**REPORT TO**

**THE CORPORATION OF THE TOWN OF NEWMARKET**

**REGARDING THE MEETINGS OF COUNCIL ON MARCH 26, 2012 AND OF COMMITTEE OF THE WHOLE ON AUGUST 27, 2012 AND ON FEBRUARY 25, 2013**

1. **COMPLAINT**

The Corporation of the Town of Newmarket (“Town”) received a detailed complaint about three meetings:

1. A meeting of Town Council (“Council”) on March 26, 2012;
2. A meeting of Committee of the Whole on August 27, 2012; and
3. A meeting of Committee of the Whole on February 25, 2013.

The complainant requested an investigation into whether the Town breached the provisions of the *Municipal Act, 2001*[[1]](#footnote-1)(“Municipal Act” or “Act”). The complaint alleges that matters discussed at both the March 26, 2012 meeting of Council and the February 25, 2013 meeting of Committee of the Whole ought to have been discussed in closed session. The complaint further alleges that the matter discussed in the closed meeting of Committee of the Whole on August 27, 2012 was not an issue that was properly the subject of a closed meeting under the Municipal Act.

The request was sent to the offices of Amberley Gavel Ltd. for investigation.

1. **JURISDICTION**

The Town appointed Local Authority Services (LAS) as its closed meeting Investigator pursuant to section 239.2 of the Municipal Act. LAS delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Town.

1. **LEGISLATIVE BACKGROUND**

**(a) The Municipal Act and Closed Meetings**

Section 238(2) of the Municipal Actprovides that every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings. Section 239 of the 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 meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public (“open meeting exceptions”).

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 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).

(3.1) 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.

 …

Section 239 also requires that before a council, local board or committee move 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.

Subsections 239 (5) & (6) limit the actions that may be taken by the council, local board or committee at the closed session. Votes may only be taken at a closed meeting for procedural matters, giving direction or instructions to staff or persons retained by the municipality such as a lawyer or planner. It provides as follows:

Open meeting

[(5)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s5)  Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote. 2001, c. 25, s. 239 (5).

Exception

[(6)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s6)  Despite section 244, a meeting may be closed to the public during a vote if,

(a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and

(b) 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. 2001, c. 25, s. 239 (6).

**(b) Investigations under the Municipal Act**

Section 239.1 of the Municipal Act provides that a person may request that an investigation be undertaken 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.

We note that this section of the Municipal Act was not, in our opinion, to be used to complain generally about whether or not a council, committee, or board *ought to have moved into closed session* to deal with a matter under consideration. Rather, the section is designed to provide openness, transparency, and accountability to ensure that those bodies are not inappropriately shrouding their discussions and deliberations “behind closed doors”.

Two of the three issues in the complaint deal with whether or not the Council or Committee of the Whole *ought to have dealt with matters in closed session rather than in open session*.

1. **INVESTIGATION BACKROUND**

The investigation into the complaint began on March 25, 2013.

The Town Clerk was consulted during the course of the investigation. Documents provided by the Town and reviewed for the investigation included Agendas and Minutes of Meetings of the Council and Committee of the Whole, documents related to the matters under consideration, the Procedure and Notice By-laws, and applicable legislation. The Town Clerk also provided additional documentation respecting an ongoing review of the Town’s Procedure By-Law.

1. **The Town’s Procedure By-Law**

In accordance with section 238 of the Municipal Act, the Town has a Procedure By-Law that governs the calling, place and proceedings of meetings.

The Procedure By-Law[[2]](#footnote-2) provides for closed sessions of Council or its Committees if the subject matter being considered falls within those matters set out in Section 239(2) or Section 239(3) of the Act.[[3]](#footnote-3)

The Town is currently undergoing a comprehensive review of its Procedure By-Law, including consultation with the public and the Town’s boards and committees. The Town has also contracted with its Integrity Commissioner to provide input and advice into the draft revisions.[[4]](#footnote-4) The intent is to have the draft procedure by-law adopted by Council before its summer recess.

Moreover, the Town Clerk had planned a refresher training session for Members of Council on the provisions of the Municipal Act dealing with open and closed meetings.

