



City of
Peterborough

To: **Members of the Committee of the Whole**

From: **Patricia Lester, City Solicitor, Director of Legal Services**
John Kennedy, City Clerk

Meeting Date: **September 6, 2016**

Subject: **Report OCS16-007**
A report to provide information from the City's Closed Meeting Investigator

Purpose

A report to provide information to Council from the City's Closed Meeting Investigator, Local Authority Services and to make public Amberley Gavel's Report as required under the **Municipal Act, 2001**.

Recommendation

That Council approve the recommendation outlined in Report OCS16-007 dated September 6, 2016, of the City Solicitor and Director of Legal Services and the City Clerk, as follows:

That Report OCS16-007 be received for information.

Budget and Financial Implications

There are no budget or financial implications arising out of this report.

Background

Closed Meeting Investigations

Section 239.2 of the **Municipal Act, 2001** ("Act") allows municipalities to appoint Closed Meeting Investigators. Those Investigators are empowered to investigate complaints, and otherwise exercise the powers appointed to them by the municipality. Upon conclusion of the investigation, the Investigator is required to report their conclusions and reasons for those conclusions to the municipality and make any such recommendations that are appropriate in the circumstances. If in the course of the investigation, it appears that the findings may adversely affect the municipality, the Investigator shall give the municipality the opportunity to make representations respecting the adverse report or recommendation. However this did not occur as the Investigator did not deem its decision to "adversely affect" the City. The decision of the Investigator is final, and there is no ability to appeal the decision.

Complaint regarding April 11, 2016 Meeting

The City Clerk's Office received a complaint from a citizen that the Committee of the Whole held a meeting in Closed Session on April 11, 2016 did not meet the requirements of the Act and was improperly held in closed session.

The complaint was forwarded to Local Authority Services, ("LAS") the City's Closed Meeting Investigator. LAS delegated its power and duties to Amberley Gavel Ltd. to undertake the investigation and report to City Council.

Amberley Gavel Ltd. reviewed the Agenda and Minutes for the April 11, 2016 meeting, the City's Procedure By-law, other relevant documentation and consulted with the City Clerk and Deputy Clerk. The Investigator's conclusion was that the closed meeting on April 11, 2016, was improperly held in closed session. The Report prepared by Amberley Gavel Ltd., dated July, 2016, is attached to this report as Appendix A.

The Act requires that the Investigator's Report be made public by Council and the purpose of this Staff Report is to inform Council and the public about the Investigator's findings.

The balance of this report explains the context of the April 11, 2016 meeting, the Investigator's findings and staff's conclusions.

Facts Regarding the April 11, 2016 Meeting

The City had been considering a Draft Plan of Subdivision Application for the "Batten-White Subdivision" ("Application") in accordance with the **Planning Act**. After having sent the Application back to the developer for certain modifications, a revised subdivision plan was before the Planning Committee of Council on March 21, 2016 for approval. All eleven members of Council sit on the Planning Committee.

On March 21, two members of Council were absent and one declared a conflict of interest leaving eight Members of Council to vote on the matter. The motion lost on a tie vote of 4-4. The vote was not a majority decision and therefore the matter was left undecided and no recommendation could be placed before Council. This resulted in Council, as the approval authority, not having made a decision on the Application.

This created a problem in that the legislative timeline for approving or denying the Application had expired and the developer automatically had a right of appeal to the Ontario Municipal Board (OMB).

The City's Procedure By-law relating to tie votes (Article 16.17.3), provides that a tie vote shall be decided in the negative. The purpose of the closed meeting was to advise Council that the City would not have an official position on the Application in the event of an OMB hearing. Therefore, the OMB could render a decision on the Application without the City's concurrence or conversely without an opportunity for the City to argue against the Application.

The grounds relied upon by the Committee of the Whole to move in closed session was section 239(2)(e) of the Act, litigation or potential litigation, including matters before Administrative Tribunals (such as the OMB), affecting the municipality or local board. Council as a party to potential litigation or in litigation must be able to discuss its position and strategies in closed sessions without disclosure to an opposing party.

The Minutes for the Committee of the Whole Meeting for April 11, 2016 in Closed Session indicate that the Committee had a discussion about why the matter was being dealt with in Closed Session. They were advised that the matter may result in potential litigation and hence the meeting was closed to the public. They were also advised that the meeting could have alternatively been closed under section 239(3.1), the education and training exception under the Act, as the topic under discussion at the meeting was not the Application itself but, rather, the procedural flaw in the City's Procedure By-law which left the Application matter virtually undecided. The Clerk and the Deputy Clerk indicated that no discussion occurred on the merits or defects, if any, in the Application at the Closed Session meeting. It was entirely devoted to the flaw in the City's Procedure By-law.

