

## **CITY OF VAUGHAN**

### **EXTRACT FROM COUNCIL MEETING MINUTES OF SEPTEMBER 20, 2016**

Item 32, Report No. 31, of the Committee of the Whole, which was adopted, as amended, by the Council of the City of Vaughan on September 20, 2016, as follows:

***By approving the following recommendation of the Council (Closed Session) meeting of September 20, 2016:***

- 1. That the legal advice be received.**

**32**

#### **CLOSED MEETING INVESTIGATION REPORT REGARDING THE SPECIAL MEETING OF COMMITTEE OF THE WHOLE FOR THE CITY OF VAUGHAN IN CLOSED SESSION ON APRIL 13, 2016**

The Committee of the Whole recommends:

- 1) That the recommendation contained in the following report of the City Clerk, dated September 7, 2016, be approved;**
- 2) That the deputation of Ms. Carrie Liddy, Humberview Drive, Woodbridge, and Communication C4, dated September 2, 2016, be received; and**
- 3) That the following communications be received:**

**C3 Mr. Richard Lorello, dated September 1, 2016;**

**C11 City Clerk, dated September 1, 2016; and**

**C12 Confidential Communication from the City Clerk, dated September 1, 2016.**

#### **Recommendation**

The City Clerk recommends:

- 1. That the closed meeting investigation report of Amberley Gavel Ltd. dated August 2016 and set out at Attachment 1 to this report, be received.**

#### **Contribution to Sustainability**

The considerations addressed in this report may assist in the development of practices and procedures that support an accountable, transparent and pragmatic approach to deliberations undertaken in Council and at its various committees.

#### **Economic Impact**

The cost of the investigation has not yet been invoiced by Amberley Gavel Ltd. Under the City's contractual arrangements with the Local Authority Services arm of AMO, a \$330 per year retainer is paid to Amberley Gavel Ltd. to serve as the City's closed meeting investigator. A further fee paid at the rate of \$225 per hour, plus taxes and reasonable out of pocket expenses, is also payable upon receipt of an itemized invoice. A filing fee of \$125 was paid by the complainant to the City at the time the complaint was filed.

#### **Communications Plan**

The investigation report is being made public through publication of this report.

## CITY OF VAUGHAN

### **EXTRACT FROM COUNCIL MEETING MINUTES OF SEPTEMBER 20, 2016**

Item 32, CW Report No. 31 – Page 2

#### **Purpose**

This report provides Council with the outcome of a closed meeting investigation conducted by the City's appointed investigator pursuant to sections 239.1 and 239.2 of the *Municipal Act*.

#### **Background - Analysis and Options**

It is the obligation of Council to declare by resolution the general nature of an item to be discussed in closed session, and the Municipal Act provision under which the closed meeting is permitted to be held. In this case the item was described as 'City Manager Recruitment' and Council resolved to go into closed session on the basis that it dealt with the 'personal information of identifiable individuals'. The City's practice is to disclose as much information as is practical when complying with the requirement to disclose the topic of a closed meeting, bearing in mind the protection of both the City's interests and the personal privacy interests of persons who may be affected. All of this must be assessed of course in the context of a complex human resources recruitment for the head of the City's administration.

By correspondence dated April 14, 2016, the City Clerk received a closed meeting complaint respecting the 'special closed meeting' of April 13, 2016. The complaint was forwarded to the City's Closed Meeting Investigator, Amberley Gavel, for processing.

Pursuant to s. 239.2 (10) of the *Municipal Act*, if after making an investigation, the Closed Meeting Investigator is of the opinion that the meeting or part of the meeting that was the subject matter of the investigation appears to have been closed to the public contrary to section 239 or to the municipality's procedure by-law, the Investigator shall report his or her opinion and the reasons for it to the municipality and may make such recommendations as he or she thinks fit.

The municipality is required to ensure that the reports received under subsection (10) are made available to the public. It is the practice of the City of Vaughan to do so through the publication of the report on a public agenda.

In the instant case the Closed Meeting Investigator concluded:

- That Committee of the Whole (Closed Session)\* (sic) was not properly in closed session when it met on April 13, 2016. [\*The meeting of April 13, 2016 was a Special Meeting of Council];
- That in the view of the Investigator one of the substantive decisions made at the meeting was not permitted to be made in closed session (that being an item relating to the organizational design of the City, the establishment of a new Deputy City Manager position);
- That the procedure by-law was breached by not following correct processes for giving notice about what the investigator concluded was a separate agenda item (the new position), for not adding that agenda item by unanimous consent only, and for not passing a specific resolution to discuss that item in closed session (the appointment of a person to the position).

Accordingly, given the Investigator's conclusions, the entire report is attached for public disclosure.

The report having been received on August 22, 2016, little time for analysis has been available prior to placing this report on the public agenda for Committee of the Whole. Staff will review the report in detail and provide further analysis through a communication to Committee.

#### **Relationship to Term of Council Service Excellence Strategy Map (2014-2018)**

This report is consistent with the priorities established in the Term of Council Service Excellence Strategy Map, particularly with respect to continuing to advance a culture of excellence in governance.

**CITY OF VAUGHAN**

**EXTRACT FROM COUNCIL MEETING MINUTES OF SEPTEMBER 20, 2016**

Item 32, CW Report No. 31 – Page 3

**Regional Implications**

N/A

**Conclusion**

This report satisfies the City's requirement to make public closed meeting investigation reports in which the Closed Meeting Investigator forms the opinion that the City is not in compliance with either the closed meeting requirements of the *Municipal Act* or its procedure by-law. The report having been received just prior to publication deadline for the Committee of the Whole agenda, staff's analysis with respect to the report will be set out in a separate communication to follow.

