**REPORT TO**

**THE CORPORATION OF THE COUNTY OF BRUCE**

**REGARDING THE INVESTIGATION OF THE CLOSED MEETING**

**OF THE COUNTY OF BRUCE HIGHWAYS COMMITTEE**

**HELD ON DECEMBER 20, 2012**

1. **COMPLAINT**

The Corporation of the County of Bruce (“County”) received a complaint about an in-camera (“closed”) meeting held by the County’s Highways Committee on December 20, 2012.

The complainant requested an investigation into whether the County breached the open meetings provisions of the *Municipal Act, 2001*[[1]](#footnote-1)(“Municipal Act” or “Act”). The complaint alleges that a matter discussed in the closed meeting was not an issue that was properly the subject of a closed meeting under the Municipal Act.

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

1. **JURISDICTION**

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

1. **LEGISLATIVE BACKGROUND**

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

Section 238(2) of the Municipal Actprovides that every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings.

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

The section sets forth exceptions to this open meeting rule. It lists the reasons for which a meeting, or a portion of a meeting, may be closed to the public (“open meeting exceptions”).

Section 239 reads in part as follows:

Meetings open to public

**[239.](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s1)**[(1)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm#s239s1)  Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

[(2)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm%22%20%5Cl%20%22s239s2)  A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(a) the security of the property of the municipality or local board;

(b) personal matters about an identifiable individual, including municipal or local board employees;

(c) a proposed or pending acquisition or disposition of land by the municipality local board;

(d) labour relations or employee negotiations;

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

(3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

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

2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

 …

Section 239 also requires that before a council, local board or committee moves into a closed meeting, it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution also must include the general nature of the matter(s) to be deliberated at the closed meeting.

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

Open meeting

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

Exception

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

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

(b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board. 2001, c. 25, s. 239 (6).

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

Section 239.1 of the Municipal Act provides that a person may request that an investigation be undertaken on whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public.

1. **INVESTIGATION BACKROUND**

The County CAO, the County Engineer, the County Deputy Clerk, and two lawyers in the County’s legal firm were consulted during the course of the investigation. Documents provided by the County and reviewed for the investigation included Agendas and Minutes of Meetings of the Highways Committee, documents related to the matters under consideration, the Procedure and Notice By-laws, and applicable legislation.

1. **The County’s Procedure By-Law**

In accordance with section 238 of the Municipal Act, the County has a Procedure By-law that governs the calling, place and proceedings of meetings. The Procedure By-law[[2]](#footnote-2) provides for closed sessions of Council or its Committees if the subject matter being considered falls within those matters set out in Section 239(2) or Section 239(3) of the Act.[[3]](#footnote-3)

1. **Agenda for the Highways Committee Meeting of December 20, 2012**

The Public Agenda for the Highways Committee Meeting of December indicated that it would be meeting in closed session “Pursuant to Section 239 of the Municipal Act, as amended, Sub-Section 3.1 Educational or Training and Sub-Section 2(e) Litigation or Potential Litigation”. It did not specifically list any agenda items for the Closed Meeting.

1. **Agenda for the Closed Meeting of the Highways Committee Meeting of December 20, 2012**

The Agenda for the Closed Meeting of the Highways Committee listed three items for consideration:

 (1) Approval of Minutes: November 15, 2012

 (2) Developing Rules of Procedures

 (3) Potential West Road Project

The last item is the issue dealt with in the complaint.

1. **Minutes of the Meeting of the Highways Committee of December 20, 2012**

The Minutes of the Public (Open) Meeting of the Highways Committee of December 20, 2012 indicate that a motion was carried “That the Committee move into a closed meeting pursuant to Section 239 of the Municipal Act, as amended, Sub-Section 3.1 Educational or Training and Sub-Section 2(e) Litigation or Potential Litigation”.

Subsequent to the Closed Meeting, the Committee reported out to the Public Session “That the Draft Bruce County Developing Rules of Procedures with Chiefs and Councils – Saugeen Ojibway Nation (SON) be received”. It did not report out on the item related to the Potential West Road Project.

1. **ANALYSIS AND FINDINGS**

The County’s CAO and Engineer indicated that both of the two substantive matters on the Closed Meeting Agenda (i.e. not the approval of the minutes of the November 15, 2012 meeting) dealt with consultation with the Chiefs and Council Saugeen Ojibway Nation (SON). The matter titled “Potential West Road Project” did not deal specifically with the potential project per se, in terms of advancing the project further in material sense. Saugeen Ojibway Nation (SON) has concerns about the level and type of consultation that the Province and the County will have related to the West Road Project. Both agenda items were in consideration of those concerns.

Litigation has been ongoing between the Saugeen Ojibway Nation and various defendants related to a potential land claim advanced by the Saugeen Ojibway Nation in 1994. The CAO confirmed that any discussion that occurs with Council or its Committees with respect to the West Road Project, and more specifically the Saugeen Ojibway Nation’s interest in that project, inevitably engages the very issues that are of the very subject of what appears to be protracted and sensitive litigation. Two solicitors in the County’s external law firm confirmed that any public discussion related to the interests of the Saugeen Ojibway Nation in this respect could prejudice the positions of the County as a defendant (and, indeed, possibly the positions of other defendants) to the 1994 legal claim.

In setting the agenda for the Closed Meeting of December 12, 2012, the CAO was aware that she would be directly addressing the land claim litigation when discussing with the Highways Committee consultation with the Saugeen Ojibway Nation. She confirmed that the land claim litigation was considered and discussed by the Highways Committee in its December 20, 2012 Closed Meeting.

The Closed Meeting Agenda item titled “Potential West Road Project” engaged the legal issues underlying the potential land claim. As such, the meeting was closed to the public under Section 239(2)(e) of the Municipal Act dealing with litigation or potential litigation.

