

**REPORT ON CLOSED MEETING INVESTIGATION – 2020-01**

**THE CORPORATION OF THE COUNTY OF BRUCE**

**Meaghan Barrett**

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## REPORT ON CLOSED MEETING INVESTIGATION – 2020-01

### INTRODUCTION

A complaint was filed with our office March 9, 2020 (the “Complaint”) in our capacity as closed meeting investigator (“Investigator”) alleging that the Council of The Corporation of the County of Bruce (the “County”) and the County’s Executive Committee have contravened section 239 of the *Municipal Act, 2001*<sup>1</sup> and/or the County’s Procedural By-law.<sup>2</sup>

Specifically, the Complaint asserts that:

- portions of meetings of the County’s Executive Committee on June 9, 2016, April 14, 2016, February 1, 2018, March 22, 2018, April 5, 2018, April 19, 2018, May 3, 2018 and May 17, 2018 were improperly held in closed session, and votes, resolutions or decisions were improperly made during these closed session meetings, in contravention of section 239 of the *Municipal Act, 2001* and the Procedural By-law;
- one or more votes or decisions, by which Council passed a motion to access the Krug Reserve Fund, was improperly made by Council in closed session at a meeting or meetings held between February 1, 2018 and March 22, 2018, in contravention of section 239 of the *Municipal Act, 2001* and the Procedural By-law.

### CLOSED MEETING INVESTIGATOR – AUTHORITY & JURISDICTION

The County appointed Local Authority Services Inc. (“LAS”) as its closed meeting investigator pursuant to section 239.1 of the *Municipal Act, 2001*. LAS has delegated to Aird & Berlis LLP its authority to act as the Investigator for the County.

Our jurisdiction as Investigator is set out in section 239.2 of the *Municipal Act, 2001*. As the appointed closed meeting investigator, we are authorized to investigate, in an independent manner, a complaint made by any person to determine whether the County has complied with section 239 of the *Municipal Act, 2001* or a by-law enacted under subsection 238(2), in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation to Council, together with any recommendations as may be applicable.

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

<sup>2</sup> The County had three (3) Procedural By-laws in effect during the period of time of the various meetings: Procedural By-law Nos. 2016-013, 2018-001 and 2018-015 (collectively, the “Procedural By-law”). When a specific by-law is being referenced in this Report, the by-law number will be used.

## (1) Preliminary Matter Regarding Jurisdiction

As a preliminary matter, the complainant challenged our jurisdiction to act as Investigator in this file. The complainant expressed concerns respecting our ability to act impartially as Investigator due to a former business relationship between our firm and Bruce Power LP (“Bruce Power”) and our firm’s work in the energy industry. We provided written confirmation to the complainant that no legal conflict of interest nor any apprehension of bias existed. We recommended that the County obtain independent legal advice on the issue which confirmed our representations. We received written confirmation on April 12, 2020 that the complainant acquiesced to our jurisdiction to carry out the investigation.

## (2) Matters Outside Jurisdiction

The Complaint included a number of allegations that are outside the scope of our jurisdiction as Investigator, including allegations that the County:

- provided inaccurate documents as part of a previous closed meeting investigation;
- misrepresented funding sources in meeting minutes that were the subject of a previous closed meeting investigation; and
- provided a false response to a request for certain documents that were considered by the Executive Committee at the meetings that are the subject of the Complaint, which request was made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*.<sup>3</sup>

These above referenced matters are, therefore, not addressed or considered in this Report.

In addition, the Complaint alleged that the County forged or misrepresented open and closed meeting minutes and agendas for the meetings that are the subject of the investigation detailed in this Report. This allegation is also outside of our jurisdiction as Investigator.

Certified true copies of the open and closed meeting minutes and agendas of the meetings that are the subject of the Complaint were provided to our office by the County’s Clerk. Pursuant to subsection 447.6(1) of the *Municipal Act, 2001*, these copies are admissible in evidence in judicial or quasi-judicial proceedings without proof of the seal or official character of the Clerk.<sup>4</sup> Accordingly, the certified true copies of the records that have been provided to our office are admissible for the purpose of this investigation and are accepted as the true and official copies of these documents.

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<sup>3</sup> R.S.O. 1990, c. M.56, as amended.

<sup>4</sup> Subsection 447.6(1) of the *Municipal Act, 2001* provides:

### **Admissibility of certified copies**

**447.6 (1)** A copy of any record under the control of the clerk of the municipality purporting to be certified by the clerk and under the seal of the municipality may be filed and used in any court or tribunal instead of the original and is admissible in evidence without proof of the seal or of the signature or official character of the person signing it, unless the court or tribunal otherwise directs.

## THE COMPLAINT

The Complaint was properly filed pursuant to section 239.2 of the *Municipal Act, 2001*.

The Complaint, as originally filed, contained a detailed review of the closed meetings that were at issue in the Complaint, as well as extensive background information on some of the matters discussed or alleged to have been discussed during those closed meetings, and included a number of exhibits.

Following a request for clarification regarding certain allegations and requests contained in the Complaint, we received correspondence from the complainant that reiterated many of the issues raised in the original Complaint, but that also provided additional and clarifying information. Subsequent correspondence was received from the complainant with further additional information, including a request to expand the scope of our investigation to include an eighth Executive Committee meeting, allegedly connected to the other meetings that are the subject of the original Complaint.

The Complaint contains a number of allegations, which can be distilled to a contention that Council and the Executive Committee improperly advanced a project in partnership with one or more private, third party entities, almost entirely in closed meetings from approximately 2016 to 2018.