**Attachment**

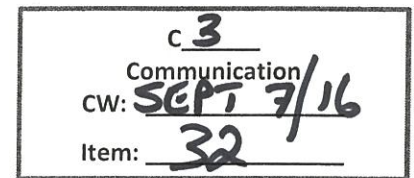
Attachment 1    Report, August 2016: Report to the Corporation of the City of Vaughan Regarding the Investigation of a Complaint Regarding the Special Meeting of Committee of the Whole for the City of Vaughan in Closed Session on April 13, 2016

**Report prepared by:**

Jeffrey A. Abrams, City Clerk

(A copy of the attachments referred to in the foregoing have been forwarded to each Member of Council and a copy thereof is also on file in the office of the City Clerk.)

**From:** Abrams, Jeffrey  
**Sent:** September-02-16 3:05 PM  
**To:** Magnifico, Rose  
**Subject:** FW: SEPT 7 CoW ITEM #32 CLOSED MEETING INVESTIGATION REPORT



**From:** Richard Lorello [<mailto:rlorello@rogers.com>]  
**Sent:** Thursday, September 1, 2016 3:58 PM  
**To:** Bevilacqua, Maurizio <[Maurizio.Bevilacqua@vaughan.ca](mailto:Maurizio.Bevilacqua@vaughan.ca)>; lafrate, Marilyn <[Marilyn.lafrate@vaughan.ca](mailto:Marilyn.lafrate@vaughan.ca)>; Carella, Tony <[Tony.Carella@vaughan.ca](mailto:Tony.Carella@vaughan.ca)>; DeFrancesca, Rosanna <[Rosanna.DeFrancesca@vaughan.ca](mailto:Rosanna.DeFrancesca@vaughan.ca)>; Racco, Sandra <[Sandra.Racco@vaughan.ca](mailto:Sandra.Racco@vaughan.ca)>; Di Biase, Michael <[Michael.DiBiase@vaughan.ca](mailto:Michael.DiBiase@vaughan.ca)>; Rosati, Gino <[Gino.Rosati@vaughan.ca](mailto:Gino.Rosati@vaughan.ca)>; Ferri, Mario <[Mario.Ferri@vaughan.ca](mailto:Mario.Ferri@vaughan.ca)>; Shefman, Alan <[Alan.Shefman@vaughan.ca](mailto:Alan.Shefman@vaughan.ca)>; Noor Javed <[njaved@thestar.ca](mailto:njaved@thestar.ca)>; Abrams, Jeffrey <[Jeffrey.Abrams@vaughan.ca](mailto:Jeffrey.Abrams@vaughan.ca)>  
**Cc:** [njaved@thestar.com](mailto:njaved@thestar.com); Adam Martin-Robbins <[amartinrobbins@yrmg.com](mailto:amartinrobbins@yrmg.com)>; Steven Delduca <[sdelduca.mpp.co@liberal.ola.org](mailto:sdelduca.mpp.co@liberal.ola.org)>; Furio Liberatore <[furiol@rogers.com](mailto:furiol@rogers.com)>; Robert Kenedy <[rkenedy@yorku.ca](mailto:rkenedy@yorku.ca)>; Eddy Aceti <[eddy@acetiandassociates.com](mailto:eddy@acetiandassociates.com)>; Ken Schwenger <[ken.schwenger@sympatico.ca](mailto:ken.schwenger@sympatico.ca)>; Craig, Suzanne <[Suzanne.Craig@vaughan.ca](mailto:Suzanne.Craig@vaughan.ca)>; MacKenzie, John <[John.Mackenzie@vaughan.ca](mailto:John.Mackenzie@vaughan.ca)>; Jankowski, Paul <[Paul.Jankowski@vaughan.ca](mailto:Paul.Jankowski@vaughan.ca)>  
**Subject:** SEPT 7 CoW ITEM #32 CLOSED MEETING INVESTIGATION REPORT

Good afternoon Mayor and Members of Council

Mr. Abrams please post this communications in advance of the Sept 7 Committee of the Whole Meeting.

I am in agreement with the closed session investigation by Amberley Gavel in which they concluded that Vaughan Council was not properly in closed session as Committee of the Whole (Closed Session) on April 13, 2016 under section 239(1)(b) of the Municipal Act when it decided to create a new position of Deputy City Manager for Legal and Human Resources and appoint an individual into that position immediately. In my opinion this was an illegal meeting, contravening the Municipal Act.

I am of the opinion the Vaughan Council has far too many closed session meeting, some of which have had detrimental effects on communities and taxpayers. I am also of the view that certain members of council colluded to bring about this decision to adopt a new Deputy City Manager position in a hasty manner that was not transparent and kept the general public in the dark with respect to a decision that impacted the City's budget. The new position enacted commits taxpayers to paying in excess of \$200,00 for a new Deputy City Manager position that had no competitive recruitment process.

It is proper and customary that new positions are identified during the budget process and are revealed to the public in the form of new ARR (Additional Resource Request). It is during the budget process that the public can weigh into the discussion and ask questions as to why a new position is necessary. The now deemed illegal closed session meeting in question effectively shut the public out the process and effectively committed the public to spending that they were NOT consulted on.

Only a few short months ago, the previous City Manager set out an organizational restructuring of the City of Vaughan and it was conducted in an open and transparent manner before the public and agreed to by Council. If the previous City Manager had felt that a fourth Deputy City Manager was necessary at the time, he would have laid that out in his original plan.

Why did certain members of council find it necessary to use its power to over ride the City Manager within an illegally held meeting in closed session without public consultation?

In light of this investigation and its findings, I ask for council to bring forward and adopt a resolution for a reconsideration and defer the decision previously made in closed session. This should be deferred to the upcoming budget consultations where it belongs so that the general public can hear Council's rational for creating the new position in question and receive feedback for the public.

Only in this way can Council hope to correct the wrong that was identified in the investigators report below.

[https://www.vaughan.ca/council/minutes\\_agendas/AgendaItems/CW0907\\_16\\_32.pdf](https://www.vaughan.ca/council/minutes_agendas/AgendaItems/CW0907_16_32.pdf)

Sincerely  
Richard T. Lorello

C4.1

c	4
Communication	
CW:	SEPT 7/16
Item:	32

-----Original Message-----

From: Abrams, Jeffrey

Sent: September-02-16 12:30 PM

To: Magnifico, Rose

Cc: Bartolomeo, Julia

Subject: Fw: Deputation for item 32 Committee of the Whole Sept 7

Please process

Sent from my BlackBerry 10 smartphone on the Bell network.

Original Message

From: Carrie Liddy <[carrie.liddy@sympatico.ca](mailto:carrie.liddy@sympatico.ca)>

Sent: Friday, September 2, 2016 12:10 PM

To: Abrams, Jeffrey; Rosati, Gino; Ferri, Mario; Di Biase, Michael; Racco, Sandra;

Shefman, Alan; DeFrancesca, Rosanna; Carella, Tony; Iafrate, Marilyn; Craig, Suzanne

Subject: Deputation for item 32 Committee of the Whole Sept 7

Council, Commissioner,

Please see my written deputation submitted with regards to the closed meeting report.

Written deputation submitted with regards to the closed meeting report of April 13 2016

C4.2

Written Deputation: September 7 2016 Item 32

CLOSED MEETING INVESTIGATION REPORT REGARDING THE SPECIAL MEETING OF  
COMMITTEE OF THE WHOLE FOR THE CITY OF VAUGHAN IN CLOSED SESSION ON  
APRIL 13, 2016

The Report Findings

The closed meeting report is clear. The closed meeting held to create a new senior management position for the head lawyer and head of human resources of the City of Vaughan is improper and violates several sections of the Municipal Act. Holding closed meetings in contravention of the Municipal Act has been addressed by the Supreme Court, and they found illegal closed meetings to be a serious breach of people's rights.

***The matter is not trivial***

Discussion on Findings

I have listed recommendations at the end of this deputation and they are discussed here:

The creation of the new position is not valid and Council needs to take steps to address the situation.

Firstly, all bylaws enacted through the closed meeting need to be immediately rescinded. Secondly, the appointment of the City Manager can easily be voted on and the City Manager properly appointed immediately after rescinding the closed meeting in its entirety.

If Council still wishes to create another Deputy Manager position, there are several steps that need to be taken first and all steps must be in public. As I stated when I filed the complaint, the closed meeting violations have nothing to do with the person who was appointed to the position. The creation of the position is the issue.

This is substantiated in the report itself, page 3, paragraph 2.

What has to be remedied and how should Council go about fixing the violations? (I note that the situation probably cannot be remedied, and that indeed was also one of the findings of the Supreme Court.)

Written deputation submitted with regards to the closed meeting report of April 13 2016

## Facts

C 4.3

Here are the facts:

- 1) an improper closed meeting was held to create a new senior management position for the top legal advisor and human resource advisor for the City of Vaughan
- 2) the previous City Manager underwent a restructuring process a few months before the April 13 closed meeting, during which time this same position was already rejected
- 3) after creating the position in the closed meeting, (against council's decision of a few months earlier), an individual was hired without a competitive process being held
- 4) neither the Clerk or Deputy Clerk attended the closed meeting or anyone from the Clerk's office : the Clerk is a mandatory and defined role and has a mandatory responsibility under the Municipal Act.
- 5) the previous city manager attended, for what appears to be in lieu of the city clerk, however, the Clerk position cannot be delegated without a vote of Council and the meeting may be nullified in any event because of this
- 6) the previous city manager (admittedly a lame duck) knew the meeting was improper (by his admissions to the closed meeting investigator) and knew council's decision was contrary to the earlier restructuring and took no steps to notify Council, or rectify the problem, compounding the issues with the closed meeting
- 7) the city clerk , who did not attend the meeting, was "shocked" to find out council acted as they did, however took no steps to address the closed meeting violations after being informed of the matter
- 8) the newly appointed top lawyer and head of human resources and the Clerk's supervisor, has a conflict and probably can't take any steps to rectify the closed meeting and in any event wasn't properly appointed

Council relies on senior staff for advice and in thus case, senior staff let Council down.

The actions of senior staff are adding significant complications to the closed meeting report. ***The matter of staff failing to advise Council and failing to take steps to rectify the matter needs to be addressed and it is hoped Council will address it in conjunction with addressing the closed meeting report.***

## Correcting the new position created in the improper Closed Meeting

If Council decides to repeat the creation of a new deputy manager position and appoint a person to the position, the breaches need to be addressed by undertaking a proper process, and amended the recently approved City governance structure.



