**A REPORT TO THE COUNCIL OF THE CORPORATION OF THE TOWNSHIP OF SOUTHGATE REGARDING THE INVESTIGATION**

**OF PROCEDURE BY-LAW 85-2008 AND CLOSED MEETINGS OF THE COUNCIL HELD BETWEEN JANUARY 1, 2011 AND JUNE 30, 2011**

**THE COMPLAINT**

Pursuant to Section 239.1 of the Municipal Act (“the Act”), the Township of Southgate received a complaint respecting sections 6(h) and 6(r) of Procedure by-law 85-2008 (the procedure by-law) and closed meetings of the Council held between January 1, 2011 and June 30, 2011.

The main issues raised by the complainant were:

1. The Township of Southgate has no legal authority nor ability to enforce sections 6(h) and 6 (r) of the procedure by-law which provide for exclusion of a Council member from closed meetings and from receiving confidential information to be considered at closed meetings, or for charging a member of council with an offence for failure to comply with provisions of the closed meeting section of the procedure by-law. The complaint suggests these provisions exist for the purpose of intimidating members of council.
2. A closed “Information meeting”, as defined in the procedure by-law was held on April 6, 2011, in contravention of section 239 of the Municipal Act, as an information meeting is not contemplated by the Municipal Act and the procedure by-law does not provide for notice for Information meetings
3. Insufficient information was provided in publicly posted agendas and minutes for the public to have been properly notified and informed that the municipality was entering into a transaction to sell municipal lands in the Eco Park to Lystek for a 26 acres facility that will manufacture fertilizer from human sewage and offal materials
4. Insufficient information was provided in publicly posted agendas for members of the public to watch for minutes which would show that the municipality was entering into a transaction to sell municipal lands in the Eco Park to Forsythe, for a 20 acre contaminated soil remediation facility.
5. During the period of the complaint, closed meetings of the Council or Committee of the Whole were held with insufficient notice to the public.

**JURISDICTION**

The Township of Southgate 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 the investigation and report to the Council of the Township of Southgate. The Amberley Gavel review officer interviewed the Clerk, the CAO and the Mayor of Southgate. No interview took place with the complainant due to the comprehensive nature of the complaint which was clear and detailed.

**LEGAL BACKGROUND**

Procedural By-law:

Section 238 (2) of the Municipal Act requires that every municipality and local board shall pass a procedure bylaw for governing the calling, place and proceedings of meetings.

Section 238 (2.1) of the Municipal Act requires that the Procedure By-law shall provide for public notice of meetings.

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*.*

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 the matter to be considered at the closed meeting”.

Section 239 (3.1) states that

A meeting of a Council or local board or 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.

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**

Procedure By-law

Procedure By-law 85-2008 was adopted by the Council of the Township of Southgate on December 10, 2008. Section 6 of the procedure by-law relates to closed meetings.

Subsection 6 (g) states “The response of members to enquiries about any matter dealt with by Council at a closed meeting, prior to it being reported publicly, shall be “no comment”, or words to that effect and there shall be no other form of communication with the public at large.”

Subsection 6(h) states “Any violation of this regulation will result in exclusion of the offending member from future closed meetings of Council and that member no longer being provided with correspondence materials or information proposed to be dealt with by Council at a closed meeting.”

Subsection 6(p) states “No member shall release or make public any information considered at a closed meeting or discuss the content of such a meeting with persons other than members of Council or relevant staff members without the authorization of Council.”

Subsection 6(r) states “Any member who contravenes subsection (p) may be guilty of an offence and upon conviction is liable to a fine or penalty as provided for in the Provincial Offences Act.”

We are not aware of current legislation giving a Municipal Council the authority to exclude a member of Council from closed meetings or closed meeting information, nor are we aware of any action which might be brought under the Provincial Offences Act against a member of Council who revealed publicly information shared with Council confidentially at a closed meeting.

Closed Meetings

Procedure By-law 85-2008 provides for the Council of the Township of Southgate to meet as a Council on the third Wednesday of each month and as a Committee of the Whole on the first and fourth Wednesday of each month.

Sections 13 and 14 establish headings of Agendas of the Regular Council Meetings and Committee of the Whole Meetings, respectively, and each provide for a “Closed Meeting”, if necessary.

Township Council met as a Council or in Committee of the Whole, in closed meetings, 15 times during the complaint period of January 1st to June 30th, 2011. On April 6th, a closed “Information Meeting” was held.

Information Meeting

The Procedure by-law of the Township of Southgate defines an Information meeting as follows

 “Information Meeting” shall mean a gathering of Council for the purpose of disseminating or collecting information. A quorum is not required. A statement of proceedings shall be prepared, indicating the subjects discussed.

This is a confusing and inappropriate definition and it is not consistent with the Municipal Act requirements for meetings and minutes.

Notice of the closed Information Meeting on April 6, which is the subject of this complaint, was given by publication in the local newspapers. Information was provided in the notice with respect to the location and time of the meeting, and that the meeting would be closed to the public. No information was provided about the topic of the meeting except to say that its primary purpose was “disseminating or collecting information” and “educating members of the Council”.