The main concerns set out in the Complaint appear to focus on conceptual drawings that were prepared in respect of a proposed expansion of the County Museum's archives, which plans were, at some point in the period between 2016-2018, expanded to house the innovation centre that was the subject of the above-noted project. The Complaint also alleges that during this process, the County misused funds from the Krug Reserve Fund and failed to follow the procedures contained in the by-law that governs the use of the Krug Reserve Fund.

The allegations contained in the Complaint that are within the scope of this closed meeting investigation are set out as follows:

- the Executive Committee acted in contravention of its legislative obligations under section 239 of the *Municipal Act, 2001* and the requirements of the Procedural By-law when it held closed meetings on June 9, 2016, April 14, 2016, February 1, 2018, March 22, 2018, April 5, 2018, April 19, 2018, May 3, 2018 and May 17, 2018; and
- County Council improperly passed a motion to access the Krug Reserve Fund in closed session between February 1, 2018 and March 22, 2018, in contravention of section 244 of the *Municipal Act, 2001* and the Procedural By-law.

## INVESTIGATION

In order to assess this matter and make a determination with respect to the issues, we have reviewed the following materials, in addition to the applicable law, as set out below:

- the Complaint and all exhibits attached thereto, including additional correspondence and materials received from the complainant;
- the County's Notice Policy;

- the County's By-law Nos: 2016-013, 2018-001 and 2018-015;
- the open and closed meeting minutes, agendas and reports for the meetings at issue; and
- the agendas and minutes for the regular meetings of Council referencing the Executive Committee.

Additionally, we interviewed the County's Clerk who was in attendance at the majority of the closed meetings that are the subject of the Complaint.

We also reviewed, considered and had recourse to such applicable secondary source materials, including other closed meeting investigation reports, that we believed to be pertinent to the issues at hand.

The County was fully cooperative with respect to the conduct of our investigation.

This is a report on the investigation of the Complaint made in accordance with subsection 239.2(10) of the *Municipal Act, 2001*.

## **APPLICABLE LAW**

### **(1) *Municipal Act, 2001***

Subsection 239(1) of the *Municipal Act, 2001* provides that all meetings of Council are to be open to the public, unless otherwise excepted.<sup>5</sup> Therefore, all council or committee meetings, unless they deal with a subject matter falling within a specific exception, are required to be held in a public forum.

The exceptions that are relevant to this matter are set out in subsections 239(2) and 239(3.1) of the *Municipal Act, 2001*:

#### **Exceptions**

**239 (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;

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<sup>5</sup> The term "meeting" is defined in s. 238(2) of the *Municipal Act, 2001* 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, where,

- (a) a quorum of members is present, and
- (b) members discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

- (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;
- (h) information explicitly supplied in confidence to the municipality or local board by Canada, a province or territory or a Crown agency of any of them;
- (i) a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (j) a trade secret or scientific, technical, commercial or financial information that belongs to the municipality or local board and has monetary value or potential monetary value; or
- (k) a position, plan, procedure, criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.

### **Educational or training sessions**

**239** (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.

Pursuant to clause 239(4)(a), the County is required to state by resolution the fact of holding a closed meeting, the general nature of its subject matter and, if it is closed pursuant to subsection 239(3.1), that it is to be closed under that subsection:

### **Resolution**

**239** (4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,

- (a) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting; or

- (b) in the case of a meeting under subsection (3.1), the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under that subsection.

Section 244 of the *Municipal Act, 2001* provides that votes cannot be taken by secret voting, unless the exceptions in sections 233 or 238 apply.<sup>6</sup>

A vote cannot be taken when a meeting is closed to the public in accordance with subsection 239(5), except if the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality in accordance with subsection 239(6):

#### **Open meeting**

**239 (5)** Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote.

#### **Exception**

(6) Despite section 244, a meeting may be closed to the public during a vote if,

- (a) subsection (2) or (3) permits or requires the meeting to be closed to the public; and
- (b) the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality, local board or committee of either of them or persons retained by or under a contract with the municipality or local board.

## **(2) Procedural By-law**

Subsection 238(2) of the *Municipal Act, 2001* requires the County to pass a procedural by-law for governing the calling, place and proceedings of meetings. As noted above, the closed meetings that are referenced in the Complaint are subject to three (3) different versions of the County's Procedural By-law:

- the closed meetings on June 9, 2016 and April 14, 2016 are subject to By-law 2016-013;
- the closed meeting on February 1, 2018, 2018 is subject to By-law 2018-001; and.
- the closed meetings that occurred between March 22, 2018 and May 17, 2018 are subject to By-law 2018-015.

Full extracts of the Procedural By-law that are relevant to the Complaint are attached as **Attachment "A"** to this Report, which includes a chart comparing the relevant portions of both By-laws 2016-013 and 2018-001, with revisions highlighted in red. These revisions primarily reflect legislative amendments to the corresponding sections in the *Municipal Act, 2001* that came into force between 2016 and 2018. The relevant portions of By-law 2018-015 are identical to By-law 2018-001 and have, therefore, not been reproduced.

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<sup>6</sup> The exception in s. 233 permits the appointment of the head of council by secret ballot, and the exception in s. 238 permits a vote by secret ballot to designate a member of council, other than the head of council, to preside at meetings of council.

The Procedural By-law provides that its rules of procedure apply to each Committee of Council, which includes the Executive Committee.<sup>7</sup>

In summary, the closed meeting provisions in the Procedural By-law include:

- a presumption that all meetings are open to the public unless certain subject matters are being discussed, which subject matters are identical to those contained in subsections 239(2), (3) and (3.1) of the *Municipal Act, 2001*;
- a requirement that Council state by resolution the fact of holding the closed meeting, and the general nature of the closed meeting;
- a requirement that, where the meeting is closed for education or training, Council state by resolution the fact of holding the closed meeting, the general nature of its subject matter and a statement that the meeting is to be closed as an educational or training session;
- a prohibition on voting during a closed meeting, except where both of the following criteria are met:
  - the meeting is permitted or required to be closed to the public, and
  - the vote is for a procedural matter or for giving directions or instructions to officers, employees or agents of the municipality;
- a requirement that upon resuming open session, the Chair:
  - state the matters considered in closed session; and
  - confirm that no motions were carried in closed session other than procedural motions or directions to staff.<sup>8</sup>

By-laws 2018-015 and 2018-001 include Closed Meeting Procedures as Appendix A. A full copy of the Closed Meeting Procedures is appended to this Report as **Attachment “B”**.

In summary, the Closed Meeting Procedures, which apply to the Executive Committee, require the County to adhere to the following requirements in respect of closed meetings:

- a resolution to go into a closed meeting should voluntarily disclose as much information as possible about the subject matter to be discussed in order to provide transparency and accountability to the public. The reason must meet the criteria in section 239 of the *Municipal Act, 2001*;
- a resolution to go into a closed meeting must include:
  - a notation that the meeting is going into closed session under section 239 of the *Municipal Act, 2001*; and

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<sup>7</sup> Section 21(N) of By-law 2016-013; and s. 23(N) of By-laws 2018-015 and 2018-001. References to “Council” below are equally applicable to “Committee”.

<sup>8</sup> Section 6 of By-law 2016-013; s. 7 of By-laws 2018-015 and 2018-001.



- a description of the subject matter to be discussed and the fact that the meeting is being closed under the specific subsection;
- the Warden or Chair shall prohibit discussion of any matter that was not disclosed in the resolution authorizing the closed meeting;
- once back in the open meeting, the Warden or Chair shall confirm that the Council or Executive Committee discussed only those matters identified in the resolution to go into a closed meeting and that this shall be recorded in the minutes.

## **FINDINGS**

### **(1) Executive Committee Meetings**

The Executive Committee closed meetings at issue in the Complaint occurred on June 9, 2016, April 14, 2016, February 1, 2018, March 22, 2018, April 5, 2018, April 19, 2018, May 3, 2018 and May 17, 2018.

#### **(A) June 9, 2016 (the “June 9, 2016 Meeting”)**

Prior to entering into closed session, the Executive Committee considered and passed a motion in respect of a Memorandum of Understanding (“MOU”) between the County and Bruce Power entitled “Economic Development & Innovation”, which forms an agreement for the shared funding of an Economic Development position and outlines the roles, responsibilities and reporting structure for the position. A copy of the MOU, together with a report from the CAO dated June 9, 2016 was attached to the certified true copy of the open portion of the June 9, 2016 Meeting agenda that we received from the County. We have been advised that the June 9, 2016 Meeting agenda and all attachments are publicly available.

The June 9, 2016 Meeting minutes indicate that the Executive Committee then proceeded to an *in camera* session between 11:30 a.m. and 11:55 a.m. and to discuss, in part:

Economic Development and Bruce Power Refurbishment, pursuant to Section 2(b) of the Municipal Act related to personal matters about an identifiable individual, including municipal or local board employees.

In closed session, the Executive Committee received a second report from the CAO about a candidate that had been interviewed for the Economic Development position that was the subject of the MOU with Bruce Power.

The June 9, 2016 Meeting minutes indicate that a vote was taken when the Executive Committee returned to open session in respect of a matter entitled “Economic Development – Bruce Power”, and the following motion was carried:

That the Memorandum of Understanding, be approved; and,

That the contract arrangements for the joint Economic Development Position that will work from Bruce County Administration Centre and the Bruce Power Corporate Office to June 30, 2018 with a one year extension to June 30, 2019 subject to Bruce Power agreement.

### ***The June 9, 2016 Meeting was Closed for a Permitted Purpose***

It is our view that the June 9, 2016 Meeting was closed for a permitted purpose in accordance with the exception contained in clause 239(2)(b) of the *Municipal Act, 2001* and section 6(A) of By-law 2016-013.

A municipality is entitled to hold a closed meeting under clause 239(2)(b) of the *Municipal Act, 2001* when discussing personal matters regarding an identifiable individual. The *Municipal Freedom of Information and Protection of Privacy Act* provides guidance for interpreting the information that constitutes personal matters regarding an identifiable individual, which includes information that, if publicly disclosed, would give rise to a reasonable expectation that a person can be identified.<sup>9</sup>

As a general rule, information associated with an individual in a professional, official or business capacity is not “personal information” about the individual.<sup>10</sup> However, the information may qualify as personal information if the information reveals something of a personal nature about the individual.<sup>11</sup> For example, if information relates to an evaluation of that person’s performance or an investigation of their conduct, that information may be considered “personal information” even if it is in respect of an individual acting in his or her professional capacity.<sup>12</sup>

Similarly, discussion or evaluation of the educational and professional background of potential volunteer committee members, and discussion of their potential as a committee member, has been found by the Ontario Ombudsman to fit within the “personal matters” exception.<sup>13</sup> General staffing and hiring policies or remuneration considerations do not fall within the exception under clause 239(2)(b). By way of example, the exception would apply to discussion about a specific individual’s salary, but would not apply to discussion of the salary range for a position.<sup>14</sup>

The closed meeting minutes for the June 9, 2016 Meeting indicate that staff provided an update to the Executive Committee about a candidate that had been interviewed for the Economic Development position that was the subject of the MOU with Bruce Power. The confidential report attached to the closed meeting minutes demonstrates that the Committee was provided with information about an interview with a specific candidate for the position. While typically information related to an individual in his or her professional capacity is not considered personal information, the consideration of the specific candidate’s employment history and suitability for the position falls within the intent of the prescribed exception.