1. **Meeting of Council on March 26, 2012**

The complaint alleges that Council should have discussed an item considered at the meeting in open session in a closed session.

No motion was made by any member of Council to go into a closed session with respect to the matter that was the subject of the complaint. Nor could we determine that there was any legislative requirement for Council to consider the matter in a closed session under the *Municipal Act 2001*, or any other Provincial Act.

We do not have any jurisdiction to consider this part of the complaint any further.

1. **Agenda for the Meeting of Committee of the Whole on August 27, 2012**

The complaint alleges that at the meeting of Committee of the Whole on August 27, 2012 Council went into closed session to discuss a personal matter involving an identifiable individual. The complainant indicates concern “with the manner in which the Corporation of the Town of Newmarket posted the meeting agenda prior to the session”.

The complainant further questions “whether a deceased person can have ‘personal matters’”.[[5]](#footnote-5) In addition, the complainant indicates that the “family of the deceased individual was public in having no objections to an open session as well”.

The Agenda for the both the public session and the closed session of Committee of the Whole indicated that the Committee would be discussing, among other items, an item dealing with the “Ray Twinney Complex (Personal Matter)”. This is the subject matter under issue in this complaint.

1. **Notice of the Meeting of Committee of the Whole on August 27, 2012**

The Town noted on its public meeting notices and on its public website that there would be a closed session of Committee of the Whole on August 27, 2012. Further the public agenda for the Committee of the Whole meeting released to the public website indicated that the Committee would resolve to convene into a closed session to discuss, among other items, a “Community Services Report – Recreation & Culture 2012-55 Ray Twinney Complex – (*Personal Matter*)”.

We cannot conclude that there was any error in the manner in which this item was posted prior to the closed session of Committee of the Whole.

1. **Minutes of the Meeting of Committee of the Whole on August 27, 2012**

The Minutes of the Meeting of Committee of the Whole on August 27, 2012 indicate that the Commission resolved into closed session for the purpose of discussing:

“Personal matters about an identifiable individual, including municipal employees or local board employees (*Personal Matter – Audit Committee, Sports Hall of Fame, Honorary Citizen, Municipal Asset Naming*); A proposed or pending acquisition or disposition of land by the municipality or local board (*Property Matter – Ward 5*); Labour Relations or Employee Negotiations (*Labour Relations*).

The specific item dealing with the “Ray Twinney Complex – (*Personal Matter*)” appears to have been excluded from this resolution.

However, that is at most a procedural irregularity and does not affect our conclusion about whether or not the Committee of the Whole could have discussed this item in closed session.[[6]](#footnote-6)

In fact, the municipality is required only to give notice of meetings, and only in limited circumstances with respect to Special Meetings pursuant to Section 240(b) is the subject matter of meetings required to be outlined in the notice by the Act.

1. **Minutes of the Meeting of Committee of the Whole in Closed Session on August 27, 2012**

The Minutes of the Closed Session of the Meeting of Committee of the Whole on August 27, 2012 indicate that the Committee voted on a motion with respect to the matter under consideration. That motion was carried. The resolution was not reported out in the open session of Committee of the Whole.

1. **Meeting of Committee of the Whole on February 25, 2013**

The complaint indicates that “During an open session of the Committee of the Whole, a report submitted by Newmarket’s Integrity Commissioner makes numerous references to the ‘President of the Redbirds Lacrosse Club’ whereas more appropriately, the term ‘an identifiable individual’ should have been used”.

A report dated February 21, 2013 from the Integrity Commissioner, entitled “Code of Conduct Complaint Investigation”, was considered by Committee of the Whole on February 25, 2013. The report’s content contains the title of the “President of the Redbirds Lacrosse Club”; however, the name of the individual holding this title has been identified in closed brackets as merely “[a named individual]”.

1. **ANALYSIS AND FINDINGS**
2. **Notice for the Meeting of Committee of the Whole on August 27, 2012**

As indicated above, the notice for the closed meeting of Committee of the Whole on August 27, 2012 was appropriately published and disseminated by the municipality.

1. **Meeting of Committee of the Whole on August 27, 2012**

We have noted that the subject issue in the notice was not specifically included in the omnibus motion to resolve into closed session on August 27, 2012. However, that does not render the meeting or the discussion invalid as long as the matters discussed in the closed session were covered by the resolution authorizing the closed session. We note that the authorizing resolution did do considerably more that cite the Section(s) of the Act authorizing the closed session.

