

**REPORT TO**  
**THE COUNCIL OF THE CITY OF MARKHAM**  
**REGARDING THE INVESTIGATION**  
**OF CLOSED MEETINGS**  
**OF MARKHAM COUNCIL AND ITS GENERAL COMMITTEE**

**Complaint**

The Town of Markham (“Town”) received a complaint on December 15, 2011 regarding a closed meeting of General Committee on December 5, 2011 and a closed meeting of the Council held on December 13, 2011. Although the Town has subsequently renamed itself as the City of Markham this report will use the term Town as that was what was in place at the time of the meetings in question, except for recommendations for future action.

The complainant alleged that the meetings may not have been closed properly under Section 239 of The Municipal Act. The complainant indicates the issue inappropriately discussed in closed session was “Mayor's Days”, three days off with full pay between Christmas Day and New Year's Day for full-time staff.

The complaint was forwarded to the offices of Amberley Gavel Ltd. for investigation.

**Jurisdiction**

The Town of Markham appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the Municipal Act 2001 as amended by Bill 130 (Municipal Act). LAS delegated its powers and duties to Amberley Gavel Ltd. to undertake the investigation and report to the Council of the Town of Markham.

Section 239.1 provides that the role of the closed meeting investigator is to report to council 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”.

## **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 does set 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.

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).*

### ***Other criteria***

**(3)** *A meeting shall be closed to the public if the subject matter relates to the consideration of 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. 2001, c. 25, s. 239 (3).*

***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 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.

No matter or item other than the matter(s) expressly referred to in the public resolution may be discussed or otherwise dealt with at the closed meeting.

Subsections 239 (5) and (6) limit the actions that the council, committee or local board may take at the closed meeting. Votes may be taken only for procedural matters or for giving direction to staff or persons retained by the municipality.

**Investigation**

The investigation into the complaint began on February 2, 2012 and the Town's Public Services & Records Coordinator was so advised. The Public Services & Records Coordinator, Stephen Huycke and the Town Clerk, Kimberley Kitteringham were interviewed on February 7, 2012. The complainant was also interviewed on February 7, 2012. The Mayor of the

Town, Frank Scarpitti, was interviewed by telephone on March 22, 2012.

Documents provided by the Town and reviewed during the course of the investigation include a By-law to Govern the Proceedings of Council and Committees of Council; General Committee and In-camera General Committee Agendas and Minutes for December 5, 2011; and Council and In-camera Council Agendas and Minutes for December 13, 2011. The Town's website was also reviewed.

## **Observations**

### **(1) December Days Off-work Tradition**

The Town of Markham has a longstanding tradition of recognizing staff annually for their performance with days off-work with pay for a period between Christmas Day and New Year's Day. The Mayor confirmed the practice existed prior to 1985 when he became a member of the Town Council.

### **2) December 5, 2011 General Committee Minutes**

At the meeting it was duly moved, seconded and carried as follows:

That, in accordance with Section 239(2) (b)(c) (a)(c) (b) of the Municipal Act, General Committee resolve into an in-camera session to discuss the following confidential matters (10:01 AM):

- 1) Personal matters about an identifiable individual, including municipal or local board employees;
- 2) A proposed or pending acquisition or disposition of land by the municipality or local board;
- 3) The security of the property of the municipality or local board;
- 4) A proposed or pending acquisition or disposition of land by the municipality or local board;

- 5) Personal matters about an identifiable individual, including municipal or local board employees.

The General Committee rose from the in-camera session (1:34 PM.)

### **3) December 5, 2011 In-camera General Committee Minutes**

The nature of the discussions and motions on the business items contained in the General Committee motion to authorize the in-camera session in the previous paragraph are recorded in the in-camera minutes.

### **4) December 13, 2011 Council Meeting**

## **13. IN-CAMERA ITEMS**

**The following motion was duly moved, seconded and carried:**

That, in accordance with Section 239 of the *Municipal Act*, Council resolve into an in-camera session to discuss the following matters (2:06 p.m.):

(1) MINUTES OF IN-CAMERA COUNCIL MEETING –  
NOVEMBER 22, 2011

(Section 239 (2) (g))

REPORT OF GENERAL COMMITTEE – December 5, 2011

And it included additional subjects that mirrored those in the General Committee motion of December 5, including:

(6) Personal matters about an identifiable individual, including municipal or local board employees.

(Section 239 (2) (b))

Council rose from the in-camera session at 4:07 pm.

**5) Following the Closed Session on December 13**

Relevant to the complaint at hand, the following motion was presented to Council for its consideration and it was subsequently passed.

**(5) DAYS BETWEEN CHRISTMAS AND NEW YEAR'S**

- 1) That the Town of Markham remain open and operate on a skeleton staff basis on the following dates: Wednesday, December 28; Thursday, December 29; and Friday, December 30, 2011; and,
- 2) That Fire and Emergency Services remain fully operational at all times; and,
- 3) That staff continue to provide essential services such as snow removal and waste collection; and,
- 4) That the Civic Centre and Community Centres remain open and accessible to the public; and further,
- 5) That the Town of Markham return to full operation on Tuesday, January 3, 2012.

**6) December 13, 2011 Council In-Camera Minutes**

The nature of the discussions and motions on the business items contained in the Council motion to move to an in-camera session in the previous section were recorded in the in-camera minutes.

## **Findings**

1. Markham has a Procedural By-law which makes provision for items to be included on an agenda, makes provision for public notice of meetings, and describes provisions for holding an in-camera meeting.
2. Markham posts a Council meeting schedule for the calendar year on the Town website.
3. Markham complied with its Notice provisions in the case of the two meetings in question.
4. There has been a long-standing tradition of annually granting most Town employees days off-work with pay between Christmas and New Year's holidays in recognition of good performance.
5. The subject matter of the in-camera discussion on the issue of the days off-work is not in accordance with the authorizing resolution as it does not qualify as “personal matters about an identifiable individual(s)” due to the large number of employees affected by the decision.

## **Conclusions and Recommendations**

1. While the subject of whether or not to grant a benefit to a large number of employees cannot be considered a personal matter about an individual or individuals, even though it might be argued it could be for a small number of identified individuals, it would certainly fit under the exception in the Municipal Act that allows for in-camera meetings for matters concerning *labour relations or employee negotiations*; S239(2)(d)
2. It is recommended that the City of Markham add to its resolutions authorizing closed sessions a more detailed explanation of the individual exceptions being cited in order to enhance transparency, rather than just recite the subsection of the Municipal Act.  
For example, the corporation’s interest would not have been impaired had the authorizing resolution indicated that the public was being excluded for

*“...a labour relations matter, more specifically the issue of scheduled work days between Christmas Day and New Year’s Day pursuant to S 239(2)(d) of the Municipal Act.”*

This practice, which should always be used unless it impairs the interests of the City or an individual who is the subject of a closed meeting discussion, would also be helpful in encouraging those who draft such resolutions in selecting the appropriate exception.

### **Public Report**

We received full cooperation from the Mayor, and Clerk and her staff and we extend our thanks to all.

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.

March 2013.

Closed Meeting Investigator

AMBERLEY GAVEL LTD.

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Per: