

**A REPORT TO THE COUNCIL OF THE CITY OF MARKHAM**  
**REGARDING AN INVESTIGATION OF**  
**A CLOSED MEETING OF THE DEVELOPMENT SERVICES**  
**COMMITTEE**

**Complaint**

Pursuant to Section 239.1 of the Municipal Act (“the Act”), Amberley Gavel Ltd. received a complaint relating to a closed session meeting of the Development Services Committee of the Town of Markham held on January 24, 2012. (The Town has since been renamed as the City of Markham).

There is no dispute that during a regular meeting of the Development Services Committee meeting held on that date that the Committee moved into closed session for a portion of the meeting.

The complaint is essentially twofold. Firstly, it alleges that the *in camera* meeting “may not have been closed properly under Section 239 of the Municipal Act”. Secondly, it alleges that in this closed session the Committee discussed a particular matter and that this discussion should have taken place in public.

**Jurisdiction**

Local Authority Services (LAS) has been appointed to act as the closed meeting investigator for the Town of Markham pursuant to Section 239.2 of the Municipal Act. LAS has, in turn, delegated its powers and duties to Amberley Gavel Ltd. to undertake this investigation and report.

The investigator for Amberley Gavel Ltd. conducted five telephone interviews with the complainant, and four participants in the closed session meeting. The Town Clerk also provided the investigator with relevant background material including both the public and closed session minutes of the meeting in question. During the interview process the investigator received extensive information and opinions relating to the specific allegations that are the subject matter of the complaint and the larger issue that forms the background to the complaint.

## **Legal Background**

### Closed 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 is one of the elements of transparent, open government that the Act encourages. However the Act also provides for a limited number of exceptions that allow a local council or committee of council to meet in closed session (i.e. *in camera*).

Section 239 reads, in part, as follows:

**239. (1)** Except as provided in this section, all meetings shall be open to the public.

#### **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.

Section 239 also requires that before a council moves into closed session it shall pass a resolution at a public meeting indicating that there is to be a closed meeting. The resolution must also include “the general nature of the matter to be considered at the closed meeting”.

Finally, subsections 239(5) and (6) limit the actions that may be taken by the Council at the closed session. Votes may be taken at the closed session only for procedural matters or for giving direction or instructions to staff or

persons retained by the municipality.

The role of an investigator of a complaint filed under Section 239.1 is fairly narrow. The investigator's role is to determine "whether the municipality...has complied with section 239 or a procedure by-law under section 238(2) in respect of a meeting or part of a meeting that was closed to the public and to report on the investigation". Accordingly, the role of the investigator is to examine the *process* followed and not the substance of any particular issue.

### **Factual Background**

The Agenda for the January 24<sup>th</sup> meeting of the Development Services Committee referenced the following item:

6. In-camera Matter (8.0)

That, in accordance with Section 239(2)(f) of the Municipal Act, Development Services Committee resolve into an *in-camera* session to discuss the following confidential matter:

- (1) Advise [sic] that is subject to solicitor-client privilege, including communications necessary for that purpose (Ward 3)

The evidence clearly indicates that this item related to an OMB appeal *in Ward 3* in the municipality. In fact, a solicitor retained by the municipality for this matter attended the meeting and provided advice on this particular issue to the Committee in closed-session.

However, prior to going into closed session, the Councillor for *Ward 5* expressed a desire to raise another issue in closed session and, as required pursuant to the Procedure By-law of the Town of Markham, requested the consent of the Committee to discuss this "New Business". The Committee's consent was duly granted.

The *public* minutes of the Development Services Committee subsequently contains the following reference to the closed session meeting:

## **IN-CAMERA MATTER (8.0)**

Moved by Councillor Carolina Moretti  
Seconded by Councillor Colin Campbell

That, in accordance with Section 239 (2)(f) and (e) of the Municipal Act, the Development Services Committee resolve into an *in-camera* session to discuss the following confidential matter (12:59 P.M.):

- 1) Advise [sic] that is subject to solicitor-client privilege, including communications necessary for that purpose (Ward 3);
- 2) Litigation or potential litigation, including matters before administrative tribunals affecting the municipality or local board and advice that is subject to solicitor-client privilege, including communications necessary for that purpose (Ward 5)

CARRIED

Moved by Councillor Colin Campbell  
Seconded by Councillor Carolina Moretti

That the Development Services Committee rise from the *in-camera* session (2.03 P.M.)

CARRIED

As indicated above the committee was in closed session for just over one hour. The evidence provided to the investigator indicates that the Committee spent anywhere between 30 to 45 minutes discussing the OMB appeal issue relating to Ward 3. During this period the Committee received advice from an outside solicitor retained by the municipality on this file. Following that discussion the outside solicitor left the closed session meeting.

The Committee then turned its attention to the second item to be discussed *in camera* in Ward 5. In the closed session meeting staff (legal and planning) advised the Committee, and the Town Solicitor advised the Committee of the form of the litigation that might possibly arise.

However the complainant alleged that the closed session discussion “was political in nature.

