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CLERK'S

REPORT TO
THE COUNCIL OF THE CITY OF GREATER SUDBURY
REGARDING AN INVESTIGATION INTO COMPLAINTS ABOUT AN
ALLEGED CLOSED MEETING OF MEMBERS OF COUNCIL HELD ON
OR BEFORE FEBRUARY 12, 2013

Jurisdiction

The Ombudsman Ontario ("Ombudsman") was initially appointed as the closed meeting investigator by the Council of the City of Greater Sudbury ("City") for the 2010-2014 term of Council. On February 12, 2013 City Council ("Council") resolved in public session to reconsider the appointment of the Ombudsman. Council then resolved to retain Local Authority Services Ltd. ("LAS") as its closed meeting investigator for the balance of the Council term, pursuant to section 239.2 of the *Municipal Act, 2001*¹, as amended by Bill 130² ("Municipal Act"). LAS has delegated its powers and duties to Amberley Gavel Ltd. ("Amberley Gavel") to undertake the investigation and reporting processes.

Subsequent to February 12, the Ombudsman received a number of complaints with respect to a closed meeting that allegedly occurred on or before February 12, 2013 with respect to the reconsideration of the Ombudsman's appointment.

Given that the complaints were received after the reconsideration of the Ombudsman's appointment (although the appointment was not yet formally rescinded by municipal by-law as discussed in this report), the Ombudsman declined to investigate the complaints. Amberley Gavel indicated that it would take jurisdiction over the prior complaints only if the complainants chose to have Amberley Gavel investigate their complaints. The Ombudsman advised Amberley Gavel that five complainants wished to have their complaints investigated. An additional complainant contacted Amberley Gavel directly. Hence, Amberley Gavel proceeded with its investigation of the matter.

Complaints

The complainants allege that Members of Council held a closed meeting of Council on or before February 12, 2013 prior to consideration by Council of a notice of motion with respect to rescinding the appointment of the Ombudsman.

Preliminary Matter: Amberley Gavel's Jurisdiction

After the investigation had already commenced, one of the complainants took issue with the appointment of Amberley Gavel as the closed meeting investigator for this matter. The complainant asserted that Amberley Gavel could not be impartial or independent with respect to the investigation since it would be investigating a matter in which Amberley Gavel had a direct or indirect pecuniary interest. A closed meeting investigator is required by virtue of section 239.2(5)(a) the *Municipal Act* to be impartial and independent. The complainant requested that Amberley Gavel delegate its authority to another closed meeting investigator.

Amberley Gavel's authority to investigate was initially delegated to it by LAS and Amberley Gavel has no power to delegate those powers further. Thus, Amberley Gavel indicated to the complainant that it would consult with LAS about the complainant's concern. Since the investigation was already in process, LAS decided that it would have Amberley Gavel continue

¹ S.O. 2001, c. 25.

² *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 ("Bill 130").

with the investigation, but directed that if Amberley Gavel made a preliminary conclusion during the investigation that there had been a closed meeting of Members of Council, the investigation would be turned over by LAS to another investigator, independent of Amberley Gavel, to finalize the investigation and reporting.³

Legislative Background

1. The Municipal Act

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 meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public.

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 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.

³ The jurisdictional decision by LAS does not express a conclusion as to whether or not Amberley Gavel has an indirect or direct pecuniary interest in the matter such that it would be unable to act in an impartial or independent manner.

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) 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) 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).

Section 239 also provides that a person may request that an investigation be undertaken as to whether a municipality or local board has complied with the Municipal Act or a procedural by-law in respect of a meeting or part of a meeting that was closed to the public. Unless the complaint is considered vexatious or frivolous, the investigator is to investigate the complaint and report on the investigation.

If, after making an investigation, the investigator is of the opinion that the meeting or part of the meeting that was the subject-matter of the investigation appears to have been closed to the public contrary to section 239 or to a procedure by-law under subsection 238 (2), the investigator shall report his or her opinion and the reasons for it to the municipality or local board, as the case may be, and may make such recommendations as he or she thinks fit. The investigator has no power or authority under the Municipal Act to change a substantive decision of a municipal council, committee, or local board even it finds that the decision was made in an improper closed meeting. Absent a legal judgment by a court of law overturning the decision, only the decision-making body has the legislative power to change the substantive decision through reconsideration.

Investigation

The investigation into the complaint began on May 24, 2013. All thirteen Members of Council, including the Mayor, were interviewed, twelve in person and one by telephone. The City Clerk was also interviewed.

The complainants were contacted by electronic mail to provide more particularized details with the respect to the complaint.

Documents reviewed during the course of the investigation included agendas, minutes, e-mail correspondence, the City's Procedure and Notice By-laws, applicable legislation, and media reports. Webcasts of various Council meetings were also viewed.

Facts and Evidence

1. The City's Procedure By-law

Section 238 of the Municipal Act requires that every municipality pass a procedure by-law. Section 238 reads in part as follows:

- (2) Every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings.
- (2.1) The procedure by-law shall provide for public notice of meetings.

The City has a very comprehensive Procedure By-law that governs the calling, place and proceedings of meetings. Article 14.01 of the Procedure By-law⁴ provides that "Council or a Committee may, by resolution, close a meeting or part of a meeting to the public in accordance with s. 239 of the *Municipal Act, 2001*". For specificity, the applicable provisions of the Municipal Act are attached as Appendix A to the Procedure By-law.

The City's Notice By-law provides a process for public notice of meetings.⁵

The Procedure By-law deals with Notices of Motion as follows:

20.01 Notice of Motion - Submitted Prior to Meeting

A Member's notice of motion shall be submitted in writing to the Clerk by 12 p.m. on the Wednesday of the week prior to the designated meeting and shall be included on the agenda.

20.03 Notice of Motion - Submitted During Meeting

A notice of motion may be submitted to the Clerk during a meeting, in which case:

- (1) during the "Notices of Motion" portion of the meeting, the Chair shall have the notice of motion read; and
- (2) the notice of motion shall be recorded in the minutes and placed on the agenda for the next regular meeting under the item "Motions", following which the provisions of Article 21 shall apply.

20.06 Motion without Notice

A motion may be made without notice during a meeting if:

- (1) it is moved and seconded; and
- (2) a vote dispensing with notice is supported by:

⁴ Procedure By-law 2011-235. ("Procedure By-law").

⁵ Schedule "A" To By-Law 2012-204; City Of Greater Sudbury Policy Regarding Notification To The Public.

- (a) at least seven Members if at a Council meeting; or
- (b) a two-thirds majority of Members present if at a Committee meeting.

With respect to Motions to Reconsider, the Procedure By-law provides:

34.01 Motion to Reconsider

Once a motion has been voted on, any Member who voted on the prevailing side may bring a motion to reconsider and, if such motion is seconded, it shall be open to debate and dealt with.

34.03 Reconsider at Subsequent Meeting

Where a motion to reconsider is made at a meeting subsequent to that at which the question to be reconsidered was dealt with, the motion shall be initiated by a notice of motion given pursuant to Article 20 and shall require the support of two-thirds of the Members present in order for the motion to be carried.

2. The Notice of Motion that is the Subject of the Complaints

Councillor Berthiaume introduced a Notice of Motion during the scheduled section of the open meeting agenda of Council on February 12, 2013 dealing with Notices of Motion. The Notice of Motion is outlined in Attachment A to this report which is an excerpt of the Minutes of the open Council meetings at which this issue was discussed.

The Notice of Motion, in its first part, dealt with the reconsideration of the appointment of the Ombudsman as the City's closed meeting investigator.⁶ Councillor Berthiaume asked that notice be waived so that the reconsideration motion could be dealt with on that night. A majority of Council agreed to waive notice. The motion to reconsider the appointment of the Ombudsman was then discussed and voted on by Council, with the requisite two-thirds of Council voting in favour of the motion to reconsider.

The second part of Councillor Berthiaume's Notice of Motion concerned the appointment of LAS as the City's closed meeting investigator. Councillor Berthiaume asked that notice be waived so that the appointment motion could be dealt with at that meeting. A majority of Council agreed to waive notice. The motion to appoint LAS was then discussed and voted on by Council through a recorded vote, with twelve Members of Council voting in favour of the motion to appoint LAS. The Mayor opposed the motion.

In accordance with the City's Procedure By-law, the by-law to appoint LAS as the City's closed meeting investigator was contained on the Council agenda in open session on February 26, 2013. At that time, Councillor Belli brought forward a Notice of Motion from the floor of Council to reconsider the decision made at the February 12, 2013 meeting respecting the appointment of LAS. The motion was seconded by Councillor Cimino.

⁶ Councillor Berthiaume had originally voted in favour of the Ombudsman being the closed meeting investigator for the City. Hence, he was eligible under the City's Procedure By-law to introduce a motion for reconsideration.

A majority of Council agreed to waive notice in order that the matter could be discussed at the meeting.

The motion to reconsider the appointment of LAS was then discussed and voted on by Council, with four Members of Council voting in favour and nine voting in opposition through a recorded vote. The motion for reconsideration was thus defeated.

The motion on the by-law appointing LAS as the City's closed meeting investigator passed with nine Members of Council voting in favour and four voting in opposition.

As indicated earlier in this report, the complaints alleged that certain unnamed Members of Council had a closed meeting on or before February 12, 2013 to discuss Councillor Berthiaume's Notice of Motion prior to the open meeting of Council on February 12, 2013. Prior to considering the evidence, it is important to consider the definition of a "meeting" under the Municipal Act.

3. The Definition of a Meeting

Section 238(1) of the Municipal Act describes a "meeting" as follows:

"meeting" means any regular, special or other meeting of a council, of a local board or of a committee of either of them.

That is not a very helpful definition and indeed it appears to be a circular one. Essentially the provision says that "a meeting is a meeting". Unfortunately for municipal councils, committees, and local boards this definition in the Municipal Act is not informative or enlightening. Much is left to interpretation.