The more substantial concern raised by the complaint is whether a council, or a committee or board of Council, can invoke the open meetings exceptions of the *Municipal Act 2001* to discuss information about an individual who is deceased. In this case, Committee of the Whole moved into closed session to discuss a report that contained personal information about a deceased person. The matter under consideration may have engaged personal opinions from Members of Council about the recommendations contained within the report. Committee of the Whole determined that it was permitted to invoke the open meetings exemption under the Municipal Act respecting “personal matters” given that it would be disclosing personal information about an identifiable individual and, perhaps, the personal opinions of others.

The term “personal matters” is not defined under the Act. However, its purpose is to ensure that there is no inappropriate disclosure of personal information by Members of Council during debate. To do otherwise might breach the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*[[7]](#footnote-7)(MFIPPA) prohibiting disclosure of personal information.

Personal information is defined under MFIPPA as:

“personal information” means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Without divulging the substantive information in the Closed Session report, we are satisfied that the Community Services (Closed Session) Report, Recreation & Culture #2012 -55, Ray Twinney Complex Sports Field Naming, disclosed personal information about an identifiable individual. We are also satisfied that, given the nature of the report, discussion could have ensued in closed session with respect to the “view or opinions of another individual” about an identifiable individual. Hence, the matter was one which was properly the subject of a closed meeting under the Act.

The complainant queries whether or not the exemption respecting “personal matters” applies to matters about a deceased person. Worded differently, the question is: *Do individuals lose the right to privacy of their personal information as a result of their death?*

The Information and Privacy Commissioner has ruled that personal information is and remains the property of a deceased person and cannot be divulged unless that disclosure is to a legally-designated personal representative (such as an Estate Trustee). Hence, we are of the opinion that the Municipal Act provisions respecting closed meetings for “personal matters” covers personal information about a deceased person.

The Committee of the Whole might have sought and received permission from the deceased person’s legal representative to divulge the deceased name and personal information. However, the Committee of the Whole could still be permitted to go into closed session if it wanted to discuss its members’ “views or opinions” given that it was deliberating about a matter that engaged information about an identifiable individual.

We have, therefore, concluded that Committee of the Whole properly invoked the exemption to the open meetings provisions of the Municipal Act when it considered the subject report.

We note that Committee of the Whole formally voted in closed session on the substantive matter. Under the Municipal Act votes may only be taken at a closed meeting for procedural matters or for giving direction or instructions to staff or persons retained by the municipality. The vote on the substantive matter was clearly more than just procedural or directive in nature. Hence, it was improper to take the vote in closed session. Nevertheless, the Committee of the Whole recommendation on the matter was formally considered at a Special Council Meeting on September 10, 2012 with Council resolving to take no further action on the item at the request of the family of the deceased individual. Therefore, the fact that the Committee of the Whole breached the voting provisions of the Municipal Act is moot.

1. **Meeting of Committee of the Whole on February 25, 2013**

In her report to Town Council, the Town’s Integrity Commissioner refers to the President of the Redbirds Lacrosse Club by title rather than by name. Indeed, she has deliberately refrained from using the individual’s name by the identifier “[an identifiable individual]” in her report. Having done so, she is respecting the requirement to hold personal information (the name of the individual) in private, while appropriately referencing the source of the information that she is citing.

Ontario’s Information and Privacy Commissioner has ruled on this very issue in a number of decisions, one of which is cited below:

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in their professional, official or business capacity is not considered to be “about the individual.” An individual’s name, where it appears in his/her capacity as an official of an organization or company cannot qualify as that individual’s personal information.[[8]](#footnote-8)

Thus, even if the Integrity Commissioner had used the name of the President of the Redbirds Lacrosse Club she would not have been in breach of privacy laws.

