**REPORT TO**

**THE CORPORATION OF THE TOWNSHIP OF**

**ELIZABETHTOWN-KITLEY**

**REGARDING ALLEGATIONS OF AN IMPROPERLY CLOSED MEETING OF THE COUNCIL FOR THE TOWNSHIP OF ELIZABETHTOWN-KITLEY**

**ON JUNE 24, 2013**

**I. COMPLAINT**

Amberley Gavel Ltd. (“Amberley Gavel”) received a complaint about a closed (in-camera) meeting of The Corporation of the Township of Elizabethtown-Kitley (“Township”) Council (“Council”) held on June 24, 2013. The essence of the complaint is that Council discussed a matter at its closed session on June 24, 2013 which may or may not have been listed on the agenda for the closed session. The complaint alleges that the closed meeting was, therefore, in contravention of the open meetings provision of the *Municipal Act, 2001*[[1]](#footnote-1),as amended by Bill 130[[2]](#footnote-2) (“*Municipal Act*” or *“Act*”).

The complaint also alleges that the complainants sent a letter to the Township about this particular matter which they asked to be placed on a public agenda. The letter, dated June 28, 2013, questioned, *inter alia*, whether or not Council discussed the particular item at its closed session on June 24, 2013. Rather than placing the letter on the public agenda, the Township referred the letter to its solicitor for response. The solicitor responded that the Township did not breach the *Municipal Act*, as the complainants alleged, at the Council meeting of June 24, 2013. The complainants allege that the decision to refer their letter to the Township’s solicitor was in contravention of the provisions of the *Municipal Act*.

After seeking clarification about certain particulars of the complaint with the complainants, the Township was advised of the complaint by Amberley Gavel on November 12, 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.

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" \l "s239s1)**[(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" \l "s239s2)  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:

1. the *Act* permits or requires the meeting to be closed to the public; and
2. 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.

In addition, section 239 provides for an investigation about whether or not a municipality properly closed a meeting or part of a meeting to the public:

239.1 A person may request that an investigation of 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 be undertaken,

(a) by an investigator referred to in subsection 239.2 (1); or

(b) by the Ombudsman appointed under the Ombudsman Act, if the municipality has not appointed an investigator referred to in subsection

239.2 (1).

239.2 (1) Without limiting sections 9, 10 and 11, those sections authorize 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.

**IV. INVESTIGATION**

The investigation into the complaint began on November 12, 2014 with a request to the Township for background documents. Documents provided by the Township and reviewed during the course of the investigation included the Township’s Procedure By-law, the Agendas and Minutes of the open and closed meetings of Council at issue, and other relevant documentation. Documents provided by the complainants were also reviewed.

The Mayor, a Councillor, the Administrator-Clerk, Deputy Clerk, Solicitor, and former Treasurer for the Township 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.

**V. BACKGROUND**

1. **The Particular Issue: A Letter regarding a Human Resources Matter**

The complaint alleges that two letters were delivered by an individual, one to a Member of Council and one to a member of Township staff, just prior to the Council meeting on June 24, 2013 (“the two letters”)[[3]](#footnote-3). The author of the two letters was neither of the complainants, although the complainants witnessed the letters being delivered.

The complaint also alleges that the agenda for the Council meeting on June 24, 2013 contained an item for the closed session agenda that was about an item involving an “identifiable individual”. According to the complaint, that agenda item was struck from the agenda at the beginning of the open session of Council.

The complainants indicated that they were approached by a Member of Council after the Council meeting who asked if the complainants knew about the two letters. Since the two letters were not intended for Council, the complainants were left wondering how a Member of Council, who was not a recipient of a letter, could be aware of the two letters.

The complainants were left with the impression that the two letters might have been discussed in the closed session of Council on that evening, despite not having been listed as an item for the closed session.

If the two letters were discussed at the closed session on June 24, 2013, the complainants allege that Council would have been in contravention of the *Municipal Act*.