Black's Law Dictionary is a little more illuminating as it defines a "meeting" as:

The gathering of people to discuss or act on matters in which they have a common interest.⁷

A municipal council's "common interest" would be to carry out their role under the Municipal Act.⁸ Similarly, a committee's or local board's common interest would be to carry out their role assigned by either by the municipal council (in the case of council committees) or by legislation if any (in the case of local boards).

The Municipal Act provides that a meeting of a municipal council can take place only if there is a quorum of members present.⁹ The City's Procedure By-law, consistent with the Act, provides that "The quorum required to commence and continue a meeting shall be a majority of its Members".¹⁰ For City Council meetings that number is seven Members (out of a total of thirteen

⁷ *Black's Law Dictionary*, 8th ed., s.v. "meeting".

⁸ See *Supra*, note 1 at s.234(1) of the Municipal Act which delineates a municipal council's role.

⁹ *Supra*, note 1 at s.237(1). With some exceptions, a quorum is defined as a majority of the members of council.

¹⁰ *Supra*, note 4 at Article 26.01.

Members). In the event that a quorum is not present within thirty (30) minutes after the designated start time of the meeting, the meeting is adjourned.¹¹

However, it is not enough in our opinion that the presence or absence of a quorum at a designated start time to be determinative of whether or not a “meeting” was held for the purposes of the open meetings provisions of the Municipal Act. There are situations where Members of Council gather together either informally or formally outside of their regular or scheduled meetings.

In deciding what is or is not a meeting, it may be instructive to consider when a meeting is permitted to be closed under the Municipal Act beyond those exceptions cited in s.239.(2) outlined above. The Municipal Act permits a meeting to be closed to the public for educational or training purposes under certain conditions:

1. The meeting is held for the purpose of educating or training the members; and
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.¹²

Hence, it could be said that a quorum of a municipal council, committee, or local board is engaged in a meeting if it 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. When engaged in such activities, the meeting must be open to the public unless the subject matter under discussion is one which is properly closed to the public under one of the s.239.(2) exemptions or having met the conditions under s.239(3.1).

This definition of a meeting would cover a situation wherein a quorum of the members of a council, committee or local board gather together informally to discuss upcoming council, committee or board business and agree on how they are going to consider or vote on the matter. Although they may not be engaged in all the formal “trappings” of a municipal council, board or committee meeting they may still in these circumstances be materially advancing the business or decision-making of the municipality. This type of gathering, then, would be a breach of the openness and transparency required by the Municipal Act.

Not all situations where members of council are gathered will be considered to be a meeting under the Municipal Act. A majority of the members of council attending a City function, a wedding, or a funeral (to give a few examples) would not be considered a meeting if the members of council did not discuss common interests with the view to materially advancing the business or decision making of the municipality. Similarly, a chance encounter of a majority of members of council in the same place at the same time would not automatically be considered a meeting.

In addition, individual members of council might informally speak to each other about their common interests on a frequent basis. That is to be expected. They must work together collegially and collaboratively on almost a day-to-day basis. Like any directors of a corporation,

¹¹ *Ibid.* at Article 26.02.

¹² *Supra*, note 1 at s.239(3.1).

it is important that the members foster collegial and supportive relationships. Those relationships can be of heightened importance to the taxpayers of a municipality since members of council must achieve support from others on council to advance the interests of their individual ward. Those interests are cultivated not only on the substantive merits of the particular issue but also on the relationships between people who commit to working together. A "lone wolf" councillor who does not foster relationships with his or her council colleagues will have a much harder time gaining support for issues in his or her ward. The absence of these relationships would not be of benefit to the taxpayers.

Collegial and collaborative relationships are often achieved through socializing with colleagues. A umbrella prohibition that no member of council can be together with another member of council at the same time in the same place, unless they are in a formalized meeting under the Municipal Act, would put a chilling effect on the ability to build those positive relationships.

Moreover, the provincial legislation presumes conversations between members of council on issues of common interest. A councillor may wish to discuss an upcoming item with a fellow colleague(s) to ascertain his or her viewpoint, to understand the issues more in-depth, or to seek support for her or his point of view on a matter. The Municipal Conflict of Interest Act supports this conclusion with its prohibition on a member influencing another member where the first member has declared a pecuniary interest on a matter before a body. The presumption is that it is normal practice that Councillors influence one another outside meetings unless prohibited under this Act.

Pending legislative or judicial interpretation on this critical issue, it is our opinion that a meeting of a council, committee, or local board is one in which a quorum of the members of the body gather together at a common place (including telephonic or electronic gatherings) and discusses a matter in a way that materially advances the business or decision-making of the council, committee, or local board.

Whether or not a specific gathering can be deemed to be a meeting of the body will be based on a contextual analysis of the facts, the circumstances, and the issue(s) discussed.

Having addressed the City's Procedure By-law and canvassed the definition of a meeting, we will now turn to the evidence about whether or not there was a closed meeting of Members of Greater Sudbury Council as alleged in the complaints.

4. The Evidence of the Complainants

The complainants allege that there was a closed meeting of a number of unnamed Members of Council on or before February 12, 2013 in which those in attendance discussed the Notice of Motion that Councillor Berthiaume intended to introduce that night respecting the termination of the services of the Ombudsman.