Written deputation submitted with regards to the closed meeting report of April 13 2016

C4.4

Note: If Council simply ignores the report, any resident can bring a Judicial Review and application to quash the bylaws of the decision of Council. It is very likely the bylaw will be quashed, given the significant and clear findings in the report. Bringing a judicial review and application to quash the bylaw and meeting **will cost taxpayers a significant amount of money.**

It is sincerely hoped Council will address these issues outside of the courts particularly given Council seems to have not been advised properly by Senior Staff.

#### Breaches identified in the Report

Here are the described breaches:

- 1) no notice for the added agenda item, for the new position of top legal advisor and top human resources advisors do appointment of an individual to the position
- 2) no competition for the two new top advisory positions
- 3) no notice to the public of the additional tens of dollars in staff costs
- 4) council unilaterally changed the newly implemented senior staff structure, adding a position that was already rejected and amending a previously enacted bylaw, without notice
- 5) the clerk failed in his duty to ensure council meetings are properly run and failed to meet the mandatory sections of the Municipal Act of keeping minutes, failed to report on the minutes in the official City minute book, (the minutes have been requested and to date have not been provided) and failed to ensure all meetings of council are properly listed on an agenda and held in council chambers.

It is the duty of the Clerk to inform council of the illegal nature of these meetings and in failing to do so, he failed to perform all the mandatory duties of his office. The result is that the improper closed meeting has now caused a significantly negative impact on the city, residents, the two senior staff members appointed in the meeting, and council itself.

6) Council breached its own procedural bylaw, a bylaw Council strictly enforces on the public, however the Clerk's duty is to inform council when violations of the procedural bylaw are taking place

7) an external consultant was hired to undertake a process for hiring a new city manager and council (inadvertent as it was) illegally used the closed meeting to



Written deputation submitted with regards to the closed meeting report of April 13 2016

C4.5

amend the governance structure of the city and improperly appoint a new head lawyer and head of human resources

8) the decision of council to create the new senior staff position of top lawyer and head of human resources was already discussed , "brokered" and decided before the closed meeting : indicating there was a meeting or several meetings before the closed meeting held outside of council chambers, without notice and without any participation of the public and outside of council chambers and with no minutes and unknown participation of council and the clerk (page 6, para 5)

9) the Clerk did not act in his mandatory role of properly administering council meetings by; failing to ensure all meetings of council are held in the Council chambers ; all decisions of Council are discussed and held in public (unless closed meeting rules apply); and record all council meetings through written minutes, (whether in an open or closed meeting) and record and publish without comment.

The last two items are indeed important. Council met for a scant 11 minutes in the illegal meeting. (according to original minutes of the meeting, which appear to be amended) During that time, council appointed a new City Manager, created a new senior staff position of top legal advisor and head of human resources and appointed a person to the newly created position.

The impact of this is the Code of Ethical Conduct (part 1) has been breached. ***I note the breaches are most likely inadvertent, (given council was not told of the illegal nature of the violations identified in the report) but serious none-the-less and have to be addressed.***

#### Code of Ethical Conduct

The reasonable conclusion in the report is that the decision and discussions regarding the new position took place somewhere else and outside the public eye and this along with failing to adhere to the city human resources policies of hiring and budget changes that have to be made in public (and other policy and Municipal Act violations mentioned in the report that are outside of the closed meeting jurisdiction) now falls within the Code of Ethical Conduct.

This report draws attention to an illegal practice and that is Vaughan Council making decisions, and acting outside of council chambers and outside of the public eye.

The details of this closed meeting are important not only because of the violations of the closed meeting portion of the Municipal Act, but because of the serious implications on the **overall governance of the City of Vaughan** and the problems with senior staff that Council now needs to address.

Written deputation submitted with regards to the closed meeting report of April 13 2016

CL.6

However, having said that, the report findings outline a breach of the overall governance of the City of Vaughan by a few (**not all**) Council members that falls within the jurisdiction of the Integrity Commissioner and not the Closed Meeting investigator.

### Recommendations

- 1) The closed meeting bylaws be immediate rescinded by a vote of Council.
- 2) The City Manager be immediately reappointed
- 3) Vaughan Council schedule a public session to address expanding the senior manager of the City, (if in fact this new position is necessary and it is accepted after public consultation) and a competition to find the most suitable candidate
- 4) Each (or both) of the two members of Council (appears to be Regional Councillor Gino Rosati and Ward Councillor DeFrancesca) who first and seconded the motion to go into the improper closed meeting, schedule a meeting with the Integrity Commissioner and ask the Commissioner to prepare a report and give advice as to how to address the violations of the Code of Ethical Conduct, and the steps that need to be taken to prevent another improper closed meeting. ***I note not all of council violated the code, however this is an issue that applies to all of council going forward.***
- 5) Council address the bad advice from senior staff and the impact of senior staff failing to correct council's actions and takes steps to ensure council is properly advised on adhering to the Act, and policies of the city in order to avoid code of conduct violations. (note: this includes a report from the Integrity Commissioner)

Note that the alternative (as above) to rescinding the closed meeting bylaws is the courts and the alternative to resolving the breaches of the Code of Ethical in an amicable and cooperative manner, (and taking steps to ensure the code is not breached again) is any resident may file a complaint with the Integrity Commissioner.

I am confident council will make the right decision and take the recommended steps above.

Thank you for your time.