Moreover, the Municipal Act contains the following provisions relating to disclosure of information by an Integrity Commissioner:

If the Commissioner reports to the municipality or to a local board his or her opinion about whether a member of council or of the local board has contravened the applicable code of conduct, the Commissioner may disclose in the report such matters as in the Commissioner’s opinion are necessary for the purposes of the report.[[9]](#footnote-9)

The Information and Privacy Commissioner has ruled that the restrictions on disclosure of personal information contained in *MFIPPA* are superseded by the Integrity Commissioner’s discretion to disclose information pursuant to the Municipal Act.[[10]](#footnote-10) Therefore, the use of the individual’s title (and even their name) is warranted if the Integrity Commissioner feels that disclosure is necessary.

Recognizing that in this circumstance the discretion was entirely Council’s, we have concluded that Committee of the Whole should not have moved into closed session on February 25, 2013 in order to receive the report of the Integrity Commissioner, had it chosen to do so, merely because the report included the title of the president of a named organization.

1. **RECOMMENDATIONS**

Although we have found that the Town did not breach the provisions of the Municipal Act, we have several “best practice” procedural recommendations.

1. For greater clarity, when a council, a committee, or board is moving into closed session on various items, they should have a vote to move into closed session which clearly indicates the applicable exemption to the open meetings provision *for each item* and wherever possible the general nature of the matter to be discussed *for each item*. This clarity can be expressed in a single motion covering several topics.
2. Votes should only be taken at a closed meeting for procedural matters or for giving direction or instructions to staff or persons retained by the municipality, such as a lawyer or planner.
3. The best practice procedure after a closed session is that the chair of council, a committee, or board report out in a public session that the council, committee, or board met in closed session and that it dealt with an in-camera matter (e.g. “a matter dealing with personal matters about an identifiable individual, under s.239.2(c) of the Municipal Act”). To the extent that the chair can report out on what was decided in the closed session (e.g. “provided direction to staff on the matter”) without divulging the substance of the in-camera matter, he or she should do so to enhance transparency and public confidence.
4. **CONCLUSIONS**

We have concluded that Council for the Town of Newmarket and its Committee of the Whole have appropriately complied with the provisions of the Municipal Act respecting open and closed meetings for the three meetings at issue in this complaint.

We have made recommendations with respect to certain matters that came to our attention in the course of the investigation. We note, however, that Council has already received certain recommendations from staff on changes to the Procedure By-Law. Those recommended changes would address our recommendations. We commend Council and staff for taking all actions to further ensure openness, transparency, and accountability in deliberations of Council and its committee and boards.

1. **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 Corporation of the Town of Newmarket. 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 the Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.

May 2013

**Closed Meeting Investigator**

**AMBERLEY GAVEL LTD.**

**Nigel Bellchamber**

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**Per:**

1. S.O. 2001, c. 25 (hereinafter “Municipal Act” or “Act”). [↑](#footnote-ref-1)
2. *A By-Law to Govern the Proceedings of the Council and Committee Meetings, The Corporation of the Town of Newmarket*, By-Law No. 2008-54, dated September 29, 2008 (“Procedure By-Law”). [↑](#footnote-ref-2)
3. *ibid,* s.12. The Procedure By-Law lists all of the exceptions from section 239 of the Municipal Act. [↑](#footnote-ref-3)
4. The Integrity Commissioner had made recommendations for changes to the Procedure By-Law as a result of a recent investigation into a Council Code of Conduct violation. [↑](#footnote-ref-4)
5. The complaint further alleges that the City of Toronto “discussed a similar motion involving the same identifiable individual in an open session”. It is beyond the scope of our role to determine why and whether or not the City of Toronto might have done so in open session. [↑](#footnote-ref-5)
6. See *Farber v. Kingston (City)* (2007), 279 D.L.R. (4th) 409 (Ont. C.A.) (“*Farbe*r”), at para. 28 wherein the Ontario Court of Appeal held that procedural irregularities unconnected to the real decision at issue do not render the decision itself illegal. [↑](#footnote-ref-6)
7. R.S.O. 1990, c.F.31. [↑](#footnote-ref-7)
8. The Corporation of the City of Ottawa, IPC Order MC-040019-1/July 26, 2005. [↑](#footnote-ref-8)
9. *Municipal Act*,supra, note 1, at s.223.6(2). [↑](#footnote-ref-9)
10. City of Vaughan, IPC Order MC09-56/June 9, 2010. [↑](#footnote-ref-10)