Investigator's Report

The Investigators concluded that "litigation must be actually in process or realistically pending in order to invoke litigation privilege" and that the Committee breached the provisions of the Act when they discussed the City's Procedure By-law at a Closed Session.

Alternatively, the Investigators also concluded that if the City relied upon section 239(3.1) of the Act to close its meeting to the public, it would also have been in breach of the Act as staff was merely imparting information to Council on how the Procedure By-law operates and the effect of the tie vote on March 21. In the opinion of the Investigators, there would have been no good or valid reason that the information discussed in camera, could not have been shared with the public.

Conclusion and Strategy

Council went into closed session on April 11, 2016 to discuss the impact of a tie vote on a specific planning Application and what it might mean to the City at an OMB Hearing. However, the discussion only dealt with the City's Procedural By-law and did not address the City's position at a potential OMB Hearing.

It appears that in interpreting the types of matters that are exceptions to open meetings, only narrowly defined matters are allowed and not broader interpretations. Although the Investigator's Report reviews "litigation privilege" and concludes that it begins when litigation is contemplated, it "must be more than mere speculation" or the "litigation dispute must have been sufficiently crystallized at the time of the closed meeting in order to cloak the discussion in litigation privilege."

Council agendas are prepared by staff keeping in mind the open and transparent nature of municipal activities. This investigation has revealed that there are different interpretations of the exceptions in section 239(2) of the Act. This difference makes it difficult to establish a best practice, but staff will endeavour to ensure that only narrow issues that come within the exceptions are included in reports recommended to be dealt with in closed sessions. This experience is also a reminder that not all of a discussion needs to be closed or just that part of the discussion that would comply with the Act. In addition, there will be greater specificity in the reasons provided for going into closed sessions, in the agendas provided to the public.

Summary

The Closed Meeting Investigator's Report has been a learning experience of what the exceptions are under the Act and how they can be applied to City Council business. As such staff will initiate different strategies to ensure compliance with the Act.

Submitted by,

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City Solicitor & Director of Legal Services

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City Clerk

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Attachments:
Appendix A – Report to the Corporation of the City of Peterborough Regarding the Investigation of the Closed Meeting of the Committee of the Whole of Peterborough Council on April 11, 2016

Appendix A

**REPORT TO
THE CORPORATION OF THE CITY OF PETERBOROUGH REGARDING THE
INVESTIGATION OF THE CLOSED MEETING OF THE COMMITTEE OF THE
WHOLE OF PETERBOROUGH COUNCIL
ON APRIL 11, 2016**

I. COMPLAINT

The Corporation of the City of Peterborough ("City") received a complaint about a meeting of Committee in the Whole of Council for the City of Peterborough ("Council") on April 11, 2016. The essence of the complaint is that the closed meeting did not meet the requirements of the *Municipal Act, 2001*¹, as amended by Bill 130² ("*Municipal Act*" or "*Act*"). The complainant alleges that Committee of the Whole discussed a matter which could not have properly been discussed in closed session.

This complaint was sent to the offices of Amberley Gavel Ltd. ("Amberley Gavel") for investigation.

II. 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 City Council.

III. 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.

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").

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).

(3) A meeting or part of a meeting shall be closed to the public if the subject matter being considered is,

- (a) a request under the *Municipal Freedom of Information and Protection of Privacy Act*, if the council, board, commission or other body is the head of an institution for the purposes of that Act; or
- (b) an ongoing investigation respecting the municipality, a local board or a municipally-controlled corporation by the Ombudsman appointed under the *Ombudsman Act*, an Ombudsman referred to in subsection 223.13 (1) of this Act, or the investigator referred to in subsection 239.2 (1). 2014, c. 13, Sched. 9, s. 22.

Educational or training sessions

(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. 2006, c. 32, Sched. A, s. 103 (1).

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) 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).

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)).

IV. INVESTIGATION

Documents reviewed during the course of the investigation included Agendas and Minutes for the April 11, 2016 meeting, the City's Procedure By-Law, and other relevant documentation. The City Clerk ("Clerk") and Deputy Clerk were also consulted during the course of the investigation.

V. BACKGROUND

(a) The Development Application

The City had been considering a Draft Plan of Subdivision Application for the "Batten-White Subdivision" ("Application") in accordance with the *Planning Act*, R.S.O. 1990, c. P.13 ("*Planning Act*"). After having sent the Application back to the developer for certain modifications, a revised subdivision plan was before the Planning Committee of Council on March 21, 2016 for approval. All eleven Members of Council for the City sit on the Planning Committee. On March 21, two Members of Council were absent and one declared a conflict of interest on the Application, leaving eight Members of Council to vote on the matter. The vote lost on a tie vote (4 in favour; 4 opposed).

