

**REPORT TO
THE CORPORATION OF THE COUNTY OF BRUCE
REGARDING THE INVESTIGATION OF ALLEGED IMPROPERLY CLOSED
MEETINGS OF COUNTY COUNCIL**

COMPLAINT

The Corporation of the County of Bruce (“the County”) received a complaint with respect to alleged improperly closed meetings of County Council occurring between November 2004 and the end of 2013 dealing with matters regarding the long term management of nuclear waste.

This request was sent to the offices of Amberley Gavel Ltd. (“Amberley Gavel”) for investigation..

JURISDICTION

The County appointed Local Authority Services (LAS) as its closed meeting investigator pursuant to section 239.2 of the *Municipal Act 2001*(The Act)

LAS has delegated its powers and duties to Amberley Gavel to undertake the investigation and report to County Council.

The legislation authorizing investigations into improperly closed meetings came into force on January 1, 2008. The majority of the alleged improperly close meetings occurred after that date, and it is these meetings that are considered in this report

BACKGROUND

Section 239 of the *Municipal Act 2001* 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.

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).

ANALYSIS AND FINDINGS

Documents provided by the County include procedural and notice by-laws of the County, County Directories, and minutes and agendas for meetings of County Council and its Committees wherein the matter of the management of nuclear waste was discussed between 2004 and 2014. On only one occasion did those documents indicate that a closed session of Council occurred, and that in November of 2004. A meeting at that time is outside of our jurisdiction to investigate as the Act did not authorize investigations until 2008.

Bruce County Council is made up of the Heads of Council of each lower tier municipality in the County, of which there are eight. Thus County Council has eight members, one of whom serves as Head of Council, known as the County Warden.

The composition of County Standing Committees, established to advise Council in certain areas of jurisdiction subject to terms of reference established by County Council, is such that all eight members of Council also form the membership of each Committee.

There were no instances, neither brought to our attention by the complainant nor found in a search of minutes by the County Clerk, of closed meetings of Committees or of Council since 2008 organized by the County dealing with the issue that is subject of this complaint. Hence there were, in our determination, no improperly closed meetings organized by the County related to this complaint.

The complainant provided Amberley Gavel with additional material including notes and emails, from Ontario Power Generation (OPG) and the Nuclear Waste Management Organization (NWMO) in the original complaint and on April 2014 that it believed supported the allegations.

This material described meetings organized by OPG and NWMO, which were attended by a quorum of Bruce County Councillors, and to which all members of Bruce County Council were invited. With the exception of the Warden, the invitations were addressed to them as Heads of their local Councils.

The meetings were of a body originally set up by OPG in 2005 as the Community Consultation Advisory Group (CCAG) with respect to the Low and Intermediate Level Waste (L&ILW) Deep Geologic Repository(DGR) project regulatory review..

Initially the Heads of five local councils in Bruce County were invited, and that was quickly expanded to all Heads, and the one who was County Warden was invited to attend in his capacity as Head of Bruce County Council on November 16, 2005. It is clear from notes of subsequent meetings that the invitation was accepted and that the County Warden continued to attend and be identified in that capacity through 2013. The local and county Chief Administrative Officers were also invited to attend.

The draft terms of reference for the CCAG included the following objectives:

1. (For OPG) To provide status updates on a periodic basis to representatives from local municipalities on project developments and milestones.
2. To provide a forum to identify emerging issues related to community concerns.
3. To provide suggestions for establishing and carrying out community consultation activities during the regulatory review phase.

The Definition of a Meeting

Section 238(1) of the Act describes a “meeting” as follows:

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them.

That is not a very helpful definition and indeed it appears to be a circular one. Essentially the provision says that "a meeting is a meeting".

Black’s Law Dictionary is a little more illuminating as it defines a “meeting” as:

The gathering of people to discuss or act on matters in which they have a common interest.¹

The Act also provides that a meeting of a municipal council can take place only if there is a quorum of members present. Quorum is defined by the Act as the majority of the members of a body.

However, it is not enough in our opinion that the presence of a quorum to be determinative of whether or not a “meeting” was held for the purposes of the open meetings provisions of the Municipal Act. There are situations where members of a Council gather together either informally or formally outside of their regular or scheduled meetings.

The above definition of a meeting would cover a situation wherein a quorum of the members of a council, committee or local board gather together informally to discuss upcoming council, committee or board business and discuss on how they are going to consider or vote on the matter. Although they may not be engaged in all the formal “trappings” of a municipal council, board or committee meeting they may still in these circumstances be materially advancing the business or decision-making of the municipality. This type of gathering, then, would be a breach of the openness and transparency required by the Municipal Act.

Not all situations where members of council are gathered will be considered to be a meeting under the Municipal Act. A majority of the members of council attending a County function, a wedding, or a funeral (to give a few examples) would not be considered a meeting if the members of council did not discuss common interests with the view to or that results in materially advancing the business or decision making of the municipality. Similarly, a chance encounter of a majority of members of council in the same place at the same time would not automatically be considered a meeting.