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<sup>9</sup> *Ontario (Ministry of Correctional Services) v Goodis* (2008), 290 D.L.R. (4th) 102 at para. 69, 89 O.R. (3d) 457 (Div. Ct.).

<sup>10</sup> *Clarington (Municipality) (Re)* (2008), IPC Order MO-2368 (IPC); *Aylmer (Town)(Re)* (2007), IPC Order MO-2204 (IPC).

<sup>11</sup> *Ibid*, IPC Order MO-2204.

<sup>12</sup> *Madawaska Valley (Township)(Re)* (2010), IPC Order MO-2519 (IPC).

<sup>13</sup> *Investigation into whether Council for the Town of Bracebridge held illegal closed meetings on December 9 and 17, 2014*, Ontario Ombudsman (March 2015), at paras. 38, 41, 42.

<sup>14</sup> *Investigation into whether the Town of Mattawa Council and its Ad Hoc Heritage Committee held improperly closed meetings*, Ontario Ombudsman (December 2010) at para. 53 [“Mattawa”].

**(B) April 14, 2016 (the “April 14, 2016 Meeting”)**

The April 14, 2016 Meeting minutes indicate that the Executive Committee proceeded to an *in camera* session between 9:58 a.m. and 10:39 a.m. pursuant to the following resolution:

That the Committee move into a closed meeting to discuss Economic Development and Bruce Power Refurbishment pursuant to Section (2) (b) of the Municipal Act related to personal matters about an identifiable individual, including municipal or local board employees and Section (3.1) of the Municipal Act for the purpose of educating or training the members.

The Committee discussed two (2) matters in closed session, the first related to Economic Development and Bruce Power Refurbishment and the second regarding the renaming of the Kincardine Branch Library. Only the first matter is the subject of the Complaint.

The closed meeting minutes for the April 14, 2016 Meeting contain very little detail regarding the matters discussed in closed session. In respect of the matter entitled Economic Development and Bruce Power Refurbishment, the closed meeting minutes state only that a report was presented by the CAO in respect of the proposed Bruce Power Economic Development Contract Position, but the report is not attached to the closed meeting minutes.

The April 14, 2016 Meeting minutes indicate that a vote was then taken in open session on the following motion, which was carried:

That the final negotiations with Bruce Power to hire a Contract position dedicated to Nuclear Energy in partnership with Bruce Power for a three (3) year term beginning in 2016 and ending December 31, 2018 under a joint cost sharing agreement between the two organizations, be supported.

**(i) The April 14, 2016 Resolution to go into Closed Session was Deficient**

Subsection 239(4) of the *Municipal Act, 2001* requires the Committee to state by resolution both the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting, including the general nature of the subject matter of any education or training session. In *Farber v. Kingston (City)*, the Ontario Court of Appeal emphasized the need to balance the public interest in maximizing information available to the public while at the same time not undermining the reason for excluding the public.<sup>15</sup>

Citing *Farber v. Kingston (City)*, the Ontario Ombudsman has determined that subsection 239(4) of the *Municipal Act, 2001* requires municipalities to provide at least a brief description of the issues under discussion in the resolution, and that a mere recitation of the applicable section of the *Municipal Act, 2001* does not generally satisfy this requirement.<sup>16</sup>

Section 6(D) of By-law 2016-013 also requires the resolution to state the general nature of the matter to be discussed in closed session.

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<sup>15</sup> [2007] O.J. No. 919, at page 151.

<sup>16</sup> *Mattawa*, *supra* note 14 at para. 51.

The resolution to go into closed session that was carried at the April 14, 2016 Meeting provides no detail about the matter to be discussed in closed session. Instead, the resolution merely restates the language of the exceptions contained in subsections 239(2) and 239(3.1) of the statute.<sup>17</sup> Accordingly, the resolution to go into closed session contravenes subsection 239(4) of the *Municipal Act, 2001* and section 6(D) of By-law 2016-013.

**(ii) The April 14, 2016 Meeting was Not Closed for a Permitted Purpose**

The April 14, 2016 Meeting was closed pursuant to the exceptions in both clause 239(2)(b) and subsection 239(3.1) of the *Municipal Act, 2001*. In our view, the portion of the closed meeting related to the Bruce Power matter was not properly closed in accordance with either exception.

There is no evidence in the closed meeting minutes that information about an identifiable individual that would constitute personal information was discussed at the April 14, 2016 Meeting. Instead, it appears that the Executive Committee's discussion was related to the general terms of the contract position itself, which does not fall within the clause 239(2)(b) exception. Accordingly, it is our view that this portion of the meeting was not properly closed under the personal information exception in clause 239(2)(b) of the *Municipal Act, 2001* nor section 6(A) of By-law 2016-013.

As a result of the paucity of information contained in the resolution to go into closed session and the closed meeting minutes, it is unclear whether the portion of the closed meeting related to Economic Development and Bruce Power Refurbishment was also intended to be closed under the education and training exception in subsection 239(3.1) of the *Municipal Act, 2001* and section 6(C) of By-law 2016-013. In any event, for the reasons set out below, we have concluded that this portion of the April 14, 2016 Meeting would not have been properly closed pursuant to the education or training exception.

The education or training exception permits the County to hold a closed meeting where the purpose of the meeting is to educate or train members of council. This exception is narrowly construed as it may only be used if no member discusses or deals with any matter that materially advances the business or decision making of Council.