This exception to the open meetings provisions of the Municipal Act is designed to protect which is known as “litigation privilege”. The Supreme Court of Canada recently explained that the purpose of litigation privilege is to “ensure the efficacy of the adversarial process”[[4]](#footnote-4). It further noted that parties to litigation “must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure”[[5]](#footnote-5).

The purpose of litigation privilege is to create a “zone of privacy”, based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.[[6]](#footnote-6) That zone of privacy extends to meetings of municipal councils, committees, or boards wherein the actual or potential litigation is considered. This is particularly true when the council, committee, or board is considering correspondence from a party who is a plaintiff in a legal action as against the council, committee, or board and who references that litigation in the correspondence.

Having spoken to the solicitors who are representing the County as one of the defendants to the potential land claim, we are satisfied that the item under consideration by the County’s Highways Committee was one that engaged the protections of litigation privilege. As such, it was permissible for the Highways Committee to consider this matter in closed session, having invoked the exception to the open meetings rule of the Municipal Act dealing with potential or actual litigation affecting the municipality.

We note that the Highways Committee did not make any decisions or give any directions to staff on the issue that is the basis of this complaint.

1. **RECOMMENDATIONS**

Although we have found that the County did not breach the provisions of the Municipal Act in holding a Closed Meeting of the Highway Committee on December 20, 2012, we have some recommendations with respect to the content of the agenda and the titling of agenda items.

1. **The Content of the Agenda**

The Public Meeting Agenda of the Highways Committee noted that the Committee would hold a closed meeting to discuss matters that attracted two exemptions under the Municipal Act. However, it did not indicate which matter was to be considered under which exemption. To ensure transparency and accountability, we recommend that the claimed exception to the Municipal Act be listed against *each* agenda item rather than in a “catch-all” fashion as part of a larger agenda. Thus for this particular Public Meeting Agenda, the content could have been:

2. Closed Meeting

 (a) Approval of the Minutes of the closed Meeting of the Highways Committee dated November 15, 2012.

(b) Developing Rules of Procedure, dealing with a matter under section 239(3) of the Municipal Act relating to Educational or Training Sessions[[7]](#footnote-7)

(c) Potential West Road Project/Consultation with Saugeen Ojibway Nation (SON), dealing with a matter under section 239(2)(e) of the Municipal Act relating to litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board

1. **Titling of Agenda Items**

The Municipal Actalso requires that prior to moving into closed session a resolution must be passed at a public meeting indicating that there is to be a closed meeting. The resolution also must include the general nature of the subject matter(s) to be deliberated at the closed meeting.

The Act does not provide guidance as to what language to use to convey “the general nature of the matter(s) to be deliberated at the closed meeting”, other than by necessary reference to one of the exceptions found in s. 239(2) of the Act.

Thus, the Clerk of a municipality, who is usually the individual charged with preparing the agenda, often must use some discretion when titling an agenda item that is the subject of a closed meeting. That discretion involves a tension between inadvertently disclosing too much and disclosing too little. Nevertheless, the title of the agenda item must be phrased in a way that “maximizes the information available to the public while not undermining the reason for excluding the public”.[[8]](#footnote-8)

In the interest of disclosing enough information, one might title the agenda item such that members of the public know *the essence* of the item under consideration without disclosing *the potential substance* of the ensuing deliberations. This might also provide Members of Council (or a committee or board) with sufficient information to prepare for the discussion or, most importantly, to disclose pecuniary or other interests at the appropriate time.

In this case, it would appear that the agenda item which is the subject of the complaint was not listed with enough specificity to meet best practice. It was not descriptive enough, such that the public could know the general nature – or the *essence* -- of the subject matter that was to be considered at the meeting. Without inadvertently divulging the precise *substance* of the discussion under consideration at the impugned meeting(s), the item could have been titled “Potential West Road Project/Consultation with Saugeen Ojibway Nation”.

1. **CONCLUSIONS**

We have concluded that the Bruce County Highways Committee appropriately met in closed session to discuss the matters under consideration at its meeting of December 20, 2012.

While we have made recommendations with respect to the content of agendas and the titling of agenda items, mere *procedural* inaccuracies would likely not render decisions made at a meeting as illegal. In any event, as noted earlier in this report, the Highways Committee did not make any decision, take a vote, or give any direction to staff with respect to the issue that is the subject matter of this complaint.

1. **PUBLIC REPORT**

We received full co-operation from all parties that we contacted and we thank them.

This report is forwarded to the Council of the Corporation of the County of Bruce. 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.

May 2013

Nigel Bellchamber

**Per: AMBERLEY GAVEL LTD.**

1. S.O. 2001, c. 25 (hereinafter “*Municipal Act”* or “*Act*”). [↑](#footnote-ref-1)
2. *A By-Law to Govern the Proceedings of the Council and Committees of the Corporation of the County of Bruce*, By-Law No. 2012-016, dated May 3, 2012 (“Procedure By-law”). [↑](#footnote-ref-2)
3. *ibid,* s.5(b). The Procedure By-law lists all of the exceptions from section 239 of the *Municipal Act*. [↑](#footnote-ref-3)
4. *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 27 (“*Blank*”). [↑](#footnote-ref-4)
5. *ibid.* [↑](#footnote-ref-5)
6. *ibid.* at para. 34. [↑](#footnote-ref-6)
7. We were not engaged to determine whether this agenda item was an appropriate one in which this exemption could be used; however, we have suggested the County review the subject matters under which this exemption is appropriately used. [↑](#footnote-ref-7)
8. See *Farber V. Kingston (City)* (2007), 279 D.L.R. (4th) 409 (Ont. C.A.), at para. 21 (“*Farber*”). [↑](#footnote-ref-8)