

**REPORT TO  
THE CORPORATION OF THE MUNICIPALITY OF GREATER SUDBURY  
REGARDING ALLEGATIONS OF AN IMPROPERLY CLOSED MEETING OF  
THE COUNCIL FOR THE CITY OF GREATER SUDBURY  
ON JULY 31, 2014**

**I. COMPLAINT**

Amberley Gavel Ltd. (“Amberley Gavel”) received a complaint on August 1, 2014 about a closed (in-camera) meeting of The Corporation of the City of Greater Sudbury (“Municipality”) Council (“Council”) held on July 31, 2014. The essence of the complaint is that Council should not have held a closed meeting to “suspend the Auditor General Department until after the October 27, 2014 municipal election”. The complaint alleges that the closed meeting was in contravention of the open meetings provision of the *Municipal Act, 2001*<sup>1</sup>, as amended by Bill 130<sup>2</sup> (“*Municipal Act*” or “*Act*”).

The Municipality was advised of the complaint by Amberley Gavel on August 5, 2014.

**II. JURISDICTION**

The Municipality 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 the Council of the Municipality.

**III. BACKGROUND**

Section 238 of the *Municipal Act* provides that all municipalities must have a procedure by-law governing the calling, place, and proceedings of meetings, including a provision for public notice of meetings.

---

<sup>1</sup> S.O. 2001, c. 25.

<sup>2</sup> Bill 130: *An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”).

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. (1) Except as provided in this section, all meetings shall be open to the public.  
2001, c. 25, s. 239 (1).

#### **Exceptions**

(2) 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).

Section 239(4)(a) of the *Municipal Act* requires that, “before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting”.

Further, section 239(6) of the *Municipal Act* prohibits the taking of a vote in a closed meeting unless:

- a) the *Act* 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.

#### **IV. INVESTIGATION**

The investigation into the complaint began on August 5, 2014 with a request to the Municipality for background documents. Documents provided by the Municipality and reviewed during the course of the investigation included the Municipality's Procedure By-law, the Agendas and Minutes of the open and closed meeting of Council at issue, and other relevant documentation.

The Mayor, the City Clerk, the City Solicitor, the Assistant City Solicitor, and the Director of Human Resources & Organizational Development were consulted during the course of the investigation. As a result of these interviews, we deemed that it was not necessary to interview others who were in attendance at the subject meeting. However, Members of Council were invited to speak to the investigator if they desired.

It should be noted that 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" (Section 239.2). Accordingly, the role of the investigator is to examine and report on the *process* and not on the substance, timing, or community impact of the decision(s), made at closed or open meetings of a council, committee, or local board. Our authority is limited to assessing whether or not the *process* used to reach the decision conformed to the Municipal Act or the Municipality's procedure by-law, not whether or not the Council made the right decision at the right time.

#### **V. BACKGROUND**

##### **(a) Auditor General's Request for an Unpaid Leave of Absence**

The Auditor General for the Municipality applied for an unpaid leave of absence in order to register and run as a candidate for Mayor of the City of Greater Sudbury in the 2014 Municipal Election. The leave of absence was to begin on the day he would seek nomination and to end on the day of the Municipal Election (October 27, 2014). The Auditor General was, at the time of the request, an employee of the Municipality.

The *Municipal Elections Act, 1996*<sup>3</sup> provides that an employee of a municipality may be eligible to be a candidate for a municipal election. The applicable sections of the *MEA* are:

An employee of a municipality or local board is eligible to be a candidate for and to be elected as a member of the council or local board that is the employer if he or she takes an unpaid leave of absence beginning as of the day the employee is nominated and ending on voting day. (Section 30(1))

---

<sup>3</sup> Municipal Elections Act, 1996, SO 1996, c 32, Sch, <<http://canlii.ca/t/kpmw>> retrieved on 2014-12-01 ("MEA").

The employee shall give the council or local board written notice, in advance, of his or her intention to take unpaid leave under subsection (1). (Section 30(2))

The employee is entitled, as of right, to take unpaid leave under subsection (1). (Section 30(3))

**(b) Municipality's Procedural By-law**

The Municipality has a procedure by-law which governs the calling, place, and location of meetings. The Procedure By-law provides that the Mayor may call a Special Meeting of Council at the time, date, and location chosen by the Mayor.<sup>4</sup> Notice for the meeting is by way of a published agenda which is distributed to Members of Council, staff, and other persons as the Chair of the meeting in question or the Clerk deems necessary.<sup>5</sup> A copy of the meeting agenda is posted on the Municipality's website as public notice of the meeting.<sup>6</sup>

The Procedure By-law stipulates that all meetings shall be open to the public, unless one of the listed *Municipal Act* exemptions applies to the subject matter under consideration. The By-law also stipulates that before holding a closed meeting Council must state by resolution the (a) fact of holding a closed meeting and (b) the general nature of the matter to be considered. In addition, the By-law mirrors the provisions of the *Municipal Act* respecting the taking of votes in closed session.

**(c) Notice of the Meeting**

The Meeting Agenda was posted on the Municipality's website by the Clerk.

**(d) Agenda for the Special Meeting of Council on July 31, 2014**

The Agenda for the Meeting of Council on July 31, 2014 indicated that the Special Meeting was called by the Mayor and that Council would move into Closed Session "to deal with one Personal Matter [Identifiable Individual(s)] in accordance with the *Municipal Act*, 2001, S.239(2).":

**(e) Minutes of the Meeting of Council on July 31, 2014**

The Minutes of the Meeting of Council on July 31, 2014 in open session indicate that Council moved into Closed Session at approximately 4:20 p.m. to deal with the "Personal Matter (Identifiable Individual(s))".