The Ontario Ombudsman has determine that it must be clear that the purpose of a meeting closed under the education or training exception relates to education only, and that a municipality cannot circumvent the open meeting rule by characterizing the subject matter as "educational." The Ombudsman wrote as follows in a report regarding an investigation into closed meetings in the City of Oshawa:

Councils and committees should avoid using closed education sessions as opportunities to consider information that will form the basis for their future decision-making, unless they otherwise come with the exceptions to the open meeting requirements and are properly authorized on that basis.<sup>18</sup>

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<sup>17</sup> We note that the resolution fails to identify that the meeting was closed in accordance with section 239 of the *Municipal Act, 2001*, citing only the relevant subsections. This was also the case for the June 16, 2016 Meeting.

<sup>18</sup> *Investigation into the City of Oshawa, Development Services Committee special meeting of May 22, 2008, "The ABCs of Education and Training"*, Ontario Ombudsman (March 2009) at para. 29.

In a report regarding a closed meeting in the County of Essex, LAS wrote that the education and training exception is only appropriate where “the sole purpose is to provide education or training and no transactional business or decision making occurs during the session.”<sup>19</sup> In that case, LAS rejected the County’s assertion that updating councillors regarding the status and progress of various initiatives of a local development corporation amounted to “education and training”, concluding that to find otherwise “would allow Council to go into closed session any time a member wanted merely to impart information.”<sup>20</sup>

Similarly, in a report regarding an investigation into a closed meeting in the Town of Moosonee where Council obtained information from a municipal advisor about specific grants the Town would be receiving and the conditions attached to those grants, the Ontario Ombudsman determined that the consultant’s presentation was not a proper use of the training or education exception. The Ontario Ombudsman determined that the information presented was not general in nature and related to matters that directly impacted the business of the municipality. In the Moosonee case, after receiving the consultant’s presentation, Council voted in open session to approve the course of action presented by the municipal advisor.<sup>21</sup>

The Ontario Ombudsman reached a similar conclusion in its report on an investigation into a closed meeting in the City of Welland, where, following a presentation from staff, Council specifically discussed the information that was provided as it pertained to the City and the suitability of the City as a distribution node. The Ontario Ombudsman concluded that the purpose of the meeting was to inform Council’s decision making and advance the formulation of the City’s economic strategy, which did not fall within the education or training exception.<sup>22</sup>

Given that the Executive Committee passed a resolution to take action on the report presented by the CAO related to the proposed Bruce Power Economic Development Contract Position following the closed portion of the meeting, it is evident that this portion of the meeting resulted in an advancement of the municipality’s business. If this portion of the meeting was intended to be closed pursuant to subsection 239(3.1) or section 6(C) of By-law 2016-013, it was not properly closed.

### **(C) February 1, 2018 (the “February 1, 2018 Meeting”)**

The February 1, 2018 Meeting minutes indicate that the Executive Committee proceeded to an *in camera* session between 10:56 a.m. and 11:42 a.m., and that the meeting was closed, in part, pursuant to the following resolution:

Section 239(2)(3.1)1 of the Municipal Act for the purpose of educating or training the members to discuss Applied Research and Training Centre.

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<sup>19</sup> Local Authority Services, *Report to the Corporation of the County of Essex Regarding the Investigation of the Closed Meeting of Essex County Council Held On July 2, 2009* (September 2009: Amberley Gavel Ltd.) at p.13.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Town of Moosonee Letter*, Ontario Ombudsman, 9 September 2014.

<sup>22</sup> *Investigation into multiple closed meetings by Council for the City of Welland from June 2012 to May 2014*, “Property and Propriety”, Ontario Ombudsman (November 2014).

During the closed portion of the February 1, 2018 Meeting, the CAO presented a report with an update on the Applied Research and Training Centre and advised that the County would be submitting an application for funding to a Provincial Ministry to progress the plan, including the characteristics for the Centre and the full business plan. The CAO's closed meeting report states that the County had been in discussions with local unions, private businesses, and school boards about the Centre. The CAO advised the Executive Committee that Bruce Power had committed to build a facility in Southampton and that it had been in discussions with the MaRS group to use the facility as an innovation hub, that would also include mid-career training for the skilled trades. Finally, the report provided an update on the next steps for staff.

The February 1, 2018 Meeting minutes indicate that the matter was reported as follows:

The Chair reported that staff were given direction in the closed meeting.

A review of the audio-video recording of the open portion of the February 1, 2018 Meeting demonstrates that the Chair read out the motion to proceed into a closed meeting contained in the meeting minutes, which included some information about the subject matter to be discussed and identified the subsection of the *Municipal Act, 2001* under which the meeting was being closed, as required by the *Municipal Act, 2001* and section 7(D) of Procedural By-law 2018-001.

**(i) The February 1, 2018 Meeting was Not Closed for a Permitted Purpose**

The portion of the February 1, 2018 Meeting related to the Applied Research and Training Centre was closed pursuant to the exception under subsection 239(3.1) of the *Municipal Act, 2001*.

It should be noted that, according to the Procedural By-law, the key duty of the Executive Committee is to consider matters related to the long-term strategic goals and operational management of the County. Consideration of the Applied Research and Training Centre, including receipt of briefings from staff on the progress of negotiations with other private and public sector entities laying the groundwork for the Centre, fall squarely within this mandate.

The information that members received from staff during the closed portion of the February 1, 2018 Meeting related to the Applied Research and Training Centre was about a specific matter that directly impacted the business of the municipality and materially advanced the Executive Committee's business by informing the future decision-making of the Executive Committee, and ultimately, Council. Accordingly, this portion of the February 1, 2018 Meeting was not closed for a permitted purpose in accordance with the education or training exception contained in subsection 239(3.1) of the *Municipal Act, 2001* or section 7(C) of By-law 2018-001.<sup>23</sup>

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<sup>23</sup> While not cited by the Executive Committee, it may be possible that the *in camera* discussion about the Applied Research and Training Centre at the February 1, 2018 Meeting and in some subsequent meetings could have been properly closed under the exception for ongoing negotiations with a third party contained in clause 239(2)(k) of the *Municipal Act, 2001*, as it appears that the Executive Committee discussed a detailed course of action regarding current or future negotiations with Bruce Power, and other private entities.

The purpose of the exception in s. 239(2)(k) is to protect information that could undermine a municipality's bargaining position or give the public an unfair advantage over the municipality. The Ontario Ombudsman has adopted the following four-part test to determine the applicability of the exception:

1. the *in camera* discussion was about positions, plans, procedures, criteria or instructions;

**(ii) There was an Improper Vote at the February 1, 2018 Meeting**

There is no evidence that a formal vote was taken during the closed portion of the February 1, 2018 Meeting. However, the February 1, 2018 Meeting minutes state that the Chair reported that staff were given direction in the closed meeting, but do not specify in respect of which matter direction was given.

Two criteria must be present for a vote in closed meeting to comply with subsection 239(6) of the statute and sections 7(E) and (F) of By-law 2018-001:

- the meeting must be permitted or required to be closed in accordance with one of the exceptions in subsections 239(2) or (3) of the *Municipal Act, 2001* or sections 7(A) or (B) of By-law 2018-001; 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.

As we have concluded that the portion of the meeting during which the Executive Committee discussed the Applied Research and Training Centre was not properly closed to the public, any resolution, including direction given to staff, was in contravention of subsection 239(6) of the *Municipal Act, 2001* and sections 7(E) and (F) of By-law 2018-001.

Furthermore, the Closed Meeting Procedures found at Appendix A of By-law 2018-001 recommend that where voting is permitted in closed session, i.e. for procedural matters or for giving directions or instructions to officers, employees or agents of the municipality, that formal motions be used for voting. Even if the February 1, 2018 Meeting had been closed for a permitted purpose, there is no evidence that the Executive Committee abided by this recommendation.

**(iii) The Report following the Closed Portion of the February 1, 2018 Meeting was Deficient**

The minutes of the February 1, 2018 Meeting state that the Chair reported that staff were given direction in the closed meeting.

However, the audio-visual recording of this meeting does not include any report from the closed meeting session, although it is possible that the recording was not recommenced following the closed meeting session until after the reporting had occurred.

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2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;
  3. the negotiations are being carried on currently, or will be carried on in the future; and
  4. the negotiations are being conducted by or on behalf of the municipality or local board.

Additionally, there must be “some evidence that a course of action or manner of proceeding is ‘pre-determined’, that is, there is some organized structure or definition given to the course to be taken.” See *Investigation into a complaint about a closed meeting held by the City of St. Catharines on June 25, 2018*, Ontario Ombudsman (February 2019) citing IPC Order M-92.

The Chair's report as reflected in the minutes of the February 1, 2018 Meeting contains a boilerplate statement that direction was given to staff. This report is deficient and contravenes section 7(H) of Procedural By-law 2018-001 and the Closed Meeting Procedures attached thereto as it fails to:

- indicate in respect of which of the matters considered in closed session direction was given to staff; and
- confirm that the Executive Committee discussed only those matters identified in the resolution to go into a closed meeting.

We were advised in the course of our investigation that during the period of the meetings that are the subject of our investigation, it had been the County's practice to include a boilerplate statement in its report to open session following a closed meeting that direction had been given to staff following a closed meeting, whether or not direction had in fact been given. This practice is clearly in error and defeats the accountability and transparency objectives of the *Municipal Act, 2001* and the Procedural By-law. However, we are advised that this is no longer the County's practice.

**(D) March 22, 2018 (the "March 22, 2018 Meeting")**

The March 22, 2018 Meeting minutes indicate that the Executive Committee proceeded to an *in camera* session between 11:38 a.m. and 12:35 a.m. after passing the following resolution:

That the Committee move into a closed meeting pursuant to Section 239(3.1)1 of the Municipal Act for the purpose of educating or training the members.

Four separate matters were discussed at the meeting. Only the Applied Research and Training Centre matter is the subject of the Complaint.

The Executive Committee received an update on two (2) separate items related to the Applied Research and Training Centre. The first item related to the acquisition of property for the Applied Research and Training Centre. The second item was an update on an application to the Ministry of Advanced Education and Skills regarding the Centre, and a discussion of whether County Council would consider co-locating with the Centre.

Upon its return to open session, the March 22, 2018 Meeting minutes indicate that the Chair provided the following report regarding the matter(s) discussed in closed session:

The Chair reported that staff were given direction in the closed meeting.

**(i) The March 22, 2018 Resolution to go into Closed Session was Deficient**

The resolution to go into closed session that was passed at the March 22, 2018 Meeting provided no information about the matters to be discussed in closed session and, therefore, does not satisfy the requirements under subsection 239(4) of the *Municipal Act, 2001* nor section 7(D) of Procedural By-law 2018-015.



**(ii) The March 22, 2018 Meeting was Not Closed for a Permitted Purpose**

The March 22, 2018 Meeting was closed pursuant to the education and training exception under subsection 293(3.1) of the *Municipal Act, 2001*.

Both the update to the Executive Committee regarding an application for funding and the possibility of co-locating Council with the Centre and the update regarding the acquisition of property for the Applied Research and Training Centre were discussions that advanced the Committee's future decision-making regarding the Centre. Both "updates" do not fall within the education or training exception for a closed meeting under subsection 239(3.1) of the *Municipal Act, 2001* or section 7(C) of Procedural By-law 2018-015.<sup>24</sup>

**(iii) There was an Improper Vote at the March 22, 2018 Meeting**

There is no evidence that a formal vote was taken during the closed portion of the March 22, 2018 Meeting in respect of the Applied Research and Training Centre. However, the March 22, 2018 Meeting minutes state that the Chair reported that staff were given direction in the closed meeting, without specifying in respect of which matter direction was given.