The resolution adopted under Section 239 of the Act at the open meeting of Council which immediately preceded the closed Information Meeting indicated that the meeting would be closed for the purpose of educating the members. In addition, the resolution named two people who would be at the meeting, as well as the Economic Development Director, CAO and Clerk.

**ISSUES**

Procedure By-Law

Does the existence of subsections 6(h) and 6(r) in the Township’s procedure by-law contravene the municipal act? Is the intent of these sections to intimidate members of Council? Are these subsections of the procedure by-law enforceable?

Does the Procedure by-law meet provisions of the Municipal Act by including information about the manner in which notice is given to the public of meetings of the Council?

As previously noted, there is no general legislative authority giving Southgate Township Council the authority to prevent members of council from attending closed meetings, refusing access to confidential information provided to other members, nor authority that exists to allow charges to be laid against members of council for contravention of subsections section 6(h) or 6(p) of the Procedure By-law.

It was the recollection of all three of those interviewed that there has not been any consideration of these particular provisions of the procedure by-law for a very long time, if indeed they have ever been discussed or raised, by or among the Clerk, CAO or Mayor. Although they should be removed as part of a review of the Procedure By-law, they apparently were not a factor in the other matters that were subject of this complaint.

Section 13(a) of the Procedure By-law sets out the timing for release to members of Council of the agenda for Council meetings but makes no reference to the manner in which notice is given to the public of council meetings.

The steps which were customarily taken to give notice to the public include publication of the agenda on the Township website by Monday at approximately 12:00 noon prior to a meeting on Wednesday, as well as provision for media or any other member of the public to request copies of all agenda attachments prior to the meeting. Hard copy agendas were available and waiting for the media to pick up prior to meetings.

The Procedure by-law must be reviewed with the intent to include a clear statement of the manner in which notice is provided to the public of Township meetings, regardless of whether they are Council or Committee, Special or Regularly Scheduled, Open or Closed, in compliance with subsection 238(2.1) of the Act.

The general Notice Policy of the Township of Southgate does not set out the manner in which the public is to be notified of meetings of the Council or Committee of the Whole, and in fact defers to the Procedure By-law of the Council, which is, as mentioned, silent for that purpose.

Information Meetings

Was the April 6, 2011 “Information Meeting” of the Township of Southgate held in contravention of the Municipal Act? Was proper notice given? Was the subject matter one of the exemptions which allows a meeting to be closed?

We have already concluded that the Municipality`s properly adopted notice provisions to the public of meetings were non- existent even though the practice may have been reasonable.

Information meetings have been used by the Township of Southgate generally for the purpose of sharing information. But any meeting, of a Council or a Committee thereof, despite the title of the meeting, must meet the provisions of the Municipal Act and the municipality’s properly constituted procedure by-law.

No information was provided to the public about the nature of the topic to be considered in the notice of the April 6 information meeting published in local media except that the purpose was to disseminate and collect information and educate the members of Council. The resolution adopted at the public meeting immediately preceding the closed Information meeting indicated that the meeting was for the purpose of “educating” the members. It is presumed, therefore, that the exemption being cited to authorize the closed meeting is section 239 (3.1) although, if that is the case, it should have been noted. That particular provision puts forth a two part test, first that the meeting is for the purpose of educating or training the members and that no member discusses or otherwise deals with any matter in a way that materially advances the business or decision making of the Council.

As the resolution indicates, two men were present at the closed meeting who are now known to represent Lystek, a fertilizer manufacturer. At the closed meeting, information was provided about the company, its processes and its plans. No resolution was adopted nor any decision apparently made. However, minutes of the meeting indicate that a member “suggested that the company present an offer to purchase and requested a site visit to the plant located in St. Mary’s”. We are satisfied that no decision was made with respect to the sale of land to Lystek, but do conclude that the comfort level of the manufacturer had been raised, and in that respect, that a member attempted to materially advance the business or decision making of the municipality on the matter.

Our conclusion is that the closed meeting did not properly meet both of the required conditions of subsection 239 (3.1) of the Municipal Act.

Closed Meetings – January 1 to June 30, 2011

The published agendas of each of the open meetings at which closed meetings were called included reference to a closed meeting. The information provided when the regular meeting Agendas were published was inconsistent in the level of information provided, and on some occasions different than the general nature of the matters to be considered at the meeting as stated in the resolution adopted prior to holding the closed meeting. Although not required for other than Special Meetings of Council, it is best practice to disclose the subject matter on each Agenda item in order to provide transparency for the public.

In many cases, it was obvious that effort was made to provide more information in the resolution excluding the public than simply a recitation of the statutory exception. This is an appropriate practice and is an indication of an attempt by the Council and staff to meet the intent of the law.