1. **A Subsequent Letter from Two Members of the Public**

Two members of the public sent a letter to the Mayor and Members of Council on June 28, 2013 asking how a Member of Council knew about the contents of a letter which was not directed to him (“the June 28 letter”). In that letter, the individuals asked the following questions:

1. “How did the Member of Council know about the communication [i.e. the two letters]?”
2. “Was the letter discussed, in any way, during the closed session??”
3. “Since, to the best of [their] knowledge, the individual had previously only discussed the letter with the individual’s lawyer, and since we were only asked to witness the documents only moments before the start of the public meetings where all parties referenced herein (except the individual who wrote the letter) remained in the meeting, and since the envelopes were sealed and individually addressed, how do the two recipients to whom the letter was addressed explain the inquiring Councillor’s knowledge of the letter and its contents?”
4. “Since the document was addressed jointly to only two individuals and not to Council as a whole, under the Privacy Act, are the recipients permitted to discuss an HR issue with anyone other than each other and/or their lawyers?”

The authors of the June 28 letter asked that their letter be placed on “the public record” and be dealt with at the “meeting of Council scheduled for Tuesday, July 3, 2013, or at the next Council meeting if the Tuesday meeting is cancelled”.

The authors of the June 28 letter received a letter dated July 3, 2013 from the Township’s solicitor. The solicitor indicated that he had “conducted a thorough inquiry into the events of June 24, 2013” and the allegations contained in the June 28 letter. He further indicated that, based on his inquiries, there was no breach of the *Municipal Act.* In addition, he indicated that Council would not receive the June 28 letter in open session and it would not have a discussion in open session about its contents, “given the sensitive nature of the matter”.

The complainants allege in their complaint to Amberley Gavel that they were not seeking an investigation under section 239 of the *Municipal Act* about the June 24, 2013 meeting in their June 28 letter. However, the Township solicitor appears, by virtue of the wording in his July 3 letter, to have conducted his “inquiries” under the provisions of section 239 of the *Municipal Act* dealing with open meetings. The complainants based their allegations on the conclusion of the Township solicitor that there was “no breach of the *Municipal Act*” on June 24, 2013, as set out in his July 3 response. The Township solicitor is not authorized to conduct an investigation for the Township under the *Municipal Act*. Council has appointed LAS to be its investigator under section 239 of the *Municipal Act*. Hence, the complainants allege that the actions of the Township solicitor, in conducting his inquiry, is a breach of the *Act*.

1. **Municipality’s Procedural By-law**

The Municipality has a procedure by-law which governs the calling, place, and location of meetings. [[4]](#footnote-4) The Procedure By-law provides Council may, by resolution, close a meeting or part of a meeting to members of the public “if the subject matter to be considered is permitted under Section 239(2) of the Municipal Act”.[[5]](#footnote-5) The By-law contains strict provisions with respect to confidentiality of closed meetings and penalties for violation of confidentiality.[[6]](#footnote-6)

Further, it provides that a request for an investigation of whether Council has complied with the *Municipal Act* or its By-law shall be referred to the “Investigator” who will conduct an investigation and report to Council in accordance with Section 239.2 of the *Municipal* Act.[[7]](#footnote-7) The report of the investigator is to be made available to the public “by a date that is no later than the date of the next regular meeting of Council following the date the report is received.”[[8]](#footnote-8) The By-law defines the investigator as the “Investigator appointed by Council pursuant to Section 239.2 of the *Municipal Act*”.[[9]](#footnote-9)

1. **Agenda for the Meeting of Council on June 24, 2013**

The Agenda for the Meeting of Council on June 24, 2013 indicated that Council would be dealing with two closed meeting items, including a “personal matter about an identifiable individual” listed as item 13.1.

1. **Minutes of the Meeting of Council on June 24, 2013**

The Minutes of the Meeting of Council on June 24, 2013 in open session indicated that the Mayor, as Chair of the meeting, noted that item 13.1 had been removed from the agenda. Council moved into closed session at 9:45 p.m. and came back into open session at 10:00 p.m. After a brief reporting out, the meeting adjourned.

1. **Agenda for the Closed Session of Council on June 24, 2013**

The Agenda for the Closed Session of Council on June 24, 2013 indicated that Council would only be discussing a proposed or pending disposition of land.