The complainants provided no individual, objectively verifiable proof that a meeting took place, only what they have read in the local newspapers. None was a witness to any such meeting nor did they see the Members of Council gathering in any one location.

They relied either on the Mayor's reported assumption in the local media that a meeting took place, other published media reports, and the extent of the discussion at the Council meeting about the issue.

The complainants assert that there was very limited discussion at the open Council meeting of February 12, 2013 about the Notice of Motion. They claim that the lack of more in-depth discussion about the matter meant that certain Councillors must have discussed the issue in a closed meeting in advance of the open meeting of Council. As one complainant alleged: "This was too well rehearsed to have come without prior discussion."

Further, one complainant asserted Councillor Berthiaume's Notice of Motion was supported by the majority of Council, yet the Mayor was not supported when bringing forward two Notices of Motion on other matters that evening. The complainant indicated: "The motion to fire the Ombudsman, to certain councillors, apparently was not in the same realm as the other issues. This to me showed prior knowledge and discussion about this matter."

The complainants also point to published media reports about e-mails between certain Councillors about the Notice of Motion prior to the introduction of the Notice of Motion. Those e-mails, however, are not proof of a meeting, as we did not observe an electronic "gathering" of Members of Council through those e-mail discussions. They are merely evidence that certain Members of Council had knowledge that Councillor Berthiaume would be bringing forward the issue to Council. Moreover, the fact that the Mayor was reported as assuming that a meeting had taken place is not evidence that a meeting did in fact take place.

Based on our review, we have concluded that there is no independent evidence from the complainants that a closed meeting actually took place. The information advanced by the complainants is based on statements in the local media, published e-mails, and individual opinions relating to the brevity of the discussion at the open meeting.

We now turn to a review of the other evidence in the investigation. This review will be based on interviews with Members of Council and the City Clerk and a review of documentary evidence. It should be noted that in all cases, the testimony has been summarized from the notes of the Review Officer.

5. Evidence of the Mayor

The Mayor's Chief of Staff sat in on the interview, with consent of the Review Officer.

The Mayor indicated that she had no knowledge about the Notice of Motion prior to its introduction at the end of the open meeting of Council on February 12, 2013. She was aware from the Clerk that a Notice of Motion might be introduced by Councillor Berthiaume that evening but the Clerk did not tell her the contents of the Notice of Motion. The Clerk indicated to the Mayor that Councillor Berthiaume did not want the contents of his Notice of Motion disclosed in advance.

The Mayor indicated that Notices of Motion are normally given to the Clerk in advance of the meeting and are circulated to all Members of Council. She indicated that the notice provisions in the City's Procedure By-law are sometimes waived by Council for Notices of Motion but that they are usually only on "benign issues".

The Mayor said that on February 12, 2013 at approximately 3:55 p.m., while on her way down to the scheduled closed meeting of Council, she observed a "large group of Councillors" congregating at the elevators on the 4th floor of City Hall. She indicated that there were "at least more than seven of them at the elevator". She does not recall specifically which Members of Council were standing at the elevator. She thought that it was "interesting" and that she "hadn't seen them like that before".

The Mayor indicated that a number of Members of Council appeared not to be surprised about the introduction of the Notice of Motion by Councillor Berthiaume on February 12, 2013 because they appeared to "have notes in front" of them. She asserts that this shows a level of preparation by these Councillors before the meeting took place. She could not confirm exactly who had notes in front of them about the issue but indicated that at least five Members of Council -- including Councillor Berthiaume -- seemed very prepared for the discussion. She indicated that Councillor Belli did not seem to be aware of the Notice of Motion prior to its introduction. She also noted that Councillor Kilgour subsequently told her that the first time he heard of the Notice of Motion was before the open Council meeting when he was in the Council lounge.

The Mayor indicated that Members of Council usually have dinner in the Council lounge in the time between the closed meetings of Council and the open meeting. She noted that there are two dining tables in the Council lounge, one which is a larger square table and one that is a smaller round table. She was sitting at the smaller table and did not hear the discussion at the larger table at which other Members of Council were seated.

The Mayor referred to the e-mails on the subject that were published by a local newspaper. She indicated that she had not seen those e-mails prior to the publication in the media. Neither she nor any of her staff were aware of or were part of those e-mails.

The Mayor referenced comments made by certain Members of Council in media reports about the issue.

6. Evidence of the Clerk

The Clerk indicated that Councillor Berthiaume had approached her sometime in December 2012 about the process and procedure for reconsidering the appointment of the Ombudsman. She does not recall the actual date but indicates that it was after the December 11, 2012 Council meeting where the Ombudsman made a presentation to Council.

Councillor Berthiaume asked the Clerk to keep the discussion confidential. She was aware that he intended to bring the issue forward to Council. She was also aware that Councillor Berthiaume did not intend to discuss any Notice of Motion with other Members of Council "until he was ready to bring it forward".

