**REPORT TO**

**THE CORPORATION OF THE CITY OF BRANTFORD REGARDING THE INVESTIGATION OF THE CLOSED MEETING OF COUNCIL**

**FOR THE CITY OF BRANTFORD**

**ON SEPTEMBER 23, 2015**

1. **COMPLAINT**

The Corporation of the City of Brantford (“Municipality”) received a complaint about a Closed Meeting of the Budget Review Task Force of the Municipal Council (“Council”) held on September 23, 2015. The essence of the complaint is that the closed meeting did not meet the requirements of the *Municipal Act, 2001*[[1]](#footnote-1),as amended by Bill 130[[2]](#footnote-2) (“*Municipal Act*” or *“Act*”).

This request was sent to the offices of Amberley Gavel Ltd. (“Amberley Gavel”) for investigation.

1. **JURISDICTION**

The City appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act*.

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to Township Council.

1. **BACKGROUND**

Section 239 of the *Municipal Act* provides that all meetings of a municipal council, local board or a committee of either of them shall be open to the public. This requirement is one of the elements of transparent local government.

The section sets forth exceptions to this open meetings rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public. The section confers discretion on a council or local board to decide whether or not a closed meeting is required for a particular matter.

That is, it is not required to move into closed session if it does not feel the matter warrants a closed session discussion.

Section 239 reads in part as follows:

Meetings open to public

**[239.](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%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 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).

The *Act*, under subsections 239(5) and 239(6), does not permit a council, committee, or local board to vote while in closed session unless the *Act* requires or permits the meeting to be closed by virtue of one of its exceptions and 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.

The *Act* authorizes the municipality to appoint an investigator who has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a 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, and to report on the investigation (section 239(2)).

1. **INVESTIGATION**

Documents reviewed during the course of the investigation included the Agenda and Minutes and Supporting Documents for the Budget Review Task Force Meeting of Council on September 22, the Procedural By-Law and Notice By-law, and other relevant documentation.

The Deputy Clerk/Manager of Legislative Services (“Deputy Clerk”) and the Director of Human Resources were also consulted during the course of the investigation.

1. **BACKGROUND**
2. **The Complaint**

The complaint alleges that the Budget Review Task Force held an improper meeting on September 22, 2015 to discuss five budget reduction options for the 2016 budget. The complaint alleges that the issues discussed while in closed session did not fall within the listed exemptions for open meetings, contrary to Section 239(1) of the Municipal Act. The complaint also asked that other procedural matters be reviewed during the investigation.

1. **The Agenda for the Meeting of the Budget Review Task Force on**

**September 22, 2015**

The Agenda for the Meeting of the Budget Review Task Force listed an item called “2016 Budget Reduction Options” and that it would be a “private and confidential item” (in closed session) dealing with labour relations or employee negotiations and personal matters about an identifiable individual, including municipal or local board employees.

The Report submitted to the Budget Review Task Force listed five possible budget reductions options.

1. **The Minutes for the Meeting of the Budget Review Task Force on**

**September 22, 2015**

The Minutes for the Meeting of the Budget Review Task Force show that the Budget Review Task Force went into closed session at 6:04 p.m., reconvened back into open session at 6:09 p.m., went back into closed session at 6:11 p.m. and reconvened into open session at 7:06 p.m. It then considered two issues related to the budget reduction options and adjourned at 7:16 p.m.

The open session Minutes note the staff’s advice that the matters should be discussed in closed session because “specific individuals could be identified given the size of the program areas” under discussion, that decisions on the options “would directly impact municipal employees and that staff would need to consult with the Union regarding the layoff of bargaining unit members”. It would appear that the first concern (identification of specific individuals) was being addressed as a closed session item under section 239(2)(b) and the second concern (directly impacting employees and consultation with the union) was being addressed under section 239(d). Two of the five items did not fall under either of these concerns.

After a brief discussion in closed session about why two of the five items were being discussed in closed session (without discussing the substance of those items), the Budget Task Force decided to discuss two of the five items in open session, discussing only three items in closed session.

1. **ANALYSIS AND FINDINGS**
2. **Personal Matters about an Identifiable Individual**

Staff have indicated that particular municipal employees could be identified if the particular location or service under discussion as a budget reduction is discussed in open session of Council or committee, given the size of the program area.

The *Municipal Act* provides that personal information about identifiable individuals, including municipal and local board employees, should be shielded from disclosure in a public forum, since such disclosure may be an unjustified invasion of privacy. Hence, it allows a council, local board, or committee to discuss such matters in a closed session.

In reviewing the scope of this exemption under the *Municipal* *Act*, Amberley Gavel usually considers decisions of Ontario’s Office of the Information and Privacy Commissioner (IPC). The IPC deals with interpretation of what is “personal information” under the *Municipal Freedom of Information and Protection of Privacy Act*[[3]](#footnote-3)(MFIPPA). It has found that in order to quality as “personal information” related to an identifiable individual, the information must be about an individual in their personal capacity, rather than their professional, official or business capacity, unless such information reveals something of a personal nature[[4]](#footnote-4). Information about a person in their professional capacity can take on a more personal nature if it relates to that individual’s performance or conductor if the discussion involves expressions of opinion about an individual.

Staff indicated that they anticipated that members of the Budget Task Force might enter into discussions about the severance issues or performance history of any of the individuals who might have potentially been affected by any recommendations of the Budget Task Force. We believe that it is not staff’s role to speculate on, pre-judge, or pre-determine what, if anything, a council or a committee might do during its discussions. The better approach, in the interests of transparency and accountability, would be for as much of the meeting to be held in open session as is possible. If a member of a council or committee wants to ask questions or discuss matters that fall clearly within any of the *Municipal Act* exemptions, it is at that point – and for those questions or discussions only – that the council or committee could go into closed session.