1. **Minutes for the Closed Session of Council on June 24, 2013**

The Minutes for the Closed Session of Council on June 24, 2013 indicated that Council went into closed session at 8.54 p.m.[[10]](#footnote-10) and discussed the proposed or pending disposition of land. No other matters were contained in the Minutes as having been discussed. The closed session adjourned at 10:00 p.m.

**VI. ANALYSIS AND FINDINGS**

It should 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 Members of Council ought to have been advised about the content of the two letters delivered on June 24, 2013, or whether or not the individual who allegedly divulged the existence of the two letters breached any privacy considerations. Our role is confined to interpreting whether or not Council followed the processes outlined in either the *Municipal Act* or the Municipality’s Procedure By-law.

1. **Item 13.1 of the Council Agenda**

The Deputy Clerk was in charge of compiling the agenda for the Council Meeting of June 24, 2013. Given the passage of time, she was unable to remember what item was scheduled to be discussed by Council under Item 13.1 of the Council Agenda

The Clerk recalls that there was no specific item scheduled for Item 13.1 which is why the Mayor was advised that the agenda item was to be struck from the meeting. Given the passage of time, she was unable to remember what item was originally scheduled under this agenda item. However, she also said it could be that the agenda was compiled using a template and that this could have been an unnecessary carryover from the template.

The Mayor recalls that the matter scheduled to be discussed may have involved a residential tax matter in some way.

It is understandable that the Mayor and staff would not remember the precise nature of Item 13.1 of the Council Agenda given the passage of time. However, we saw or heard no evidence that the matter related to the June 24 letter delivered to the Mayor and the Clerk-Administrator moments prior to the start of the Council meeting.

1. **The Two Letters of June 24, 2013**

The Mayor recalls receiving the June 24 letter from its author just prior to the start of the Council meeting on June 24 while he was already standing in conversation with another Council member. The Administrator-Clerk also recalls receiving the letter from its author just prior to the start of the meeting.

The Administrator-Clerk recalls that she read the letter while in closed session but did not discuss it with either the Mayor or Councillors at that time. The Mayor recalls that he read the letter after the Council meeting was adjourned.

Council had adjourned the closed session; came back into open session; re-opened the doors of the Council Chambers to let any remaining members of the public back into the meeting (of which there were none); reported out; and then adjourned the open meeting.

As the Members of Council and the staff were collecting their paperwork at the end of the meeting, the Mayor recalls opening the June 24 letter. After briefly reading the first lines of the letter, he decided that all Members of Council should be made aware of the letter. He then read the letter out.

He asserted that he would not have read out the letter if members of public were in the room and would have dealt with advising Council about the letter through a different process. A different approach would have been preferable in our opinion.

The Administrator-Clerk indicated that the Mayor read the letter out and that she advised Members of Council that they had a process to deal with such matters under policy and that it would be dealt with accordingly. Evidence was that there was no discussion about the letter by Members of Council.

The Councillor who was alleged to have approached the complainants after the Council meeting, and who allegedly asked if the complainants knew about the two letters, did not recall the incident. Further, he does not recall the item having even been discussed at Council on June 24, 2013.

We have concluded that, although no members of the public were in the Council Chambers at the time, Council was not in closed session when the letter was read out to the Members of Council by the Mayor. Further, there was no discussion as to its contents which would materially advance the business of the municipality. Had there been any, our conclusion would likely have been different. Councillors must avoid discussions of Township matters involving a quorum of Council outside of properly convened meetings, or risk being found in breach of the *Act.*

1. **The June 28, 2013 Letter**

When the municipality received the June 28, 2013 letter the Administrator-Clerk assigned the then Treasurer to consult with the Township’s solicitor about the matter. The Administrator-Clerk, properly so, delegated her related Clerk’s duties to the Treasurer since she was a party to the matter underlying the June 24, 2013 letters.