However, a review of the minutes of both the open and closed meetings on the fifteen occasions when closed meetings of the Council were held revealed the following:

On three occasions, issues related to the disposition of property were appropriately considered at the closed meetings, citing exemption 239(2)(c), with no vote being taken at the closed meeting. Immediately following the closed meeting, in open session, resolutions were adopted to approve preparation of a “willing host letter” (March 2, 2011), an Agreement of Purchase and Sale (May 18) and another Agreement of Purchase and Sale (June 15, 2011). Such practice is permitted and specific notice of resolutions or matters considered in open session is not required at properly constituted public meetings

On ten occasions, the exemption cited in the resolution adopted at the open meeting was subsection 239(2) (b), personal matters about an identifiable individual including municipal or local board employees. It is not normal to identify the individual(s).

But, in seven of these cases, the subject being considered involved a company rather than an individual, and 239(2)(b) proved to be an inappropriate exception.

Three of these topics were possible eligible exceptions under a different subsection.

Four of these exceptions cited under section 239(2)(b) applied to a vacancy rebate application by a company which is not an eligible exception under section 239.

Exception 239(2)(b) was used on one occasion to permit discussions about a tile drainage loan, which is not appropriate under section 239.

On two final occasions this exception was cited to permit consideration of complaints. One of the complaints was by an individual property owner about a water bill deemed to be too high, and which would not meet the test of personal information about an individual.

The second occasion was by one property owner about another and might have met the test of including personal information about an identifiable individual.

On two occasions, discussion took place regarding the proposed disposition of land with no reference to that topic being made in the resolution adopted prior to the closed meeting although they would be eligible exceptions within 239(2)(c).

On one further occasion, consideration was given to a matter which might have been considered an exception under 239(2)(e) but no reference of the matter was made in the resolution adopted prior to the closed meeting.

On four occasions, questions were raised by members of Council, an update was provided by the CAO or direction sought by the CAO on what appeared to be minor matters, but for which no exception was cited in the resolution adopted prior to the closed meeting, and which do not appear to be matters which would fall within the exceptions of S.239.

**CONCLUSIONS**

Accordingly, as a result of its investigation of the complaints filed, Amberley Gavel Ltd. would summarize its findings as follows:

1. The procedure by-law of the Township of Southgate is insufficient in that it does not provide for the public notice of Council meetings.
2. Subsections within the procedure by-law suggesting the exclusion of members of council from closed meetings, or withholding confidential closed meeting material as a result of contravening the closed meeting section of the by-law, or indicating that a member may be subject to charges for contravention of the same section did not affect the consideration of the matters which are the subject of this complaint. However, these sections should be removed and consideration be given to including the issue of confidentiality within a councillor Code of Conduct under Section 223.2 of the Municipal Act.
3. The April 6 closed Information meeting of the Southgate Council was not in compliance with the Municipal Act. The exception under subsection 239(3.1) did not apply in retrospect because the two part test was not met, that is while the meeting was held for the purpose of educating the members, it appears that the meeting a member did materially advance the business or decision-making of the council. Care during 239(3.1) closed meetings must be exercised by all members of Council in attendance to ensure compliance

1. On numerous occasions the authorizing resolutions where members of the public were excluded from meetings were incorrect, inappropriate, or ignored. These meeting were improperly closed.
2. Discussions held regarding the disposition of property specifically referred to in the complaint, were held at closed meetings with an appropriate citation of the exception of the proposed or pending disposition of land by the municipality. While notice of any meeting is a requirement under the Act, notice of the subject matter(s) to be discussed at that meeting is not necessary unless it is a Special Meeting of the Council.

**RECOMMENDATIONS**

While council and the administration may have been behaving in what they believed to be an appropriate manner, it is apparent that there was a lack of understanding of relevant legislation by members of council and staff. The following recommendations, if implemented, would assist council and the administration in serving their community with greater transparency, bring procedures into compliance with the Act and thus reduce the exposure of their corporate decisions to court action.

1. The Township’s Procedure By-law is out of date, includes inappropriate sections and omits others as noted above, and thus is in need of a review and rewrite. This will clarify processes, better define relationships and create stronger links to the community.
2. Council should commit to a training plan for the organization with respect to open and closed meetings. Proper training will afford both staff and members of Council common knowledge of what is required by law and also what is best practice for a municipal corporation in Ontario.
3. As a general rule, Council should not invite selected members of the public into closed sessions of Council. To do so, regardless of the reason cited, gives the appearance that a Council is negotiating directly with a party, outside of public view, a procedure not permitted by the Municipal Act.
4. The chair of Council must be vigilant in ruling out of order items being raised at a closed meeting which have not been considered in the authorizing resolution adopted prior to the meeting.

Amberley Gavel Ltd. would like to thank the Mayor, CAO and Clerk of the Township who were interviewed during the course of this investigation. Special note should be made of the thoroughness and diligence of the Municipal Clerk in providing the considerable amount of detailed information necessary for this investigation

This report is provided to Council in accordance with the requirements of the Municipal Act. We recommend it be placed on the agenda of the next regular meeting of Council, or on the agenda of a special meeting called earlier for the purpose of receiving it.

May 2012

Nigel Bellchamber

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AMBERLEY GAVEL LTD.