**REPORT TO**

**THE CORPORATION OF THE CITY OF MARKHAM**

**REGARDING THE INVESTIGATION OF THE MEETING OF THE MARKHAM SPORTS, ENTERTAINMENT AND CULTURE CENTRE SUB-COMMITTEE OF**

**FEBRUARY 11, 2013**

1. **COMPLAINT**

The Corporation of the City of Markham (“City”) received a complaint on March 25, 2013 about a closed meeting of the Markham Sports, Entertainment and Culture Centre Sub-Committee (“MESC”) held on February 11, 2013. The essence of the complaint is that the holding of a closed meeting was in contravention of the open meetings provision 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 City 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).

1. **INVESTIGATION**

Documents provided by the City and reviewed during the course of the investigation included the City’s Procedure By-law, the Agendas and Minutes of the open and closed meetings of the MESC, and other relevant documentation. The City Solicitor and City Clerk were consulted during the course of the investigation.

**BACKGROUND**

1. **The Markham Sports, Entertainment and Culture Centre Sub-Committee**

The MESC is a sub-committee of the General Committee of Council. On February 11, 2013 it was comprised of seven Members of Council, including the Mayor and Deputy Mayor.[[3]](#footnote-3) The mandate of the MESC was “to provide recommendations specifically related to the proposed Markham Sports, Entertainment & Cultural Centre to be located in Markham Centre and to provide recommendations on any other directly related development.”[[4]](#footnote-4)

1. **Agenda for the MESC Meeting of February 11, 2013**

The Agenda for the February 11, 2013 meeting contained an item intended to be dealt with in-camera listed as:

“**3.** In **Camera Matters**

That, in accordance with Section 239 (2) (a) of the *Municipal Act*, the Markham Sports, Entertainment and Cultural Centre Sub-Committee resolve into an in-camera session to discuss the following confidential matters:

- The security of the property of the municipality”

According to the City’s Council/Committee Coordinator, a revised agenda was issued to the Members of the Sub-Committee and the public at the open meeting of the MESC on February 11, 2013. The subject item was listed as:

“**3.** In **Camera Matters**

That, in accordance with Section 239 (2) (a) of the *Municipal Act*, the Markham Sports, Entertainment and Cultural Centre Sub-Committee resolve into an in-camera session to discuss the following confidential matters:

- The security of the property of the municipality

- Advice that is subject to solicitor-client privilege, including communications necessary for that purpose”

1. **Minutes of the MESC Meeting on February 11, 2013**

The Minutes for the MESC Meeting of February 11, 2013 indicate that the meeting commenced at 12:14 p.m. in open session. At 12:15 p.m., the meeting went into closed session to discuss the subject item. It resolved back into open session at 2:42 p.m. The meeting then immediately adjourned.

1. **Agenda for the Closed Meeting MESC Meeting of February 11, 2013**

The subject agenda item was identified on the revised “Confidential Agenda” in the same manner as that on the revised open meeting agenda. The item specified that the discussion would include an individual associated with the Markham Sports, Entertainment & Cultural Centre proposal.

1. **Minutes of the Closed Meeting of the MESC Meeting on February 11, 2013**

The Minutes for the In-camera (closed) Meeting of the MESC on February 11, 2013 indicate that the MESC received a deputation from individuals associated with the Markham Sports, Entertainment & Cultural Centre proposal. Discussion occurred between members of the MESC and these individuals.[[5]](#footnote-5) City staff answered questions from members of the MESC relating to the issues under discussion. The third party individuals were present throughout the whole meeting.

1. **ANALYSIS AND FINDINGS**

Three reasons were cited by the City to Amberley Gavel as to why the agenda item was intended to be dealt with in closed session:

(a) The subject matter dealt with security of the property of the municipality, and could be exempt from the open meetings rule by virtue of section 239(2)(a) of the *Municipal Act*, since it involved a potential long-term lease of a City facility; and

(b) The City Solicitor would be called upon to provide legal advice that would be subject to solicitor/client privilege under section 239(2)(f) of the *Municipal Act*; and

(c) There was an agreement between the municipality and a third party not to divulge confidential information belonging to that third party.

Each of those reasons will be canvassed in light of the *Municipal Act*.

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

The City asserted that the subject matter of the closed meeting dealt with the security of the property of the municipality or local board and, therefore, was exempt by virtue of section 239(2)(a) of the *Municipal Act*. The City contended that it is dealing with the potential long-term lease of a City facility and that it routinely deals with such issues in closed session.