That is, just because a *portion* of a discussion might be about matters for which a meeting can be closed, a council or committee should not close the *whole* meeting to the public. The matter should be bifurcated such that the issues that can be discussed in public are discussed in open session.

**(b) The Meaning of the Terms “Labour Relations” and “Employee Negotiations”**

The term “labour relations” is not defined in the Municipal Act. Normally, the term refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation. However, we do not believe that “labour relations” can be extended in its broadest sense to cover all matters dealing with the relationship between a council, as the employer, its union, and its employees.

We can appreciate that staff were reluctant to have any discussions with the union which represented the employees who were potentially affected by the budget reduction options prior to canvassing the appetite for such reductions with the Budget Task Force. However, the collective agreement as between the City and its union clearly provide for some process to take place once reductions have been contemplated. In addition, since the City was in the process of collective bargaining for a renewal agreement, it could have introduced new measures to deal with the downsizing of staff or the closure of staff facilities in a general sense during those discussions with the unions, rather than dealing with any specific facility closure.

The term “employee negotiations” covers discussions that a council, local board, or committee would have to establish the employment terms and conditions that it will negotiate with a particular employee.

Like negotiations about land acquisition or disposal, it makes sense that a council, a committee, or local board would not have open public discussions about its negotiating strategy, most specifically the terms upon which it is willing to compensate a particular individual who is seeking to work for the municipality. Open disclosure of those terms could detrimentally affect the municipality’s interest. The exemption under the Municipal Act protects the municipality’s economic interests by not compromising the municipality’s bargaining position. Hence, the discussions leading up to negotiations with a particular individual may be held in closed session.

However, that was not the issue with the matters under consideration at the subject meeting. There were no negotiations as between individual staff about their severance arrangements at the time of the discussions at the Budget Task Force regarding potential budget reductions.

**VII. CONCLUSION**

Based on all of the foregoing, Amberley Gavel has concluded that the Budget Review Task Force for the City of Brantford breached the provisions of the *Municipal Act* when it discussed certain matters in a closed meeting on September 22, 2015.

**VIII. OTHER MATTERS IN THE COMPLAINT**

**(a) Meetings between the Chair of the Budget Task Force and Senior Staff with**

 **Individual Members of Council**

We were advised that the Chair of the Budget Task Force and senior staff met with individual members of council to secure individual input and suggestions about the 2016 budget. The complaint alleges that these are improper meetings, without notice, and without any structure (e.g. official notes, reporting out). The complaint alleges that these are meetings which are designed to “get around the meeting guidelines” (e.g. the provisions of the *Municipal Act* or the Procedural by-law).

Amberley Gavel’s authority is solely to review whether a meeting of a council or committee or local board breached the provisions of the *Municipal Act* or the procedural by-law for the applicable body. Hence, we must first considered if these gatherings were “meetings” as defined by the *Municipal Act*.

The definition of a “meeting” is not defined in the *Municipal Act.* However, we have previously defined it as a gathering of a quorum of members of a council or body who enter into discussions that materially advance the business of the municipality or that set the foundation for decisions that would materially advance the business of the municipality at a future date.

This “gathering” does not have to involve the physical presence of members in a meeting place. Given the technological age, meetings can take place by serial or sequential email correspondence, telephone, text, or through online programs such as Skype or “Go To Meetings”. The defining factor, in our opinion, is that a *quorum* (usually a simple majority) of members of a council together have *discussions* that either materially advance the business of the municipality or that set a *foundation* for decisions which will be made at a future date.

One has to be careful not to characterize every discussion between individuals or groups of less than a quorum of members of council as a “meeting” for the purposes of the *Municipal Act*. To say that members of council cannot communicate with one another on important issues would be to add an unnecessary chilling effect to their statutory duty to collaborate with each other as representative members of a community. Members of council work closely together to benefit the taxpayers and discourse should be encouraged. It is when a council or a committee, as a *quorum* and in the absence of the public, is making *a decision or is setting the groundwork for future decisions* that they may be in contravention of the *Municipal Act* or their own procedure by-law.

Nevertheless, we would caution the Municipality that these types of meetings which seem to be more formalized in nature (e.g. by a Chair of a committee or task force along with senior staff in attendance) appear to be straying “close to the line” of the *appearance* of lack of transparency or accountability on behalf of those individual members of council who were invited to give their opinions on an anonymous basis (i.e. an opinion that is not officially recorded).

**(b) Pre-writing Motions of Council**

The complaint alleges that the Municipality’s process is to pre-write motions authorizing a council or committee to go in-camera with a councillor’s name on the draft motion (i.e. pre-determining the mover of a motion to move into closed session). We note that there is nothing in the *Municipal Act* or the Municipality’s Procedural By-law that prohibits such practice. In our experience, it is usually done for expedience and for no other improper purpose. A member would be able to withdraw his name at the time the motion was introduced.

**IX. PUBLIC REPORT**

We received full co-operation from the staff and we thank them.

This report is forwarded to the Council of the City of Brantford. 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.

Nigel Bellchamber

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**AMBERLEY GAVEL LTD.**

**January 2016**

1. S.O. 2001, c. 25. [↑](#footnote-ref-1)
2. *Bill 130: An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”). [↑](#footnote-ref-2)
3. RSO 1990, c.M.56. [↑](#footnote-ref-3)
4. *York Police Services Board (Regional Municipality) (Re)*, 2010 CanLII 65788 (ON IPC). [↑](#footnote-ref-4)