In the afternoon on February 12, 2013 the Councillors' secretary brought the Clerk the Notice of Motion from Councillor Berthiaume. The secretary indicated that the Councillor was not certain that he was going to introduce it that evening at the Council meeting.

The Clerk indicated that she told the Mayor later in the day on February 12, 2013 that a Notice of Motion might be brought by Councillor Berthiaume to that evening's meeting. At that time the Clerk did not have confirmation from Councillor Berthiaume that he intended to introduce the Notice of Motion to the meeting. Respecting his request to her to not divulge the contents of the Notice of Motion until he was ready to introduce it, the Clerk declined to provide the Mayor with more information.¹³

The Clerk affirmed that she had not been in any meeting or forum with Members of Council for a discussion about the Notice of Motion, apart from the open meeting of Council on February 12, 2013. She noted that she had not heard other Members of Council speak about the particular Notice of Motion, although she was aware of the opinions of certain Members of Council with respect to the conduct of the Ombudsman.

The Clerk indicated that she had been in the Council lounge¹⁴ during the period of time between the closed and open meetings of Council on February 12, 2013 but that she did not hear any discussions by Members of Council about the Notice of Motion during that time. She explained that during the dinner hour it is customary for Members of Council only to speak to each other about "mundane" issues, such as the weather, vacations, or what they had for dinner the previous night. She said that occasionally two Members of Council might discuss issues that are common to their wards but that her observation is that Members of Council are careful not to discuss Council business as a group unless they are in a formalized meeting.

The Clerk emphasized that Members of Council are quite aware of and diligent about the Municipal Act provisions dealing with open meetings and the exemptions to the open meetings rule. She stressed that, as Clerk, she is very stringent about the rules and procedures and that Members of Council seek her guidance if they are unsure about an issue dealing with legislative process or procedures.¹⁵

The Clerk explained the layout of the Councillors' office space on the 4th floor, the 4th floor elevator area, and the Council lounge. She later provided the Review Officer with a physical tour of these areas.

She indicated that it is quite common for Members of Council to visit their common office space prior to attending meetings of Council in order to gather their mail, speak to their secretaries, or

¹³ Although not the subject of this complaint, we would note that the Clerk's decision in this regard is proper. She is under no professional or legislative obligation to divulge the lawful intentions of a Member of Council until she is aware that the intention has been crystallized such that it will be part of the business or deliberations of Council. At that point, she would be obliged to advise the chair of the applicable meeting about the confirmed scheduled agenda items.

¹⁴ There is some confusion about what is called the "Council lounge" versus the "Councillors' office". For the purposes of this investigation, the "Council lounge" is on the same floor as the Council chambers and where the Members of Council have dinner in between closed and open meetings of Council. The "Councillors' office" is on the fourth floor and is a "touch-down" common office space where there are three independent workstations and a small table available for use by twelve Members of Council.

¹⁵ This is clearly verifiable when one watches the webcasts of Council meetings. The Clerk is often called upon to give guidance and she is diligent in ensuring that Members of Council are informed of and understand the rules of procedure.

respond to e-mails on the computer. She indicated that the common office area is quite a small space and it would be difficult to have seven people in the room at the same time.

The Clerk indicated that it is also common for Members of Council to leave their common office space at the same time if they are heading downstairs to a Council meeting. She has often seen Members of Council waiting at the 4th floor elevator together to go downstairs to a meeting. She noted that Members of Council often arrive at a meeting in groups of three or four, especially if they had just previously been together in the common office space.

The Clerk provided Amberley Gavel with the agenda and minutes of the closed meeting of Council on February 12, 2013. It was noted and confirmed that Councillor Berthiaume's Notice of Motion was not on the closed session agenda and it was not discussed in closed session.

The Clerk explained the provisions of the City's Procedural By-law with respect to Notices of Motion. She indicated that it is customary to have a Notice of Motion placed on the meeting agenda in advance, for discussion at a subsequent meeting. However, she noted that the Procedural By-law provides for waiver of the notice period with the support of a majority of Members of Council.

The Clerk confirmed that the package of e-mails submitted to Amberley Gavel with the complaints included all the e-mails that were provided to another party in response to a Freedom of Information request about correspondence between Members of Council on this issue.

7. Evidence of Members of Council

The Mayor's evidence is set out earlier in this report.

Interviews were held with all Members of Council over two days. A representative of the City Solicitor's Office sat in on some of the interviews.¹⁶

Members of Council were co-operative, forthcoming, and credible in their interviews. They appeared to be quite knowledgeable about the open meetings rule in the Municipal Act and when the exemptions to the open meetings rule could be invoked.

All Members of Council, including Councillor Berthiaume, denied having a closed meeting to discuss Councillor Berthiaume's Notice of Motion. Those Members of Council who were aware that Councillor Berthiaume intended to bring forward the issue about the Ombudsman's Office indicated that they were told that by Councillor Berthiaume individually and at different times than others. They did not discuss the issue as a group, but rather one on one with Councillor Berthiaume.