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...”[[6]](#footnote-6)

Since the legislative aims of the *Municipal Freedom of Information and Protection of Privacy Act (“MFIPPA”)* are similar but not identical 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 MESC must be found to have discussed in closed session considerations related to protection of property from loss or damage in order to comply with section 239(2)(a) of the *Municipal Act*. A review of the Minutes of Confidential Meeting of the MESC indicates that the matters discussed did not relate to the protection of the municipality’s property from loss or damage. Hence, section 239(2)(a) of the *Municipal Act* does not apply to the meeting in question.

In terms of the potential harm to the municipality’s financial and economic interests, the IPC concluded:

“In coming to this conclusion, I recognize that this interpretation fails to prevent a harm which one might expect the Legislature to have addressed; premature disclosure of a municipality’s bargaining strategy when attempting to buy or sell assets other than land [i.e. sale of street and expressway lights]. The result of this “plain meaning” interpretation is that section 239(2) protects the confidentiality of negotiations for the purchase or sale of municipally-owned land (**under section 239(2)(c)**), but not of other municipally-owned assets [emphasis added].”[[7]](#footnote-7)

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

The City contends that one of the reasons that the MESC met in closed session was that it was dealing with a potential long-term lease of municipal property. Amberley Gavel accepts that negotiations about the terms and conditions of long-term leases of municipal property might fall within the exemption of the *Municipal Act* respecting “a proposed or pending acquisition or disposition of land” (section 239(2)(c)). Although the MESC did not invoke this exemption to deal with the subject matter under consideration, for completeness of our report, this exemption will be canvassed.

The purpose of section 239(2)(c) is to allow a council or local board to give instructions to staff, a lawyer, or its agent (collectively, “agent”) in closed session respecting the acquisition or disposal of land within certain parameters. It makes sense that a council or local board would not have open public discussions about its negotiating strategy, most specifically the price it is willing to pay for lands that it wants to acquire title to or receive for lands that it wants to dispose of (including through a long-term leasing arrangement).[[8]](#footnote-8) Open disclosure of the price that a municipality is willing to pay for acquisition of land, or willing to accept for disposal of land, could detrimentally affect the market value of the property. Potential purchasers or sellers of land ought not to know what value a council is willing to accept or pay. The exemption under the *Municipal Act* protects the municipality’s economic interests by not compromising the municipality’s bargaining position. Hence, the discussion can be held in closed session.

It would appear from the reading of the Minutes of the In-Camera Meeting of the MESC on February 11, 2013 that the MESC was not confidentially discussing its negotiating strategy, although it was discussing certain concerns respecting a potential deal as between the parties. Most importantly, however, it was having the discussion in the presence of the very party with which it was purporting to negotiate.

We do not believe that it is a proper interpretation of section 239(2)(c) that a council can negotiate behind closed doors with the very corporate entities (or their personal representatives) with which they wish to enter into a long-term lease. There is no provision in the *Municipal Act* that allows a council to negotiate behind closed doors with third parties. As a result, the exemption to the *Municipal Act* in section 239(2)(c) can not apply to the closed meeting of the MESC on February 11, 2013.

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

The City also indicated that the subject meeting was closed to the public under Section 239(2)(f) of the Municipal in that the MESC would be receiving advice that is subject to solicitor-client privilege.

The Supreme Court of Canada recently considered the nature of the solicitor-client privilege in *Blank v. Canada (Minister of Justice)*[[9]](#footnote-9):

“The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients’ cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.”

A municipal council, committee, or local board must be able to confide in its solicitor on all legal matters and to have “full, free, and frank discussions”. This is necessary to ensure that the communication between the solicitor and the council, committee, or board, as the client of the solicitor, is not going to be revealed in a public forum to third parties. That is the purpose of solicitor-client privilege and is the reason why a council, committee, or local board is permitted to go into closed session to deal with a matter involving solicitor-client privilege.

Most importantly, the rationale for solicitor-client privilege is to ensure that the strategic legal advice of the solicitor is not divulged to the very party with which the council, committee, or local board is dealing.

Three criteria are necessary to establish the existence of solicitor-client privilege: (1) a communication between solicitor and client, (2) which entails seeking or giving of legal advice, and (3) which is intended to be confidential.[[10]](#footnote-10)

The client in this case is the municipality and discussions with its internal solicitor can be solicitor-client communications. The City Solicitor was asked to provide certain advice during the subject MESC meeting, albeit apparently in the form of information rather than legal guidance. For the purposes of that information, solicitor-client privilege can be established.