## memorandum

c 11
Communication
CW: SEPT 7/16
Item: 32

DATE: SEPTEMBER 1, 2016

TO: MAYOR AND MEMBERS OF COUNCIL

FROM: JEFFREY A. ABRAMS, CITY CLERK, in consultation with  
DANIEL KOSTOPOULOS, CITY MANAGER

RE: COMMITTEE OF THE WHOLE, ITEM 32  
CLOSED MEETING INVESTIGATION REPORT

This is further to Item 32 in the Committee of the Whole meeting agenda for September 7, 2016, entitled "Closed Meeting Investigation Report Regarding the Special Meeting of Committee of the Whole for the City of Vaughan in Closed Session on April 13, 2016." In the report to Committee it is noted that staff had insufficient opportunity at the time of submission to fully analyze the Closed Meeting Investigator's report attached to the item.

The report of the Closed Meeting Investigator is advice to Council. It does not invalidate any decision taken in the substantive matter considered by Council. The Closed Meeting Investigator's report responds to a complaint and conveys the Investigator's opinion about the City's compliance with the open meeting provisions of the *Municipal Act*. It may inform the refinement of practices and procedures that support Council's meeting practices, but Council is not obliged to amend existing procedures.

This is particularly so given the unique context in which the Investigation occurred. The circumstances leading to the meeting in question, the complaint, and the City's closed meeting practices in this instance all relate to a complex human resources recruitment involving appointments to the highest administrative positions in the organization. Nothing more may be said in this public communication that details the circumstances of the recruitment decisions. That is the purpose of the confidential communication which accompanies this document.

The process begins with the Council meeting of March 22, 2016, at which time the closed meeting resolution for the Committee of the Whole (Closed Session) meeting of April 2<sup>nd</sup> was adopted to authorize a discussion in closed session regarding:

"CITY MANAGER RECRUITMENT (personal matters about identifiable individuals)"

The following chart, compiled for the purposes of the Investigation and supplied to the Investigator, sets out the meetings which occurred from that point:

April 2016						
◀ March						May ▶
Sun	Mon	Tue	Wed	Thu	Fri	Sat
<b>For reference: Council Meeting March 22, 2016 +/- 1:00 p.m.</b>					<b>1</b>	<b>2</b> Special Committee of the Whole (Closed Session) Meeting +/- 9:00 p.m.
<b>3</b>	<b>4</b>	<b>5</b> Resumption of Special Committee of the Whole (Closed Session) Meeting +/- 4:00 p.m.	<b>6</b>	<b>7</b>	<b>8</b>	<b>9</b>
<b>10</b>	<b>11</b>	<b>12</b>	<b>13</b> Special Council Meeting +/- 5:00 p.m.	<b>14</b>	<b>15</b>	<b>16</b>
<b>17</b>	<b>18</b>	<b>19</b>	<b>20</b> Special Council Meeting +/- 1:15 p.m.	<b>21</b>	<b>22</b>	<b>23</b>
<b>24</b>	<b>25</b>	<b>26</b>	<b>27</b>	<b>28</b>	<b>29</b>	<b>30</b>

(Note that the meeting of April 13 2016 was a meeting of Council, meeting in closed session and not as indicated in the report either a meeting of Committee of the Whole or Committee of the Whole (Closed Session)) .

As noted above, the human resources information associated with the meetings noted above cannot be disclosed in public given the personal information elements. Matters related to human resources are complex and require confidentiality. The personnel decisions involved some of the most senior administration positions within the City, and Council is obligated to act within the interest of the parties by protecting personal information. The report does not take issue with human resources issues being considered in closed session, nor did it in any way criticize the merits of the appointees.

The issue in question is a procedural matter which will be reviewed in detail with the intention of informing future processes for maintaining procedural compliance with Municipal Act requirements. The advice provided in the investigator's report does not invalidate the outcomes of Council's appointments. The Investigator's findings were in respect of compliance with the open meeting procedures of the *Municipal Act*. There were no findings that the decisions taken by Council were without authority, made in bad faith, or 'illegal'.

*Respectfully submitted,*

Jeffrey A. Abrams, City Clerk



**CLOSED MEETING INVESTIGATION REPORT  
REGARDING THE SPECIAL MEETING OF COMMITTEE OF THE WHOLE  
FOR THE CITY OF VAUGHAN IN CLOSED SESSION ON APRIL 13, 2016**

**Recommendation**

The City Clerk recommends:

1. That the closed meeting investigation report of Amberley Gavel Ltd. dated August 2016 and set out at Attachment 1 to this report, be received.

**Contribution to Sustainability**

The considerations addressed in this report may assist in the development of practices and procedures that support an accountable, transparent and pragmatic approach to deliberations undertaken in Council and at its various committees.

**Economic Impact**

The cost of the investigation has not yet been invoiced by Amberley Gavel Ltd. Under the City's contractual arrangements with the Local Authority Services arm of AMO, a \$330 per year retainer is paid to Amberley Gavel Ltd. to serve as the City's closed meeting investigator. A further fee paid at the rate of \$225 per hour, plus taxes and reasonable out of pocket expenses, is also payable upon receipt of an itemized invoice. A filing fee of \$125 was paid by the complainant to the City at the time the complaint was filed.

**Communications Plan**

The investigation report is being made public through publication of this report.

**Purpose**

This report provides Council with the outcome of a closed meeting investigation conducted by the City's appointed investigator pursuant to sections 239.1 and 239.2 of the *Municipal Act*.