As we have concluded that the portion of the meeting during which the Committee discussed the Applied Research and Training Centre was not properly closed to the public, any resolution, including direction given to staff, was in contravention of subsections 239(6) of the *Municipal Act, 2001* 7(E) of Procedural By-law 2018-015.

**(iv) The Report following the Closed Portion of the March 22, 2018 Meeting was Deficient**

The March 22, 2018 Meeting minutes and the audio-visual recording of the meeting indicate that the Warden provided a report following the closed meeting session that County staff had received direction during the closed meeting. However, the Chair's report is deficient and contravenes subsection 7(H) of Procedural By-law 2018-015 and the Closed Meeting Procedures attached thereto as it fails to:

- indicate in respect of which of the matters considered in closed session direction was given to staff; and
- confirm that the Committee discussed only those matters identified in the resolution to go into a closed meeting.

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<sup>24</sup> It is possible that the Executive Committee's discussion regarding the acquisition of property for the Applied Research and Training Centre could have been properly closed to the public pursuant to the exception under clause 239(2)(c) of the *Municipal Act, 2001*, which provides for circumstances in which the Executive Committee would be discussing the proposed or pending acquisition or disposition of land by the municipality. However, this exception was not cited in the resolution to go into the closed meeting.

**(E) April 5, 2018 (the “April 5, 2018 Meeting”)**

The minutes of the April 5, 2018 Meeting indicate that the Executive Committee proceeded to an *in camera* session between 11:15 a.m. and 12:06 p.m., and that the meeting was closed to the public pursuant to:

Section 239(2)(b) of the Municipal Act for personal matters about an identifiable individual, including municipal or local board employees; and Section (3.1)1 of the Municipal Act for the purpose of educating or training members.

The closed meeting minutes indicate that only one matter was discussed *in camera*, which was in respect of the Applied Research and Training Centre. During the closed session, the Executive Committee received an update on status of staff’s work and negotiations with other private and public sector entities regarding the Applied Research and Training Centre, including the preparation of an application for funding to the Ministry of Advanced Education and Skills, the engagement of an architect to consider the size of the proposed Centre, and the provision of a draft MOU between the County and Bruce Power for the Executive Committee’s review and comment. A report from the CAO, a draft of the MOU with Bruce Power, a PowerPoint presentation and a draft letter from the Warden regarding the funding application were attached to the closed meeting agenda.

The minutes of the April 5, 2018 Meeting indicate that a vote was taken in open session on the following motion, which was carried:

That Bruce County Council and the eight local municipalities represented are committed to and support Bruce County’s funding application to Infrastructure Canada’s Smart Cities Challenge, to advance the concept of establishing an Energy Applied Research and Training Centre in Bruce County.

**(i) The April 5, 2018 Resolution to go into Closed Session was Deficient**

The resolution to go into closed session that was passed at the April 5, 2018 Meeting provided no information about the matters to be discussed in closed session and therefore does not satisfy the requirements under subsection 239(4) of the *Municipal Act, 2001* nor section 7(D) of By-law 2018-015.

**(ii) The April 5, 2018 Meeting was Not Closed for a Permitted Purpose**

The April 5, 2018 Meeting was closed pursuant to the exceptions under subsections 239(2)(b) and 239(3.1) of the *Municipal Act, 2001*.

The April 5, 2018 Meeting was not properly closed in accordance with the education and training exception contained in subsection 239(3.1) of the *Municipal Act, 2001* and section 7(C) of By-law 2018-015 as the matters discussed at the April 5, 2018 Meeting materially advanced the business or decision-making of the municipality. This is evidenced by the motion passed by the Executive Committee related to this item in open session.

We have also concluded that since there is no evidence that information was discussed at the April 5, 2018 Meeting regarding an identifiable individual, the meeting was not properly closed in accordance with clause 239(2)(b) of the *Municipal Act, 2001* or section 7(A) of the By-law 2018-015.

**(iii) There was an Improper Vote at the April 5, 2018 Meeting**

The closed meeting minutes indicate that staff received direction from the Executive Committee while *in camera*. Furthermore, the closed meeting minutes indicate that the CAO's report on the Applied Research and Training Centre was received by the Executive Committee for information and that the terms of the draft MOU with Bruce Power were "supported in principle" by the Executive Committee during the closed session.

In our view, even if there was no formal vote taken in closed session, it is evident from the minutes' reference to the draft MOU being "supported in principle" that a general consensus was reached by the Executive Committee in closed session which served as instructions to staff. While the vote may have not had all the trappings of a formal vote, the consensus reached by the Executive Committee constituted an effective vote. Pursuant to the direction in the Closed Meeting Procedures appended to By-law 2018-015, these instructions should have taken the form of a formal vote.

As we have concluded that the portion of the meeting during which the Executive Committee discussed the Applied Research and Training Centre was not properly closed to the public, any resolution, including direction given to staff, constituted an improper vote in contravention of subsection 239(6) of the *Municipal Act, 2001* and section 7(E) of Procedural By-law 2018-015.

**(iv) The Report following the Closed Portion of the April 5, 2018 Meeting was Deficient**

While a great number of matters related to the Applied Research and Training Centre were discussed and considered in closed session, and there is evidence that direction was given to staff regarding same, no report was made regarding the matters discussed during the closed session.

Accordingly, the April 5, 2018 Meeting contravened section 7(H) of By-law 2018-015 and the Closed Meeting Procedures attached thereto as it fails to:

- indicate that direction was given to staff; and
- confirm that the Executive Committee discussed only those matters identified in the resolution to go into a closed meeting.

