**REPORT TO**

**THE CORPORATION OF THE MUNICIPALITY OF NORTHERN BRUCE PENINSULA WITH RESPECT TO A MEETING HELD MARCH 11, 2013**

1. **COMPLAINT**

The Municipality of Northern Bruce Peninsula received a complaint from a member of Council alleging that Council went into a closed session on March 11, 2013 citing two exceptions under Section 239(2) of the Municipal Act and that in the second instance, both the subject matter, when presented to Council in closed session and also the ensuing discussion in closed session did not meet the requirements of the Municipal Act for exclusion of the public.

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

1. **JURISDICTION**

The Municipality 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 Municipality.

1. **LEGISLATIVE BACKGROUND**

**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" \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 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 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.

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)](http://www.e-laws.gov.on.ca/html/statutes/french/elaws_statutes_01m25_f.htm" \l "s239s5)  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" \l "s239s6)  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).

1. **INVESTIGATION BACKROUND**

The Municipal Clerk and Chief Administrative Officer were consulted during the course of the investigation. Documents provided by the Municipality and reviewed for the investigation included Agendas and Minutes of Meetings of the Council, documents related to the matters under consideration, the Procedure and Notice By-laws, and applicable legislation.

The Review Officer also met separately with the complainant.

1. **The Municipality’s Procedure By-Law**

The Municipality has a Procedure By-law that reflects the provisions of the Municipal Act with respect to closed meetings and the requirement to give notice of meetings to the public. There was no suggestion that the March 11, 2013 meeting had been held without appropriate notice.

1. **Meeting of Council on March 11, 2013**

It was duly moved, seconded and carried:

*“That Council move into closed meeting at 2:24 p.m. pursuant to Section 239 of the Municipal Act, 2001, as amended, for the following reasons: 1) litigation or potential litigation including matters before administrative tribunals affecting the Municipality of local board (Greenough Harbour); 2) litigation or potential litigation including matters before administrative tribunals affecting the Municipality of local board (Tyas et al)”*

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1. **ANALYSIS AND FINDINGS**

The minutes of the closed session, and conversations with the CAO and the complainant were quite helpful to the investigation.

The closed meeting began at 2:24, the minutes of the previous closed session were approved, and direction provided to the CAO with respect to the Greenough Harbour matter by motion.

The Council then turned its attention to a document that contained upwards of 100 pages entitled Supplementary Application Record(SAR) that had been filed late with the court with respect to the Tyas et al matter and deemed not admissible in court because of late filing, and hence did not form part of the public record. The minutes indicate that “Council took some time to review the 100 page document”.

When interviewed, the CAO indicated that he had been advised by the municipal solicitor that if Council were to discuss the contents of this package that it should do so in closed session, and the CAO indicated that he believed that further litigation with respect to the matter was still possible at the time.

The Council minutes then indicate that discussion turned to communications between the Tyas et al applicant’s representatives and the member of Council who is the complainant in this investigation, alleging the member’s behavior was inappropriate. This was apparently an extensive discussion.

Following several exchanges, the complainant left the meeting at 2:57 and the closed session then adjourned on motion at 2:58, public session was resumed and then immediately adjourned at 2:59.

The complainant, when interviewed indicated that he left because the subject matter that was being discussed was no longer authorized by the resolution that had been passed.

1. **FINDINGS AND RECOMMENDATIONS**

The municipality complied with the Municipal Act with respect to notice for the March 11 meeting.

The resolution that was passed authorizing the closed session was appropriate in the circumstances when it was passed. Staff had been advised by the municipal solicitor that Council should consider the multi-page Supplementary Application Record in closed session.

But a question arises regarding the substantial portion of the closed meeting discussion that ensued with respect to communications by one of the members of Council regarding the case.

Apparently the communications in question or the opinions contained therein were not considered confidential by anyone before being included in the larger package of material (SAR).

If the purpose of the closed session discussion was to criticize the member for his communications, then the authorizing resolution did not permit that.

It is indeed inappropriate for a Council to introduce a lengthy report or other document legitimately into a closed session discussion only to discuss a small portion that would, on its own, not be eligible for discussion in the absence of the public.

The question then arises, may the conduct of a member of Council, in his or her capacity as a member of Council, be discussed when the public is excluded from being able to observe the meeting?

The answer is yes, if an appropriate resolution is passed under the Act, authorizing the session be closed to consider “personal matters about an identifiable individual”. It is done regularly when employee performance is discussed. There are no identifiable individuals excluded from this exception in Section 239(2)(b) of the Act.

In this case no such resolution was passed.

But even if one had been, what does a member of Council do when he or she disagrees with the discussion of a matter being held in closed session rather than open session, whether or not the an appropriate resolution has been passed?

Best practice is that a member should feel free to question whether or not a matter truly needs to be discussed in closed session. It is not unusual for a Council, when faced with such a question, to move the matter to open session after hearing from staff as to why they placed it on the closed session agenda.

If a member wishes, a procedural motion could be introduced in closed session to move the matter to open session. A recorded vote could also be requested.

If a member is unable to convince colleagues and still objects he or she could consider leaving the closed session for the discussion of the matter to demonstrate his or her objection.

**CONCLUSIONS**

The Municipality of Northern Bruce Peninsula followed appropriate procedures in going into closed session on March 11, 2013 to discuss matters that were included in the resolution authorizing the closed session.

However, when in closed session, Council strayed from the closed session authority, and in our opinion breached the provisions of the Municipal Act when it focused on two items from a larger package that were by themselves not the subject of litigation or potential litigation.

These items could have been discussed under another exception authorized by the Municipal Act.

But, just because they may exclude the public from discussion on a matter, a Council should as a matter of best practice routinely ask itself when in closed session if an item actually needs to be discussed in the absence of the public.

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 Municipality of Northern Bruce Peninsula. 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 the Council or at a special meeting called for the purpose of receiving this report prior to the next regular meeting.

January 2014

**Closed Meeting Investigator**

**AMBERLEY GAVEL LTD.**

**Nigel Bellchamber**

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**Per:**