**Background - Analysis and Options**

It is the obligation of Council to declare by resolution the general nature of an item to be discussed in closed session, and the Municipal Act provision under which the closed meeting is permitted to be held. In this case the item was described as 'City Manager Recruitment' and Council resolved to go into closed session on the basis that it dealt with the 'personal information of identifiable individuals'. The City's practice is to disclose as much information as is practical when complying with the requirement to disclose the topic of a closed meeting, bearing in mind the protection of both the City's interests and the personal privacy interests of persons who may be affected. All of this must be assessed of course in the context of a complex human resources recruitment for the head of the City's administration.

By correspondence dated April 14, 2016, the City Clerk received a closed meeting complaint respecting the 'special closed meeting' of April 13, 2016. The complaint was forwarded to the City's Closed Meeting Investigator, Amberley Gavel, for processing.

Pursuant to s. 239.2 (10) of the *Municipal Act*, if after making an investigation, the Closed Meeting Investigator is of the opinion that the meeting or part of the meeting that was the subject matter of the investigation appears to have been closed to the public contrary to section 239 or to the municipality's procedure by-law, the Investigator shall report his or her opinion and the reasons for it to the municipality and may make such recommendations as he or she thinks fit.

The municipality is required to ensure that the reports received under subsection (10) are made available to the public. It is the practice of the City of Vaughan to do so through the publication of the report on a public agenda.

In the instant case the Closed Meeting Investigator concluded:

- That Committee of the Whole (Closed Session)\* (sic) was not properly in closed session when it met on April 13, 2016. [\*The meeting of April 13, 2016 was a Special Meeting of Council];
- That in the view of the Investigator one of the substantive decisions made at the meeting was not permitted to be made in closed session (that being an item relating to the organizational design of the City, the establishment of a new Deputy City Manager position);
- That the procedure by-law was breached by not following correct processes for giving notice about what the investigator concluded was a separate agenda item (the new position), for not adding that agenda item by unanimous consent only, and for not passing a specific resolution to discuss that item in closed session (the appointment of a person to the position).

Accordingly, given the Investigator's conclusions, the entire report is attached for public disclosure.

The report having been received on August 22, 2016, little time for analysis has been available prior to placing this report on the public agenda for Committee of the Whole. Staff will review the report in detail and provide further analysis through a communication to Committee.

#### **Relationship to Term of Council Service Excellence Strategy Map (2014-2018)**

This report is consistent with the priorities established in the Term of Council Service Excellence Strategy Map, particularly with respect to continuing to advance a culture of excellence in governance.

#### **Regional Implications**

N/A

#### **Conclusion**

This report satisfies the City's requirement to make public closed meeting investigation reports in which the Closed Meeting Investigator forms the opinion that the City is not in compliance with either the closed meeting requirements of the *Municipal Act* or its procedure by-law. The report having been received just prior to publication deadline for the Committee of the Whole agenda, staff's analysis with respect to the report will be set out in a separate communication to follow.

#### **Attachment**

Attachment 1 Report, August 2016: Report to the Corporation of the City of Vaughan Regarding the Investigation of a Complaint Regarding the Special Meeting of Committee of the Whole for the City of Vaughan in Closed Session on April 13, 2016

#### **Report prepared by:**

Jeffrey A. Abrams, City Clerk

Respectfully submitted,

Jeffrey A. Abrams

**REPORT TO  
THE CORPORATION OF THE CITY OF VAUGHAN REGARDING THE  
INVESTIGATION OF A COMPLAINT REGARDING THE SPECIAL MEETING  
OF COMMITTEE OF THE WHOLE FOR THE CITY OF VAUGHAN IN  
CLOSED SESSION ON APRIL 13, 2016**

**I. COMPLAINT**

The Corporation of the City of Vaughan (“City”) received a complaint about a Special Meeting of the Committee of the Whole for City Council (“Committee of the Whole” or “Committee”) in closed session held on April 13, 2016. The essence of the complaint is that the Committee’s discussions and decisions during the closed meeting were in contravention of the open meetings provision of the *Municipal Act, 2001*<sup>1</sup>, as amended by Bill 130<sup>2</sup> (“*Municipal Act*” or “*Act*”).

This request 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

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<sup>1</sup> S.O. 2001, c. 25.

<sup>2</sup> Bill 130: *An Act to amend various Acts in relation to municipalities*, S.O. 2006, c. 32 (“Bill 130”).



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. (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).

The *Act*, under subsections 239(5) and 239(6), does not permit a council, committee, or local board to vote while in closed session unless the *Act* requires or permits the meeting to be closed by virtue of one of its exceptions and 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.

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.

**IV. INVESTIGATION**

Documents provided by the City and reviewed during the course of the investigation included the Agenda and Minutes of the Special Committee of the Whole (Closed Session) (“COW-CS”) and Special Council Meetings with respect to the subject matter of the complaint and other relevant documentation. The former City Manager was consulted during the course of the investigation as was the City Clerk. An external party

who was also at the meetings was briefly consulted.

## **BACKGROUND**

### **(a) The Complaint**

The complaint alleges that the COW-CS held an improper discussion and made an improper decision on April 13, 2016 when it discussed the addition of a new position to the municipal structure and approved adoption of that position, without public knowledge and notice. The complaint alleges that the issue discussed while in closed session did not fall within the listed exemptions for open meetings, contrary to Section 239(1) of the Municipal Act.