## **Findings**

- 1) Allegation that meeting was not properly closed.

As a result of the investigation undertaken by Amberley Gavel Ltd. it became evident that this particular allegation partially arose out of a misunderstanding of the subject and substance of the discussion that took place in closed session. This misunderstanding might have been avoided if the resolution to go into closed session as set out in both the Agenda for the meeting and the actual resolution moved at the Committee prior to going into closed session contained greater specificity.

Any member of the public reading the agenda for the Development Services Committee meeting of January 24<sup>th</sup> or attending the meeting and hearing the resolution authorizing the *in camera* session would have had little if any idea regarding the issue or issues that warranted their elected officials to vary from the norm of public debate.

Section 239(4) of the Act requires that, prior to going into closed session, council or a committee of council must pass a resolution stating “the fact of the holding of the closed meeting and *the general nature of the matter to be considered at the closed meeting*”[emphasis added]. Although it is not uncommon for municipalities in the province to simply reference one of the enumerated exemptions set out in Section 239(2) of the Municipal Act to satisfy this requirement to disclose “the general nature of the matter to be considered”, it is increasingly recognized that it is a “best practice” to include give greater specificity in the resolution authorizing the closed session meeting.

This “best practice” is in keeping with the policy intent behind the provisions in the Municipal Act relating to closed session meetings – to ensure as much transparency as possible in the decision-making process. In the opinion of Amberley Gavel Ltd. it is usually possible to give members of the public notice of the general subject matter of the *in camera* discussion without impairing the confidentiality of an issue.

The Town of Markham did make an attempt to add *some* transparency in this particular process when in the fall of 2011 it made a change to its procedure by referencing the specific ward to which the *in camera* issue related after quoting the “exemption” being relied upon as set out in Section 239(2) . However in the opinion of Amberley Gavel Ltd. this change does not go far enough.

For example, the *agenda* item for the closed session portion of the Development Services Committee meeting of January 24<sup>th</sup> simply indicated that the closed session subject-matter was:

Advise (sic) that is subject to solicitor-client privilege, including communications necessary for that purpose (Ward 3).

Without impairing any confidentiality the agenda item could have referenced the specific address that was the subject of the intended *in camera* discussion or at a minimum referenced the fact that the discussion related to a particular Ontario Municipal Board Appeal.

Further, when the Committee voted on a second item (as “New Business”) for the closed session the requisite resolution authorizing the committee to go *in camera* again simply added two enumerated grounds under Section 239(2) of the Act:

Litigation, or potential litigation, including matters before administrative tribunals, affecting the municipality or local board and advice that is subject to solicitor-client privilege, including communications necessary for that purpose. (Ward 5)

Again, without breaching any confidentiality, the resolution could have added some specificity indicating that the *in camera* discussion related to a particular property, although it might be less appropriate to do so with potential litigation as compared to litigation that is already a matter of public record.

Obliqueness in resolutions relating to closed sessions breeds suspicion. Directness in wording, to the extent possible, is more in keeping with the “transparency and accountability” theme that underlies the open meeting provisions enshrined in the Municipal Act.

- 2) Allegation that a portion of the closed session discussion should have taken place in public.

It is the finding of Amberley Gavel Ltd that the *main* purpose of going into closed session on the second issue was “potential litigation” and “the receiving of advice that is subject to solicitor-client privilege”.

The evidence is clear that in the closed session meeting the committee members received advice from the Town Solicitor and from planning staff on the specific litigation issue and general legal advice from the Town Solicitor on the form that litigation might potentially take. In the view of Amberley Gavel Ltd this discussion was properly conducted in closed session in accordance with Section 239 of the Municipal Act.

However the evidence also indicates that at the tail end of the closed session meeting the Ward Councillor raised another issue peripherally related to the matter with respect to which litigation advice had been given. Although the preponderance of evidence indicates that the discussion on this particular issue was brief in nature, nevertheless it is the view of Amberley Gavel Ltd. that this was not the type of discussion that is exempted from the general requirement for public debate under S. 239 of the Act.

## **Conclusions**

In summary, Amberley Gavel Ltd. concludes the following on the complaints filed:

- 1) The procedure used to go into closed session on the Ward 5 issue at the January 24<sup>th</sup> meeting met the bare requirements of the Municipal Act. However, as set out above, Amberley Gavel Ltd. encourages the City of Markham to add greater specificity to their closed session resolutions wherever possible.
- 2) The majority of the discussion on the Ward 5 issue related to potential litigation. This discussion was properly held in closed session in accordance with the Municipal Act.
- 3) That portion of the discussion on the Ward 5 issue relating to a matter

not covered by the second part of the resolution, albeit “very brief” in nature in the words of one attendee, should not have been held in closed session.

Amberley Gavel Ltd. would like to thank both the complainant and councillors and staff of the municipality who co-operated fully during the course of this investigation.

This report is forwarded to the Council of the City of Markham. The Municipal Act provides that this report be made public. It is recommended that this 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.

AMBERLEY GAVEL LTD.

Per: \_\_\_\_\_