According to the Clerk, the vote that was a tie vote was not a majority decision of the Planning Committee pursuant to the City's Procedure By-law. It effectively left the matter "undecided" by the Planning Committee and no recommendation could be placed before Council. As a result, Council, as the approval authority, was considered not to have made a decision on the Application.

The legislative timeline for approving or denying the Application then expired and the developer automatically had a right of appeal to the Ontario Municipal Board ("OMB"). Significantly, given the section of the City's Procedure by-Law relating to the effect of tie votes about development applications, the Clerk advised that the municipality would not have an official position to put before the OMB on the matter. Therefore, the OMB could make a decision on the Application without the City's concurrence on the Application or, conversely, without an opportunity for the City to argue against the Application before the OMB.

According to the Clerk, this was not a situation that Council had ever contemplated or experienced.

(b) The Agenda for the April 11, 2016 Committee of the Whole Meeting (Open)

The Agenda for the Committee of the Whole Meeting for April 11, 2016 provides that Committee of the Whole would be considering meeting in Closed Session under "Section 239(2)(e) Litigation or potential litigation, including matters before Administrative Tribunals, affecting the municipality or local board".

(c) The Minutes for the April 11, 2016 Committee of the Whole Meeting (Closed)

The Agenda for the Closed Session of Committee of the Whole Meeting for April 11, 2016 provides that Committee of the Whole would be meeting in Closed Session under "Section 239(2)(e) Litigation or potential litigation, including matters before Administrative Tribunals, affecting the municipality or local board; Chief Administrative Officer Verbal Report; Batten-White Draft Plan of Subdivision Application".

(d) The Minutes for the April 11, 2016 Committee of the Whole Meeting (Closed)

The Minutes for the Committee of the Whole Meeting for April 11, 2016 in Closed Session indicate that Committee of the Whole had a discussion about why the matter was being dealt with in Closed Session. They were advised that the matter may be one for potential litigation and hence the meeting was closed to the public. They were also advised that the meeting could have alternatively been closed under Section 239(3.1), the education and training exception under the *Municipal Act*, as the topic under discussion at the meeting was not the Application itself but, rather, the procedural flaw in the City's Procedure By-law which left the Application matter virtually undecided.

Staff was directed to review the Procedure By-law and to suggest proposed changes for Council consideration.

The Clerk and the Deputy Clerk indicated to us that no discussion occurred on the merits or defects, if any, in the Application. It was entirely devoted to the flaw in the City's Procedure By-law.

VI. ANALYSIS AND FINDINGS

(a) Litigation Privilege

Section 239(2)(e) of the *Municipal Act* permits a council, local board, or committee to discuss a matter in a closed meeting if the subject involves litigation or potential litigation, including matters before an administrative tribunal (e.g. the OMB). The Supreme Court of Canada recently considered the nature of the litigation privilege in *Blank v. Canada (Minister of Justice)*³:

Litigation privilege...contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.”⁴

Litigation privilege begins when litigation is contemplated and continues throughout the litigation process, including any appeal processes. The privilege expires at the end of the litigation.

Given the fact that the litigation does not end until decisions are rendered by the court or administrative tribunal and all appeals, if any, are exhausted, Council’s processes must be set up to allow Council, as a party in the litigation, to discuss their positions and strategies in private and without fear of premature disclosure to the opposing party. For those reasons, Council conducts its deliberations in closed session. Meetings are not closed in order to exclude the public from the process, although that is the effective outcome. Meetings are closed to ensure that the opposing party is not privy to Council’s deliberations on its positions and strategies.

However, the litigation must be actually in process or realistically pending in order to invoke litigation privilege. Council should not go into closed session merely because another party has the right to bring a lawsuit or other claim against Council or that one speculates that litigation might be brought as a result of a Council decision. Therefore, “potential for litigation” must be more than mere speculation on the part of some Members of Council or staff or other advisors or the litigation dispute must have been sufficiently crystallized at the time of the closed meeting in order to cloak the discussion in litigation privilege.

An appeal had not been launched at the time of the Closed Session of Committee of the Whole on April 11, 2016.

However, we do not have to decide on whether or not the potential for litigation was sufficiently crystallized in order to attract the benefit of this exemption.

Committee of the Whole was clearly not discussing the litigation itself, or its plans and strategies. Thus, there could be no concern about premature disclosure of their litigation strategy. They were discussing a general flaw in their Procedure By-law, albeit the flaw was what potentially could lead them down the road to litigation. There has been no suggestion that a Member of Council on either side of the vote was using this flaw in the Procedure By-law as a strategic move to tie the hands of Council as the approving authority. It seems to have come as a

³ [2006] 2 S.C.R. 319, 2006 SCC 39 (“Blank”).

⁴ *ibid.* at paras. 28-29.

surprise to everyone involved.