The following is the summarized testimony of the Members of Council with respect to whether or not they had prior knowledge about the Notice of Motion by Councillor Berthiaume. We refer

¹⁶ It should be noted that Amberley Gavel is of the opinion that members of council may have representation by the municipality's solicitor when being interviewed during a closed meeting investigation. During this series of interviews, it is our understanding that the City Solicitor's Office asked Members of Council prior to the interviews if they wished to have a lawyer to sit in on the interviews. Some chose to do so; others did not. One of three lawyers from the City Solicitor's Office attended the interviews where their attendance was requested.

to them as Councillors A through K as we believe this to be consistent with the confidentiality requirements of the Act, and their personally identified comments are not central to this investigation in the way that those of the Clerk, the Mayor, and Councillor Berthiaume are:

- Councillor A had a brief one-on-one conversation with Councillor Berthiaume approximately one month prior to the introduction of the Notice of Motion. A was aware that Councillor Berthiaume was going to bring the issue forward to Council but A thought that he would be doing so at the January meeting of Council. A did not see the Notice of Motion prior to its introduction at the meeting;
- Councillor B had no prior knowledge about the Notice of Motion although aware of the opinions of various Members of Council about the Ombudsman. B had no conversations or meetings with Councillor Berthiaume about this issue;
- Councillor C vaguely recalled an e-mail from Councillor Berthiaume about the fact that he was going to bring the issue forward to Council. C thought he was going to bring the issue forward to the January meeting of Council. He later told C that he didn't bring it forward at that meeting because there was a snowstorm and he didn't want to prolong the meeting. C asked Councillor Berthiaume just prior to the beginning of the Council meeting on February 12, 2013 if he intended to bring forward the issue to that meeting. He said that he thought he would;
- Councillor D reported one brief conversation and one or two e-mail communications with Councillor Berthiaume. D indicated that he had not seen the Notice of Motion prior to it being introduced on the floor of Council. D recalled being told by Councillor Berthiaume just prior to the February 12, 2013 Council meeting that Councillor Berthiaume would be bringing forward the issue to that Council meeting;
- Councillor E indicated having no prior knowledge about the Notice of Motion before it was introduced on the floor of Council, although E was aware of the opinions of various Members of Council about the Ombudsman. E had no conversations or meetings with Councillor Berthiaume about this issue, although E noted that individual Members of Council had mentioned the appointment of the Ombudsman "over the years";
- Councillor F indicated having a brief conversation with Councillor Berthiaume in December where Councillor Berthiaume said that he would be bringing the issue forward to Council. Councillor F did not see the Notice of Motion prior to it being introduced on the floor of Council and was unaware that it was being brought forward that evening;
- Councillor G indicated that Councillor Berthiaume had mentioned at a prior meeting of Council that he would be bringing forward a notice of motion about the Ombudsman. G was not aware that he would be bringing the motion forward to the February meeting. G did not see the Notice of Motion prior to it being introduced on the floor of Council;

- Councillor H indicated one telephone conversation and one e-mail communication with Councillor Berthiaume about the issue. Councillor H thought that Councillor Berthiaume was going to bring the issue forward to the January meeting of Council;
- Councillor I indicated having had one brief conversation with Councillor Berthiaume about the issue prior to February 12, 2013. In the late afternoon of February 12, 2013 Councillor I and Councillor Berthiaume were in the common office space. Councillor Berthiaume mentioned to I in passing that he was going to introduce the Notice of Motion that evening. I had not seen the Notice of Motion prior to its introduction on the floor of Council;
- Councillor J indicated that Councillor Berthiaume had said in a brief conversation prior to February 12, 2013 that he was considering bringing forward the issue to Council. J indicated that he mentioned just before the meeting on February 12, 2013 that he would be bringing forward his Notice of Motion that evening. J had not seen the Notice of Motion prior to its introduction on the floor of Council. However, J indicated having done some independent research into alternatives to the Ombudsman for closed meeting investigations as a result of being unhappy with the conduct of the Ombudsman at the December 11, 2012 Council meeting;
- Councillor K indicated having had one conversation with Councillor Berthiaume about the issue. K was not aware that Councillor Berthiaume would be bringing the issue forward to Council on February 12, 2013 and had not seen the Notice of Motion before it was presented to Council.
- Councillor Berthiaume indicated that he had separate, individual conversations at different times with certain Members of Council, with the exception of Councillors Belli and Craig and Mayor Matichuk, about reconsidering the appointment of the Ombudsman. He said he first considered the idea after Councillor Caldarelli commented at the Council meeting of November 20, 2012 that she hoped someone on Council would introduce the reconsideration of the appointment of the Ombudsman. Councillor Caldarelli had voted against the initial appointment and was precluded from bringing forward a motion for reconsideration. He indicated that he wanted to first hear from the Ombudsman about an alleged breach of confidentiality in an Ombudsman's published report dealing with a meeting involving discussions about the Auditor General. The Ombudsman attended a Council meeting the Council meeting on December 11, 2012 and Councillor Berthiaume asked him a question. He indicated he was not satisfied with the answer he received or with the conduct of the Ombudsman during that meeting.

