act being used to justify why the meeting was to be closed to the public.

The Municipal Act requires that before a council, committee, or local board closes a meeting to the public that it disclose the general nature of the matter to be discussed. The wording of the resolution needs to do more than simply refer to the section of the Municipal Act that permits the closed meeting exception. The requirement to add a level of informative detail to the resolution was at issue in a recent case before the Ontario Court of Appeal.

In *Farber v. Kingston (City)*, the municipality resolved to move in-camera to discuss “legal matters”, without more specifics. The City argued that the *Municipal Act* required only that the municipality cite the applicable section in section 239 of the *Act* (although admitting that it did not even do that in the matter being contested). The Court disagreed, indicating that:

In the circumstances of this case, I do not think that the description “legal matters” is sufficient. In my view, the clear legislative purpose informing s. 239 is to maximize the transparency of municipal governance so far as that as possible in the circumstances.

 …

The respondent argues that s. 239(4)(b) requires that the resolution do no more than state the exception in s. 239(2) relied on to justify closing the meeting to the public. However, in my view, if the legislative intent was to require no more than that, it would have been easy to say so in s. 239(4)(b). The notion of “the general nature of the matter to be considered” suggests more fidelity to transparent governance than that, while recognizing that a full description of the matter to be considered cannot be revealed to the public because of the very need to go into closed session.

 …

Reading subsections (2) and (4)(b) together in the context of the desirability of

open municipal government, I think that the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public… At the very least, “legal matters” is inadequate to state the general nature of the matter to be considered at the closed meetings.[[4]](#footnote-4)

In maximizing the information available, while not undermining the reason for excluding the public, council, local boards, and its committees respect the principles of open and transparent government. These principles are at the core of the open meetings provision of the Municipal Act.

Council, committees and local boards should not rely only on the legislative exemption, but also describe the general nature of the subject matter to be discussed in closing, or proposing to close, a meeting, whenever possible.

1. **Closing All or Part of a Meeting**

Section 239(2) of the *Municipal Act* provides that “all or part of a meeting” may be closed to the public if the subject matter under discussion relates to one of the listed exemptions to the open meetings rule.

That does not mean that the whole meeting must be closed to the public. Only that portion of the meeting that is subject to the exemption can be closed. Best practice is for a council, committee, or local board to discuss as much as it can in an open meeting and go in-camera only on those portions of the subject matter that properly meet the exemptions criteria.

If labour relations implications needed to be discussed with Council before it made a decision on the Proposal from LUSI, Council could have resolved into closed session for that narrow discussion only. The balance of the discussion, including the services and price to be paid for ORO and consulting services from Lakefront Utility Services Inc. could have been held in Open Session.

This best-practice approach of closing only portions of the discussion to the public, and only doing so when absolutely necessary, will support the aims of the Municipal Act requiring openness and transparency in municipal decision-making.

1. **Reporting Out**

Although not stipulated in the Municipal Act, it is appropriate – and a best practice - for a council, local board, or committee of either to report out from its closed sessions. At minimum, the reporting out should include:

(i) the fact that the council, committee, or local board met in closed session (with the time that it resolved into closed session and the time that it adjourned back into open session);

(ii) the specific exemption(s) under the Municipal Actfor which the body was permitted to meet in closed session;

(iii) the general nature of the item(s) discussed;

(iv) any pecuniary interests disclosed; and

(iv) any direction emanating from the closed session, worded in a manner which enhances openness and accountability while preserving the confidential nature of the discussion.

**VII. PUBLIC REPORT**

We received full co-operation from all parties that we contacted and we thank them.

This report is forwarded to the Council of the Township. 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)
3. Information and Privacy Commission Order MO-2468-F; re: City of Toronto (October 27, 2009). [↑](#footnote-ref-3)
4. *Farber v. Kingston (City)*, 2007 ONCA 173 (CanLII) at paras 19-21. [↑](#footnote-ref-4)