The then Treasurer sought advice of the Township solicitor as to whether or not the June 28, 2013 letter could be put on the public agenda. Notwithstanding the author’s careful wording of the June 28, 2013 letter, she was concerned about confidentiality relating to the subject matter of the June 24, 2013 letter. The then Treasurer advised Amberley Gavel’s review officer that her intent was not that the Township solicitor review the matter under the open meetings provisions of the *Municipal Act*, notwithstanding that the letter clearly asked if the June 24, 2013 letters were discussed in closed session. Her sole intent was to preserve the confidentiality of the issues engaged in the June 24, 2013 letters and to seek advice as to whether or not the tabling of the June 28, 2013 letter on a public agenda would undermine the integrity of the Township’s processes relating to the subject matter in the June 24, 2013 letters.

Unfortunately, one is left with the impression, in reading the Township solicitor’s July 3rd response to the June 28 letter, that the Township solicitor was conducting a review of Council’s processes of June 24, 2013 as if he were an investigator appointed under section 239 of the *Municipal Act* to determine whether or not Council breach the provisions of the *Act* respecting open meetings. The Township solicitor clearly indicates in his July 3rd letter that “I am completely satisfied that there has been no breach of the *Municipal Act* in this matter”. Respectfully, that is not the function of the Township solicitor to decide upon breaches of the *Municipal Act* once the municipality has assigned a closed meeting investigator.

We are satisfied in speaking to Township staff and the solicitor that this was inadvertent.

He did not believe that they were dealing with a closed meeting complaint per se. Although it may have been a breach of the *Municipal Act* and the Township’s Procedure By-law that the Township solicitor responded in this manner to the June 28 letter, it was not an intentional breach.

The better approach would have been to ask the authors of the June 28 letter, at the time of receipt of the letter, if their intention was to ask for an investigation under section 239 of the *Municipal Act*. However, we appreciate that we are reviewing this matter in retrospect, especially in light of the fact that the former Treasurer was merely seeking advice about whether or not an item should be placed on a public agenda. Additionally, the authors of the June 28 letter have advised Amberley Gavel that it was not their intention to seek an investigation under section 239 of the *Municipal Act.*

We have found that all parties we interviewed about this matter were credible in their testimony that it was not their intention to breach the provisions of the *Municipal Act* in responding to the June 28 letter.

**VII. CONCLUSION**

Amberley Gavel has concluded that the Council for the Township of Elizabethtown-Kitley did not breach any provisions of the *Municipal Act* when the Mayor informed the Members of Council about the contents of the June 24, 2013 letters delivered to him and the Administrator-Clerk. Although no members of the public were present in the Council Chambers at the time, Council was not in closed session and did not behave as if it were. We can understand why the complainants had the impression that the matter was discussed in closed session, if indeed they were approached about knowledge of the letter, but we found no evidence that this was in fact the case.

However, we find that the Township did inadvertently and unintentionally breach the provisions of the *Municipal Act* in allowing the Township’s solicitor to conclude whether the processes that Council engaged in its June 24, 2013 meeting were in breach of the *Municipal Act*. We would caution the Township in dealing with any inquires about closed meetings of its council, committees, or local boards. If an individual appears to be alleging improprieties surrounding the open meetings provision of the *Municipal Act*, the complainant should be asked to particularize the complaint in accordance with the municipality’s procedures for closed meeting complaints. Once particularized the complaint should be reviewed by the investigator appointed by the municipality.

**IX. PUBLIC REPORT**

This report is forwarded to the Township of Elizabeth-Kitley. 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.

Nigel Bellchamber

**AMBERLEY GAVEL LTD.**

**February 2015**

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. Since the contents of the two letters involve a confidential human resources matter, we will not divulge the nature of the matter. We did not see, ask to see, or need to see the letters to perform our review of the complaint. [↑](#footnote-ref-3)
4. By-law Number 10-07, dated the 8th day of March, 2010 (“By-law”). [↑](#footnote-ref-4)
5. *ibid*. section 16.a). [↑](#footnote-ref-5)
6. *ibid.* sections 16.b) through l). [↑](#footnote-ref-6)
7. *ibid.* sections 16.m) and 16.n) [↑](#footnote-ref-7)
8. *ibid.* section 16.o). [↑](#footnote-ref-8)
9. *ibid.* section 2.h). [↑](#footnote-ref-9)
10. This appears to be a typographical error since the resolution to move in closed session is dated 9:45 p.m. [↑](#footnote-ref-10)