Councillor Berthiaume indicated that each of the conversations with those Members of Council whom he told about his intentions was either by telephone or in a one-on-one setting.

Councillor Berthiaume indicated that, other than with Councillor Kett, he did not share the actual contents of his Notice of Motion with any Member of Council. He had intended to introduce it at the January meeting of Council but there was a storm that evening and the meeting ended earlier than usual. He said that he then told a few

Members of Council in individual but brief conversations that he would be introducing the issue at the February 12, 2013 meeting but he did so just prior to the meeting because he wasn't sure exactly when he would introduce his Notice of Motion.

In terms of the alleged brevity of the discussion at the February 12, 2013 Council meeting, those Members of Council who voted in favour of the decision indicated that in their view the Notice of Motion didn't need much discussion. From individual prior conversations with their colleagues, they were aware that the sentiments were largely shared by many Members of Council. Hence, they indicated that they did not need to have a protracted discussion about their alternatives.

All twelve Members of Council who share the common office space asserted that it would be commonplace that various Members of Council would visit the office prior to a Council meeting to pick up mail, to consult with their secretary, or to quickly check e-mails on the computer.

However, Members of Council commented that they are very careful in ensuring that they are not discussing Council business as a group when they are in the common office space. Members of Council who share the common office space commented that they assiduously ensure that a majority of Council is not in the room at any one time for fear they might be criticized for holding an unauthorized meeting of Council even if they are discussing nothing but how bad the weather is on that particular day. They indicate that seven Members of Council are never in the shared space at the same time. Some Members of Council queried in the investigation interviews whether it would be even physically possible to have seven Members of Council work in such a small room.

Based on the testimony, it would appear that Members of Council are constantly performing mental "head counts" about how many other Members of Council are in their presence at any one time, having learned to be cautious as a result of previous investigations.

Members of Council who share the common office space also confirmed that it is quite customary for those individuals who are in the shared space to leave the room at the same time - or to leave the room in small groups -- just before a scheduled meeting is to commence. Individuals often go down in the elevator together to attend the meeting. There was disagreement with the notion that seven Members of Council could fit into one elevator and one Member of Council indicated that only one of the two elevators was working that evening. Members of Council also indicated that they would not and do not discuss Council business with their fellow colleagues in an elevator.

8. E-mail Correspondence

As indicated earlier in this report, a meeting of council, a committee, or local board can be considered as a meeting under the Municipal Act even if a meeting occurs in electronic format such as through e-mail correspondence.

Amberley Gavel reviewed the e-mail correspondence that is responsive to the question of whether or not Members of Council discussed the issue through an electronic meeting.

The evidence indicates that Councillor Berthiaume first initiated the idea of replacing the Ombudsman with "another agency to do the investigation" through an e-mail to the Councillors'

secretary on December 12, 2012. On the evidence, it appears that the Councillor's plan was to have the Notice of Motion introduced at a January 2012 Council meeting without notice. He then communicated with no more than three Members of Council by separate e-mails leading up to the introduction of the item on the Council agenda of February 12, 2013.

These Members of Council were not *discussing* the issue *together* in electronic format. Even if they were, and we have found they were not, four Members of Council is not a majority or close to a majority of Council. Hence, we could not conclude that there was any electronic meeting of Members of Council. This limited e-mail correspondence would not be considered a "meeting" under the Municipal Act.

Conclusion on the Evidence

There is no independent, objectively verifiable evidence that a closed meeting of Members of Council occurred on February 12, 2013, or on any other date, either in person or by electronic means, to discuss or advance the business of the municipality in terms of the appointment of the Ombudsman or another Closed Meeting Investigator. In order to advance a complaint under the Municipal Act about closed meetings of a council, committee, or local board there must be at least some level of independent evidence that a closed meeting actually occurred. In this absence of such evidence, in other circumstances, Amberley Gavel might have declined upon initial review to conduct a full-scale investigation.

Nevertheless, Amberley Gavel conducted the investigation based on the reported comments of the Mayor and the possibility -- although speculative at first review -- that an electronic meeting of Members of Council took place through e-mail correspondence about the issue.

Councillor Berthiaume was quite candid that he did not want to provide advance "general knowledge" (meaning to all Members of Council) about this Notice of Motion before it was introduced on the floor of Council. Although one might disapprove of his strategic decision to introduce the issue without advance notice to all Members of Council, nothing in the Municipal Act or City's Procedure By-law requires him to provide notification to all Members of Council that he is introducing a Notice of Motion.

Having introduced the Notice of Motion, Councillor Berthiaume had the right under the City's Procedural By-law to seek the approval of a majority of Council to waive the notice provisions. A majority of Council waived the notice provisions.

Council then had the opportunity to debate the issue twice in open session, once on February 12 and once on February 26, 2013 and to render substantive decisions.

Conclusion

Having concluded its review, Amberley Gavel finds that there is no evidence to substantiate the claims that Members of City Council held any improper closed meeting related to the Notice of Motion being introduced by Councillor Berthiaume at the open Council meeting on February 12, 2013.

Conversations between some members of Council did take place over a period of several

weeks. Such conversations are a normal part of the process of local government.