The complaint did not take issue with the fact that COW-CS appointed the individual into that newly-created position while in closed session on April 13, nor question the merits of the position itself. The issue was that it is a breach of the Municipal Act for a council to make an organizational change of this type (i.e. adding a brand new position to the municipal structure) while in closed session.

### **(b) The City Manager Recruitment Process**

As a result of an impending vacancy, the City wished to fill the position of City Manager. They hired an external search firm to help guide their search (the “External Consultant”). Council in COW-CS conducted interviews on April 2 and 5 and gave its final direction on April 13. The decision was finalized by City Council on April 20.

The work of Council through this process was done in closed session as Committee of the Whole to respect the privacy of the candidates who were applying for the position and the interview contents. The Clerk delegated his responsibility to the then City Manager and was absent from the relevant meetings. All meetings were closed under the Municipal Act exemption of “personal information about an identifiable individual” (section 239(2)(b)).

Council made a decision in closed session on April 13 to create a brand new municipal position called “Deputy City Manager responsible for the Legal Services department and the Human Resources department”. It then appointed a current employee into that newly-created position.

The then (now former) City Manager indicated that he was not advised in advance of the meeting that this would be an item for discussion and it “took him totally by surprise” that Council made this organizational change on April 13<sup>3</sup>.

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<sup>3</sup> He stressed, however, that he had no issue with the decision to appoint the actual individual to this position.

He indicated that he had previously in 2015 presented an organizational restructuring plan to City Council. While designing the restructuring options, he had considered the notion of a Deputy City Manager position of a similar ilk but decided against recommending such a position. Council did not ask for his opinion before they made their decision (nor would they necessarily be expected to since he was a “lame duck” City Manager at that point). He indicated that the Treasurer had the authority to accommodate any financial implication of the decision within the current year’s budget without seeking additional funding through Council.

The fact that the discussion and decision of Council seemed to have “come out of nowhere” was confirmed by a second person. This was the first time that the notion of a new position of Deputy City Manager had been raised during the formal recruitment process for the City Manager.

**(c) Procedure By-law**

The City has a Procedure By-law which establishes the principles and rules to be followed for meetings of the Council for the City of Vaughan, for the Committees that report to it directly or indirectly, and for its local boards which have not adopted separate rules of procedure.<sup>4</sup> The By-law provides that Council may meet at a Special Meeting of Committee of the Whole “to consider a matter or matters during a regular or special meeting of Council”<sup>5</sup>. The By-law stipulates that only the matter (or matters) “for which the special meeting has been called may be considered at a special meeting, and no addendum items shall be permitted”<sup>6</sup>.

The Procedure By-law provides that Council may meet at a special meeting, provided that only matters listed on the notice of the meeting as printed may be discussed at such a meeting, unless there is a unanimous vote of the members present at the special meeting who agree to add an addendum item to the agenda.<sup>7</sup>

**(d) Agenda for the Special Council Meeting of April 13, 2016**

Notice was duly given that a Special Meeting of Council would take place on April 13, 2016 at 5:00 p.m. for the purpose of dealing with the “Recruitment of City Manager”. Apart from routine matters, the only item listed on the Agenda was “Determination of Item Requiring Separate Discussion: Special Committee of the Whole (Closed Session) Report No. 15”. Report 15 dealt with the continuing recruitment efforts for a replacement City Manager and “Other Matters Considered by the Committee”.

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<sup>4</sup> Procedure By-law Number 7-2011 (“Procedure By-law” or “By-law”).

<sup>5</sup> *Ibid.*, s.5.2(1)(a).

<sup>6</sup> *Ibid.*, s.5.2(1)(e).

<sup>7</sup> *Ibid.* ss.6.2(1) and 6.4.

(e) **Agenda for the Closed Session of Special Committee of the Whole on April 13, 2016**

The Agenda for the Closed Session of the Special Committee of the Whole contained an item listed as “Recruitment of City Manager”. The Committee was scheduled to discuss the matter in closed session as it dealt with personal information about identifiable individuals.

(f) **Minutes of the Special Council Meeting of April 13, 2016**

The Minutes for the Special Council Meeting of April 13, 2016 indicate that the Council went into closed session at approximately 5:02 p.m., recessed to go into Special COW-CS at 5:03 p.m., reconvened in public session at 5:25<sup>8</sup> p.m. and then adjourned at 5:27 p.m. Prior to adjournment, the following resolution was adopted by a unanimous vote of the nine members of Council:

That Item 1, Special Committee of the Whole (Closed Session) Report No. 15 be adopted and amended, as follows: By approving the confidential recommendations of the Council (Closed Session) meeting of April 13, 2016.

(g) **Minutes of the Special Committee of the Whole (Closed Session)**

The Minutes were taken by the City Manager, as he was then, on delegated authority from the City Clerk. The Minutes indicate that COW-CS adopted several recommendations with respect to the recruitment of a City Manager. In addition, the Committee adopted a recommendation from a Member of Council that the City create a new position of Deputy City Manager responsible for the Legal Services Department and the Human Resources Department and appoint a current City staff member into that newly created position. The decisions were referred to the open session for adoption.

**ANALYSIS AND FINDINGS**

(a) **Section 239(2)(a) of the *Municipal Act***

The Special Committee of the Whole met in closed session under section 239(2)(b) to conduct the recruitment process for a replacement City Manager since it was dealing with confidential information about the candidates for the position. The *Municipal Act* provides that personal information about identifiable individuals, including municipal and local board employees, may be shielded from disclosure in a public forum, since such disclosure may be an unjustified invasion of privacy. Hence, it allows a council, local board, or committee to discuss such matters in a closed session.