There is no reason why the public could not have been privy to the discussion about the procedural flaw and what could be done to amend the Procedure By-law, whether or not the amendments could take place in time to put the matter back before the Planning Committee, or the timing for such amendments. We see neither legislative exception nor principled reason allowing Council to have held these discussions in Closed Session. Indeed, to the contrary, having the discussion “behind closed doors” has led the complainant, and perhaps others, to suspect that Council was secretly making deals with the developer or those in opposition to the Application without openness and transparency.

Moreover, it is customary that a change to a municipality’s procedure by-law comes with appropriate notice and, frequently, a public meeting. Having the benefit of early and open disclosure about a flaw in a municipality’s procedure by-law would be useful to the public, especially in terms of understanding what steps a council, local board, or committee can and cannot take under its own by-laws.

As a result, we have concluded that the Committee breached the provisions of the *Municipal Act* when Committee of the Whole discussed the City’s Procedure By-law at a Closed Session on April 11, 2016.

(b) The Education and Training Exception

Although the City did not rely upon section 239(3.1) of the *Municipal Act* to closed its meeting to the public, the members of the Committee of the Whole were advised that it would have been an alternative reason to close the meeting to the public. Hence, for completeness of reporting, we will canvass that exception.

The Municipal Act permits a municipal council to have a closed session for the purpose of educating or training the members. This is a discretionary exemption to the open meetings rule of the Act and may be invoked at the option of the council or committee (but does not have to be). However, at the meeting, no member can discuss or otherwise deal with any matter that materially advances the business or decision-making of the council. This exception covers meetings where the sole purpose is to provide education or training but where no transactional business, decision-making, or advancement of municipal business or decision-making occurs during the session.

“Education” and “training” are not defined in the Act. The dictionary definition for education is:

the process of educating, teaching, or training; the process of imparting or acquiring skills

And for “training”:

to give the discipline and instruction, drill, or practice designed to impart proficiency

This discretionary exemption to the open meetings rule allows members of council to receive the benefit of education or training in an environment where they might feel more comfortable openly asking questions of the educators or trainers and when discussing their perceptions about

their own personal level of knowledge or ability relating to a proficiency or skill. Examples of these types of sessions include training on communication skills, governance skills, team building, use of software, or leadership skills. The purpose of such training or education is not to discuss council business, either in terms of past business or decisions or potential future business or decisions.

In its 2013 publication entitled “What you need to know about: Closed Meetings”, authored by Amberley Gavel, LAS explains the purpose of this discretionary provision as follows [emphasis added]:

Ongoing training of members of council, local boards or committees is a necessity. There is discretion whether the training is done in public or at a closed meeting. If the council, local board or committee chooses to receive training at a closed meeting then the restrictions found in subsection (3.1) apply. When utilizing this reason for a closed meeting there can be no debate on an issue, and no member may encourage other members to support a particular position. **This restriction includes merely discussing a matter in a manner that is intended to assist in understanding the business of the municipality or local board.**

Both Amberley Gavel and the Ontario Ombudsman have considered the application of this section of the Municipal Act in its prior reviews of municipal meetings. Significantly, the Ombudsman has cautioned councils and their committees about using closed education sessions as “opportunities to consider information that will form the basis for their future decision-making”. Similarly, we have said that updating council or its committees on the status or progress of various initiatives or plans does not amount to education and training. Amberley Gavel has stated that “[t]o conclude otherwise is would allow Council to go into closed session any time a member wanted merely to provide information”.

Emphasis should be placed on the fact that going into closed session under the *Municipal Act* is **discretionary**, not mandatory. Council can choose to conduct its business in open session and openness, transparency, and accountability are all enhanced when it chooses to do so.

Further, it does not have to close all of a meeting to the public if it is dealing with an exception to the open meeting rules under the *Act*. It can, and should, only close those parts of the meeting which fully engage the purpose for the legislative exception has been granted.

In our opinion, there was nothing about education and training in the subject matter that was before Committee of the Whole on April 11, 2016. Staff was merely imparting information to members on how the Procedure By-law operates and the effect of the stalemate at the March 21, 2016 Planning Committee meeting. There would have been no good or valid reason, in our opinion, that this information could not have been shared with the public. It would have assisted the public to understand “the business of the municipality”, in this case the unintended defect in the City’s Procedure By-law dealing with tie votes.

In the absence of a valid reason, meetings should always be open to the public.

VII. CONCLUSION

Amberley Gavel has concluded that the Committee of the Whole for the City of Peterborough Council breached the provisions of the *Municipal Act* on April 11, 2016 when it closed its meeting to the public to discuss a flaw in the City's Procedure By-law.

VIII. PUBLIC REPORT

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

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

for

**AMBERLEY GAVEL LTD.
Closed Meeting Investigator**

July 2016