Public Report

We received the utmost co-operation from the Mayor and Members of Council who were interviewed during this investigation. It was clear from our interviews that Members of Council know their responsibilities to ensure that they are open and transparent in the transaction of Council business. Further, we received full co-operation from the City Clerk and staff in her offices. We were particularly impressed by the level of knowledge and attention that the City Clerk pays to the open meetings provisions of the Municipal Act.

In addition, the City Solicitor's Office was forthcoming and prompt in providing us with information requested.

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.

August, 2013

Closed Meeting Investigator

AMBERLEY GAVEL LTD.

Per: 

Attachment A

Excerpt from the Minutes of City Council, February 12, 2013

Closed Meeting Investigator

Rules of Procedure

Councillor Berthiaume moved that the notice provisions be waived and that the following Motion be dealt with this evening.

CARRIED

Motion to Reconsider

The following Notice of Motion was presented by Councillor Berthiaume:

CC2013-67 Berthiaume/Dutrisac: WHEREAS Council appointed the Ontario Ombudsman as its Closed Meeting Investigator for the term of Council 2010-2014;

AND WHEREAS Council is now at the midpoint in the term of office and wishes to review the appointment of a closed meeting investigator;

NOW THEREFORE BE IT RESOLVED that Council reconsider Resolution #2011-32.

CARRIED

Rules of Procedure

Councillor Berthiaume moved that the notice provisions be waived and that the following Motion be dealt with this evening.

CARRIED

Appointment of a Closed Meeting Investigator

The following Notice of Motion was presented by Councillor Berthiaume:

CC2013-68 Berthiaume/Dutrisac: WHEREAS the City of Greater Sudbury wishes to use a Closed Meeting Investigator with knowledge and understanding of municipalities and which investigator uses a credible and established process for conduct of the investigation;

AND WHEREAS Local Authority Services Ltd is a wholly owned subsidiary of the Association of Municipalities of Ontario, and currently provides investigation services through Amberley Gavel to 129 municipalities and has conducted approximately 50 closed meeting investigations over five years;

NOW THEREFORE BE IT RESOLVED that the City of Greater Sudbury retain Local Authority Services Limited as the Closed Meeting Investigator for the balance of this term of Council;

AND BE IT FURTHER RESOLVED that the costs associated with this service, which include an annual retainer fee of \$300.00 plus HST, and an hourly investigation rate of \$156.25 (paid only when an investigation is undertaken) be paid for by the Office of the City Clerk;

AND BE IT FURTHER RESOLVED that staff be directed to enter in to the necessary service agreement with Local Authority Services Ltd and prepare the necessary by-law to appoint Local Authority Services as the Closed Meeting investigator for the City of Greater Sudbury, and that the by-law be presented at the next meeting of Council and be effective immediately upon third and final reading.

RECORDED VOTE:

YEAS

Cimino
Barbeau
Berthiaume
Dutrisac
Dupuis
Rivest
Kilgour
Belli
Craig
Caldarelli
Kett
Landry-Altmann

NAYS

Mayor Matichuk

CARRIED

Excerpt from the Minutes of City Council, February 26, 2013

2013-51

By-law Appointing Local Authority Services Ltd.

A BY-LAW OF THE CITY OF GREATER SUDBURY APPOINTING LOCAL AUTHORITY SERVICES LTD. AS THE INVESTIGATOR PURSUANT TO SECTIONS 8, 9, 10 AND 239.1 OF THE MUNICIPAL ACT, 2001, AS AMENDED

City Council Resolution #CC2013-68

Councillor Belli requested that By-law 2013-51 be pulled and dealt with separately

Motion to Reconsider

The following Notice of Motion to Reconsider was presented by Councillor Belli:

THAT Council reconsider Resolution CC-2013-68 from its meeting of February 12, 2013 which motion appoints LAS as the Closed Meeting Investigator for the City of Greater Sudbury.

Rules of Procedure

Councillor Belli moved that the notice provisions be waived and that the Motion to Reconsider be dealt with this evening.

CARRIED

CC2013-82 Belli/Cimino: THAT Council reconsider Resolution CC-2013-68 from its meeting of February 12, 2013 which motion appoints LAS as the Closed Meeting Investigator for the City of Greater Sudbury.

RECORDED VOTE:

YEAS

Cimino
Belli
Craig
Mayor Matichuk

NAYS

Barbeau
Berthiaume
Dutrisac
Dupuis
Rivest
Kilgour
Caldarelli
Kett
Landry-Altmann

DEFEATED

Proceed Past 9:00 p.m.

Dutrisac/Caldarelli: THAT we proceed past the hour of 9:00 p.m.

CARRIED

The following motion was presented:

CC2013-83 Dupuis/Barbeau: THAT the City of Greater Sudbury read and pass By-law 2013-51.

RECORDED VOTE:

YEAS

Barbeau
Berthiaume
Dutrisac
Dupuis
Rivest
Kilgour
Caldarelli
Kett
Landry-Altmann

NAYS

Cimino
Belli
Craig
Mayor Matichuk

CARRIED