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<sup>8</sup> In order to accommodate a move in meeting location, the Closed Session convened at 5:09 p.m. and recessed at 5:20 p.m.

In reviewing the scope of this exemption under the *Municipal Act*, Amberley Gavel usually considers decisions of Ontario's Office of the Information and Privacy Commissioner (IPC). The IPC deals with interpretation of what is "personal information" under the *Municipal Freedom of Information and Protection of Privacy Act*<sup>9</sup> (MFIPPA). It has found that in order to qualify as "personal information" related to an identifiable individual, the information must be about an individual in their personal capacity, rather than their professional, official or business capacity, unless such information reveals something of a personal nature<sup>10</sup>. Information about a person in their professional capacity can take on a more personal nature if it relates to that individual's performance or conduct or if the discussion involves expressions of opinion about an individual. Hence, details about a job competition are shielded from public disclosure since the process involves the receipt of personal information from candidates and discussion by the interview panel about the merits of each candidate.<sup>11</sup>

In the complaint at issue, Committee went beyond discussing the candidates for the position of City Manager and, instead, added an item relating to the organizational structure of the City. This item did not come with any staff report or recommendations but seemed to have been "brokered" by Members of Council prior to the meeting. There was virtually no discussion of the item during what was only an eleven-minute meeting during which time substantive decisions were made. The then City Manager was not asked for his professional opinion with respect to the position of Deputy City Manager for this portfolio. In fact, the City Manager had considered the applicable portfolio in the past restructuring initiative, which was adopted some seven months earlier, and had not recommended this fourth Deputy City Manager position.

Organizational restructuring, to add brand new positions to a municipal structure, is not a matter which attracts the exception to the open meetings rule dealing with personal information about an identifiable individual. There is no individual yet in the position when a new position is created; so how could there be anything "personal in nature" to discuss? Hence, Council was in breach of the *Municipal Act* when discussing the decision to create this new position using that particular provision of the *Act*.

Council then immediately appointed someone into the position without holding a competition for this new position. If Council had been debating or discussing the relative merits of the individual in terms of their own personal opinions, they may have been within their authority to discuss this aspect of their decision in a closed session.

However, they were not discussing information that was personal in nature; the appointment was one in a professional capacity. There was no discussion about the individual that was personal and, in fact, the decision was made with virtually no discussion or debate. Again, it can only be reasonably concluded that the decision had been pre-determined before the meeting even began.

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<sup>9</sup> RSO 1990, c.M.56.

<sup>10</sup> *York Police Services Board (Regional Municipality) (Re)*, 2010 CanLII 65788 (ON IPC).

<sup>11</sup> *Toronto District School Board (Re)*, 2015 CanLII 50474 (ON IPC).

Moreover, Council breached its own Procedure By-law when it added a topic into discussion directly at the Special Meeting without notice of that item and, even if it were permitted to discuss it in closed session, without adopting the proper resolution to go into closed session on that particular item. The By-law requires that only those matters for which a Special Meeting has been called can be discussed at the Special Meeting. According to the Procedure By-law, this Rule of Procedure cannot be waived.<sup>12</sup>

The Special Meeting had not been called to deal with an organizational restructuring decision, the establishment of a brand new position, or the appointment of a staff member into that newly created position. The Special Meeting was called to determine who would be the successful candidate for the City Manager position. Even the City Manager, as Clerk-Delegate for the meeting, was surprised when the new topic was introduced. It would appear that only Members of Council were aware that this organizational restructuring discussion and decision would occur.

Nor do we feel that COW-CS could deal with this new position as “Other Matters Considered by the Committee”.

In order to abide by the *Municipal Act*, Council would have had to come out of closed session, discuss and decide upon the substantive matter regarding the addition of the position in open session, and then go back into closed session if its discussion on the appointment to the new position involved bona fide personal information. It could then come out of closed session and make its decisions publicly. It should not make substantive decisions in closed session, as it did here, and only announce them when effected. The *Act* prohibits a council from make a substantive decision in closed session; it can only make procedural or directional decisions.

A council should not pre-determine what it is going to do in a closed session before the meeting and then essentially “rubber-stamp” its pre-determined outcome while in public session. The public deserves to see decision making in an open and deliberative forum, even if it does not have the automatic right to be consulted on such decisions. It would strain credibility to believe that nine members of council could make such a substantive decision, with significant budget and human resources implications, in less than eleven minutes, in the absence of a professional and comprehensive staff report, unless the decision was effectively made outside of the formal process.

## **V. CONCLUSION**

Amberley Gavel has concluded that the Council for the City of Vaughan was not properly in closed session as Committee of the Whole (Closed Session) on April 13, 2016 under section 239(1)(b) of the *Municipal Act* when it decided to create a new position of Deputy City Manager for Legal and Human Resources and appoint an individual into that position immediately. Moreover, it made substantive decisions while in closed session

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<sup>12</sup> *Supra*, note 3, ss. 7.1(b).

on this matter which it would not have been permitted to make in a closed session even if the meeting had properly been closed to the public. Further, Council breached its own Procedure By-law by not following the correct processes for giving notice about agenda items, adding new items by unanimous consent only, and for going into closed session by an applicable, specific resolution on the new matter in accordance with legislative requirements...

## **VI. 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 City of Vaughan. 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

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**AMBERLEY GAVEL LTD.**

**August 2016**