However, it cannot be said that the information was “intended to be confidential” when the party against whom solicitor-client privilege can be asserted is in the meeting at which the information is divulged. In these circumstances, solicitor-client privilege has been waived.

Solicitor-client privilege can be waived, either advertently or inadvertently. Where legal advice of any kind is sought from a legal adviser in his or her capacity as such, the com­munications made in confidence by or to the client are permanently protected from disclosure by either the client or the legal adviser, except if the protection against disclosure is waived by the client. As a result, when a municipal council, committee, or board seeks or receives legal advice on a matter, whether orally or in writing, that advice is protected by solicitor-client privilege unless the municipal council, committee, or board permits disclosure of the advice or of any communication dealing with the advice. Absent a waiver of solicitor-client privilege, the *Municipal Act* exemption in section 239(2)(f) allows a council, committee, or board to seek or receive legal advice in a closed meeting.

Even if solicitor-client privilege could be asserted over the information divulged by the City Solicitor at the subject meeting, the privilege was waived by the MESC (as client) when it invited the third parties into the meeting room. It is our opinion that the benefit of the *Municipal Act* exemption dealing with solicitor-client privilege was waived by the MESC when it allowed third parties (i.e. parties other than the client, the client’s staff or agents and the solicitor) to be in attendance at or the entire meeting in which the information that could be subject to solicitor-client privilege was divulged. As a result, the exemption to the *Municipal Act* in section 239(2)(f) does not apply to the closed meeting of the MESC on February 11, 2013.

1. **A Confidentiality Agreement**

The City indicated that there is an agreement between the municipality and a third party not to divulge confidential information belonging to that third party. As a result, it was contended that all discussions between the MESC and the third party have to be done in closed session.

We were not provided with a copy of the confidentiality agreement, nor were we given specific details about its content or the extent of the cloak of confidentiality.

No documents were handed out at the subject meeting, either by staff or the third party, which contained confidential information, as far as we could determine. Further, it appears from a reading of the Minutes of the In-Camera Meeting of the MESC that much of the information discussed in the meeting did not involve third-party proprietary commercial information. Indeed much of the information was already in the public domain.[[11]](#footnote-11)

While we appreciate that a municipality is concerned about divulging third-party confidential information, there is no exemption in the *Municipal Act* that allows a council, committee, or local board to go into closed session solely to receive or discuss third-party commercial information. [[12]](#footnote-12)

The only time it would be permitted to do so is if the subject matter under consideration can be discussed in closed session by virtue of a listed exemption in the *Municipal Act* (e.g. litigation or pending litigation).

Moreover, the Minutes of the In-Camera Meeting of the MESC of February 11, 2013 indicate that the third party was in attendance as a follow up to correspondence submitted to City Council on January 29, 2013. That correspondence was on a public agenda of City Council and was received in open session. Much of the discussion in the closed session of the MESC of February 11, 2013 dealt with substantially the very same information that was contained in the public correspondence or already available in the public domain. Since it was the third party itself who provided the information in a public forum in the first place, there would be no reason for the municipality to feel that it had to later discuss that same information behind closed doors.

The City cannot rely upon a broad confidentiality agreement with a third party to assert a statutory privilege to consider all discussions and information with respect to the subject matter at issue in a closed session.

1. **Closed Meetings are Discretionary**

One of the documents we reviewed was an e-mail to the Council/Committee Coordinator issued prior to the meeting by an interested person asking why the meeting was going to be held in-camera. The Council/Committee Coordinator replied that the meeting dealt with the security of the property of the municipality and that “*Municipal Act* requires that we go in-camera”.

The *Municipal Act* itself does not require a council, committee, or local board to go into closed session to consider a matter. The default position required by the *Municipal Act* is for all meetings to be conducted in open session. Section 239(1) stipulates that “Except as provided in this section, all meetings shall be open to the public.” The use of the word “shall” means that open meetings are mandatory unless an exemption to this rule applies.

The *Municipal Act* then provides for discretionary statutory authority to consider a matter in closed session if the subject matter properly and lawfully falls under a listed exemption to the open meetings rule. The Act says that a “meeting or part of a meeting may be closed to the public if the subject matter being considered” is one in which an exemption can apply. The use of the word “may” confers discretion on the council, committee, or local board to discuss the matter in closed session. However, discussion in closed session is not mandatory. Assuming that it is not breaching other laws (e.g. privacy laws), the council, committee, or local board can choose to discuss something in open session even if an exemption to the open meetings rule might otherwise apply.