In addition, individual members of council might informally speak to each other about their common interests on a frequent basis. That is to be expected. They must work together collegially and collaboratively on almost a day-to-day basis. Moreover, the provincial legislation presumes conversations between members of council on issues of common interest. A councillor may wish to discuss an upcoming item with a fellow colleague(s) to ascertain his or her viewpoint, to understand the issues more in-depth, or to seek support for her or his point of view on a matter.

The Municipal Conflict of Interest Act supports this conclusion with its prohibition on a member influencing another member where the first member has declared a pecuniary interest on a matter before a body. The presumption is that it is normal practice that Councillors influence one another outside meetings unless prohibited

¹ *Black's Law Dictionary*, 8th ed., s.v. “meeting”.

under this Act.

Pending legislative or judicial interpretation on this critical issue, it is our opinion that a meeting of a council, committee, or local board is one in which a quorum of the members of the body gather together at a common place (including telephonic or electronic gatherings) and discusses a matter in a way that materially advances, or is intended to advance, the business or decision-making of the council, committee, or local board, regardless of their original intention for coming together..

So, were these CCAG meeting also meetings of Bruce County Council?

Certainly they met the requirements for membership and quorum. The presence of municipal staff does not, in our opinion, change that conclusion.

The second question is, did the meetings advance the business or decision-making of the Council?

To determine if the DGR was a subject matter of consideration by Bruce County Council we consulted the County minutes and agendas that had been provided to us, referenced earlier.

There is no doubt that it was.

County Council (CC), or a Standing Committee(C) (all councillors are members of County Standing Committees), dealt with the DGR or related issue on the following occasions as referenced in their minutes:

May 1, 2008 CC
July 9, 2009 CC
Aug 11, 2011 C
Nov 17, 2011 C
Jan 17, 2012 C
Mar 15, 2012 C
May 17, 2012 C
Aug 16, 2012 C
Sep 20, 2102 C
Oct 18, 2012 C
Dec 20, 2012 C
Jun 27, 2013 C
Sep 19, 2013 C

It should be noted that Committee Minutes are forwarded and dealt with by a subsequent meeting of County Council. So, while the subject matter of the DGR does not appear in

the County Council meeting minutes, it would be a subject before Council when it was considering the minutes of each of the Committee meetings above.

There is no doubt that the DGR issue was a matter that was under consideration, in one way or another, by Bruce County Council, from 2008 to 2013.

Did members at the CCAG meetings discuss common interests with the view to, or that resulted in, materially advancing the business or decision making of the municipality?

There are no "minutes" of the meetings of the CCAG although some notes summarizing attendance and discussions were kept by a representative of OPG.

At least a quorum of County Council was present at each of the following CCAG meetings:

Mar 24, 2009
Sep 30, 2009
Feb 25, 2010
June 3, 2010
Dec 20, 2011
Feb 23, 2012
May 15, 2012
Sep 18, 2012

These CCAG meetings tended to last for a minimum of one hour and often two or more hours. County Council and committee meetings ranged in length from approximately one half hour to three and a half hours, each dealing with numerous other topics as well.

Based on the notes that we reviewed from OPG and the Council and Committee minutes, we are of the opinion that the County Councillors were as much influenced in their decisions at County Council or in Committee with respect to the DGR project, and probably more, by the discussions that they participated in at the CCAG meetings.

Thus Amberley Gavel is of the opinion that the CCAG meetings between March 2009 and September 18, 2012 were also meetings of Bruce County Council.

Since there was no notice of these Council meetings given to the public in accordance with the County's Procedure By-Law; no Clerk or designate was present to take minutes, nor were any taken; and the public was unaware of and in no case attended any of these meetings; nor was there any resolution to close them, they were clearly in contravention of the open meetings requirements of the Act,

However, the question needs to be asked, did the members deliberately contravene the Act?

Our conclusion is that they did not. There is no evidence that we can determine that any

Mayor or County staff member raised the issue with the elected officials that they might be in breach of the Act as County Councillors.

Invitations were addressed to them as heads of their local Councils, with the exception of the County Warden, who was also Head of a local council. And local Councils had been the ones that formally offered to consider hosting nuclear waste in the long term, rather than the County.

We suspect they saw the CCAG discussions as having a more local impact than a County impact, and while that may have been true, it does not negate the fact that the issues involved were also ones that the County was engaged with as well.

CONCLUSION

The Heads of Bruce County local councils are also ex officio members of Bruce County Council. When all, or a majority of them, met as the Community Consultation Advisory Group with respect to the Low and Intermediate Level Waste Deep Geologic Repository project they were also meeting as Bruce County Council given the County Council's involvement relative to the project. Because they did not follow the provisions of the Municipal Act 2001 with respect to these meetings, particularly the open meeting provisions, they were in breach of the Act.

RECOMMENDATIONS

Councillors and municipal staff should be more sensitive to opportunities for the Act to be breached when members of Councils come together for purposes other than regular or special meetings of Councils or their Committees. This report clearly indicates that a meeting to which the open meeting provisions of the Act apply can occur without any intention on the part of the councillors to breach the Act.

This report is to be made public by Bruce County Council at its next regular meeting of the Council or relevant Committee.

We thank the complainants for their thorough presentation and the County Clerk and staff for providing us with all minutes covering a large number of years that they thought might be related to the issue.

July 2014

Nigel Bellchamber

Amberley Gavel Ltd.