At the conclusion of the Closed Session, Council rose and reported as follows:

---

<sup>4</sup> Procedure By-law 2011-235, section 7.09.

<sup>5</sup> *ibid.* sections 8.01 and 8.02.

<sup>6</sup> *ibid.* section 8.03.

Deputy Mayor Rivest, as Chair of the Closed Session, reported that Council met in Closed Session to deal with one Personal Matter [Identifiable Individual(s)] in accordance with the *Municipal Act*, 2001, S.239(2) and that, pursuant to Section 239(6), direction was given regarding the matters in question. The Deputy Mayor advised that Council had asked him to report that leave has been granted to the Auditor General as was requested.

**(f) Agenda for the Closed Session of Council on July 31, 2014**

The Agenda for the Closed Session of Council on July 31, 2014 indicated that Council would receive a presentation by the Municipality's Director of Human Resources & Organizational Development on the subject of the Auditor General's request for an unpaid leave of absence. The presentation also outlined options for staffing the Auditor General's Office during the leave period.

**(g) Minutes for the Closed Session of Council on July 31, 2014**

The Minutes for the Closed Session of Council on July 31, 2014 indicated that Council went into closed session at 4:20 p.m. and received a presentation by the Director of Human Resources & Organizational Development. As a result of that presentation, and of advice that Council received from its Assistant City Solicitor, Council provided direction to the Mayor and the Director of Human Resources & Organizational Development.

**VI. ANALYSIS AND FINDINGS**

In summary, the complaint alleges that Council should not have been in closed session to discuss and decide upon its options for staffing the Auditor General's Office during the leave period.

It should again be underscored that our scope is limited to whether or not Council followed the provisions of the *Municipal Act* and its own Procedure By-law. We do not have the authority to comment on whether or not Council chose the best process to enact a decision, or whether or not Council made the correct substantive decision on an issue. Our role is confined to interpreting whether or not Council followed the processes outlined in either or both of the *Municipal Act* or the Municipality's Procedure By-law.

**(a) Auditor General's Request for an Unpaid Leave of Absence**

The *Municipal Act* provides that before holding a closed meeting, the council, committee, or local board should state the "general nature of the matter to be considered". It does not provide any further guidance in terms of how specific a council, committee, or local board must be in terms of the disclosing the "general nature".

The Ontario Court of Appeal has stated that the information provided should be “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”<sup>7</sup>.

The agenda item for the open session of Council merely indicated that Council would move into closed session to deal with “one personal matter” involving an identifiable individual. While we appreciate that discussions of an employee’s leave of absence could properly be held in closed session, in this particular case the Auditor General was entitled to the leave “as of right” under the *MEA*. We see no reason why the item could have been titled “Auditor General’s Request for an Unpaid Leave of Absence and the Impact on the Auditor’s General’s Office”. This would have maximized the information available to the public while not undermining the reason for excluding the public.

Nevertheless, the exclusion of the public from the meeting was, in our opinion, appropriate given that both the Director of Human Resources & Organizational Development and the Assistant City Solicitor were providing advice to Council with respect to a personal matter. Thus, even if the agenda item had been titled with more specificity, Council would still have been permitted to have a closed meeting in accordance with the exemption dealing with personal matters about an identifiable individual.

Since the *Municipal Act* does not stipulate the degree to which the “general nature” of the matter is to be divulged, we cannot conclude that the Municipality breached the provisions of the *Municipal Act*.

**(b) Options for Staffing the Auditor General’s Office During the Leave of Absence**

It is clear from our interviews and review of documentation that Council discussed and decided upon options for staffing the Auditor General’s Office during his unpaid leave of absence. Those options engaged discussions about identifiable individuals and advice that was, in our opinion, subject to solicitor/client privilege.

Council is permitted, under section 239.(2) of the *Municipal Act*, to close a meeting or part of a meeting to the public if it is dealing with a personal matter about an identifiable individual. Council must balance its obligations under the *Municipal Act* to be open and transparent against its legal obligations, as an employer, to safeguard the privacy of its employees and its employment decisions. It did so, appropriately, in this particular case.

In any event, Council was receiving employment law advice that is subject to solicitor/client privilege. As such, it would have been permitted to be in closed session under section 239. (2)(f) dealing with “advice that is subject to solicitor-client privilege, including communications necessary for that purpose”.

---

<sup>7</sup> Farber v. Kingston (City), 2007 ONCA 173 (CanLII) at para. 21, <<http://canlii.ca/t/1qtzl>> retrieved on 2014-09-11.



As a result, we cannot conclude that Council breached the provisions of the *Municipal Act* when Council held a closed meeting on July 31, 2014 with respect to options for staffing the Auditor General's Office during the leave of absence.


## **VII. CONCLUSION**

Amberley Gavel has concluded that the Council for the City of Greater Sudbury did not breach any stipulated provisions of the *Municipal Act* or its Procedure By-law in closing a portion of its July 31, 2014 meeting to the public.

## **IX. PUBLIC REPORT**

This report is forwarded to the Council of the City of Greater Sudbury. 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.

We received full co-operation from everyone that we interviewed during this investigation and we thank them for that co-operation.

  
for \_\_\_\_\_

**AMBERLEY GAVEL LTD.**

**December 2014**