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

A review of the Minutes of the In-camera Meeting of the MESC on February 11, 2013 shows that the amount of advice sought from or given by the City Solicitor to the MESC was quite limited in content, particularly in light of the discussion that appears to have occurred over a period of almost two and a half hours.

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.

This best-practice approach will foster the aims of the *Municipal Act* requiring openness and transparency in municipal decision-making, including discussions that lead up to such decisions.

**VI. CONCLUSION**

Amberley Gavel has concluded that the MESC breached the open meetings requirement of the *Municipal Act* in closing its meeting to the public on February 11, 2013 during discussion of the proposed Markham Entertainment, Sports and Cultural Centre.

**VII. RECOMMENDATIONS**

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

1. THAT City Council, its committees, and local boards be reminded that the exemptions from the open meetings rule of the *Municipal Act* are discretionary in nature. To the extent possible, all discussions should be held in open session unless the subject matter being discussed clearly and unequivocally falls within one of the listed exemptions in the *Municipal Act.*
2. THAT, even when a listed exemption applies to the subject matter under consideration, in-camera discussions be limited to those issues that need to be dealt with in closed session. To the extent that some issues may be dealt with in open session, City Council, its committees, and local boards should do so in order to encourage openness, transparency, and accountability.
3. THAT members of City Council, its committees, and local boards; and senior staff, in attendance at a closed session be mindful of the specific authority or authorities in the authorizing resolution(s) for the exclusion of the public and be prepared to draw it to the attention of the body when the discussion strays from the authority cited or if the authority ceases to exist during 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 City of Markham. 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.

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**AMBERLEY GAVEL LTD.**

**November 2013**

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. We note that the composition of the MESC was changed after the subject meeting to include all Members of Council. [↑](#footnote-ref-3)
4. Markham Sports, Entertainment and Cultural Centre Sub-Committee (MESC): Terms of Reference, accessed at [http://www2.markham.ca/markham/ccbs/indexfile/Agendas/2012/General/gc120523/MESC%20Terms%20of%20Reference%20attachment.pdf](http://www2.markham.ca/markham/ccbs/indexfile/Agendas/2012/General/gc120523/MSEC%20Terms%20of%20Reference%20attachment.pdf) (May 15, 2013) [↑](#footnote-ref-4)
5. It would be improper, for Amberley Gavel to discuss in this report the detailed substance of the closed meeting discussions, since disclosure would offend the principle of confidentiality that closed meetings protect. In addition, to do so would allow complainants and other third parties to receive information through a closed meeting investigation that they would otherwise not be privy to; that is not the function of a closed meeting investigation. That is not to say that the complainant in this instance was attempting to do that, but rather that the possibility could be contemplated in other instances. [↑](#footnote-ref-5)
6. Information and Privacy Commission Order MO-2468-F; re: City of Toronto (October 27, 2009). [↑](#footnote-ref-6)
7. *Ibid.* [↑](#footnote-ref-7)
8. However, the council or local board can only execute the actual acquisition or disposal of land by a by-law enacted in open session. [↑](#footnote-ref-8)
9. [2006] 2 S.C.R. 319, 2006 SCC 39 (“Blank”). [↑](#footnote-ref-9)
10. *Solosky v. The Queen*, [1980] 1 SCR 821 at 837. [↑](#footnote-ref-10)
11. See for example: http://www2.markham.ca/markham/ccbs/indexfile/Agendas/2012/General/gc120420/April%2020%20Project%2044%20FINAL.pdf [↑](#footnote-ref-11)
12. We note that there is a subsection of the *MFIPPA* which could apply to disclosure of information held by a municipality where such “disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization. This involves significant injury to competitive position, or significant interference with contractual or other negotiations. (cont’d) It requires some measure of the injury. The particular circumstances must be evaluated in each case. The institution or third party must present evidence that is detailed and convincing and must describe a set of facts and circumstances that would lead to a reasonable expectation that harm would occur it the information were released. Generalized assertions of fact without sufficient evidence do not meet the test.” *Freedom of Information (FOI) and Privacy Manual*, Ontario Ministry of Government Services, available at <http://www.mgs.gov.on.ca/en/infoaccessandprivacy/Practitioners/STDU_101437.html?openNav=foi_and_privacy_manual>. However, there is no such provision in the *Municipal Act* dealing with the exemption to the open meetings rule. [↑](#footnote-ref-12)