**(F) April 19, 2018 (the "April 19, 2018 Meeting")**

The minutes of the April 19, 2018 Meeting indicate that the Executive Committee proceeded to an *in camera* session between 11:16 a.m. and 11:51 a.m., and that the meeting was closed pursuant to:

Section 239(2)(b) of the *Municipal Act* for personal matters about an identifiable individual, including municipal or local board employees; and,

Section (3.1)1 of the *Municipal Act* for the purpose of educating or training members.

The Committee discussed two (2) matters in closed session, an update on the application for Ministry funding for the Applied Research and Training Centre and negotiation of the MOU with Bruce Power, and the contract for the Business Investment Specialist and the terms for cost sharing the position with Bruce Power.

The April 19, 2018 Meeting minutes indicate that upon returning from closed session, the Chair provided the following report:

The Chair advised there was nothing to report from the closed meeting.

There was no audio-visual recording of the April 19, 2018 Meeting. We are advised that this was due to technical issues.

**(i) *The April 19, 2018 Resolution to go into Closed Session was Deficient***

The resolution to go into closed session that was passed at the April 19, 2018 Meeting provided no information about the matters to be discussed in closed session and therefore does not satisfy the requirements under subsection 239(4) of the *Municipal Act, 2001* nor section 7(D) of By-law 2018-015.

**(ii) *The April 19, 2018 Meeting was Not Closed for a Permitted Purpose***

The April 19, 2018 Meeting was closed pursuant to the exceptions under clause 239(2)(b) and section 239(3.1) of the *Municipal Act, 2001*. As in other cases, because the resolution to go into closed session failed to specify in respect of which matter each exception applied, we have considered the application of both exceptions to each matter.

There is no evidence that the Executive Committee discussed personal information about a specific individual during its discussion of either the Applied Research and Training Centre or the Business Investment Specialist position. On this basis, neither matter falls within the scope of the exception for personal matters contained in clause 239(2)(b) of the *Municipal Act, 2001* and section 7(A) of By-law 2018-015.

With respect to the Applied Research and Training Centre, the CAO's update on negotiations with Bruce Power and the update on the status of a funding application from the Ministry go beyond the scope of the education or training exception as the updates relate to a specific matter and advance the business of the municipality. Similarly, the closed meeting minutes indicate that in respect of the MOU regarding the Business Investment Specialist, "Council supported the proposed 50/50 cost split with Bruce Power",<sup>25</sup> which is evidence that the Executive Committee made a decision in closed session that advanced the business of the municipality. Accordingly, it is our opinion that neither matter discussed in closed session falls within the education or training exception under subsection 293(3.1) of the *Municipal Act, 2001* and section 7(C) of By-law 2018-015.

**(iii) *There was an Improper Vote at the April 19, 2018 Meeting***

While the Chair indicated in his reporting out in open session that there was nothing to report from the closed meeting, at least one decision was made by the Executive Committee based on the statement in the closed meeting minutes that "Council supported the proposed 50/50 cost split with Bruce Power". In our view, this statement can be characterized as instructions to staff regarding the ongoing negotiations with Bruce Power. These instructions should have taken the

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<sup>25</sup> We are advised that the reference to "Council" in this case was in fact a reference to the Executive Committee, which is entirely comprised of members of Council.

form of a formal vote, in accordance with the direction in the Closed Meeting Procedures appended to By-law 2018-015.

In any event, since we have concluded that no portion of the closed meeting was properly closed to the public, any resolution, including direction given to staff, constituted an improper vote contrary to the requirements in subsection 239(6) of the *Municipal Act, 2001* and section 7(E) of By-law 2018-015.

***(iv) The Report following the Closed Portion of the April 19, 2018 Meeting was Deficient***

The April 19, 2018 Meeting contravened section 7(H) of the By-law 2018-015 and the County's Closed Meeting Procedures as the Chair incorrectly reported that there was nothing to report from the meeting. In order to comply with the Procedural By-law, the Chair should have confirmed that the Executive Committee discussed only those matters identified in the resolution to go into the closed meeting.

Furthermore, given our conclusion that direction was in fact given to staff during the closed meeting, the report in open session should have also indicated the same.

**(G) May 3, 2018 (the "May 3, 2018 Meeting")**

The May 3, 2018 Meeting minutes indicate that the Executive Committee proceeded to an *in camera* session between 10:10 a.m. and 11:02 a.m., and that the meeting was closed pursuant to:

Section 239(2)(b) of the Municipal Act for personal matters about an identifiable individual, including municipal or local board employees;

Section 239(2)(e) of the Municipal Act for litigation or potential litigation, including matters before administrative tribunals, affecting the municipality; and,

Section (3.1)1 of the Municipal Act for the purpose of educating or training members.

There were three (3) items discussed in closed session:

- the proposed contract agreement with Bluesource for an "Improved Forest Management" (IFM) Project;
- an update from staff regarding the MOU with Bruce Power regarding the Applied Research and Training Centre; and
- an update from staff on a draft MOU with Bruce Power that would serve to update a previous MOU with Bruce Power that established cost-sharing arrangements for two (2) positions at the County related to Nuclear Energy Consulting Services.

Only the second and third matters, being the MOUs with Bruce Power, are the subject of the Complaint.

The April 19, 2018 Meeting minutes indicate that following the closed meeting, a motion was tabled in respect of a proposed contract agreement with Bluesource. This matter was not the subject of the Complaint.<sup>26</sup>

**(i) The May 3, 2018 Resolution to go into Closed Session was Deficient**

The resolution to go into closed session passed at the May 3, 2018 Meeting provided no information about the matters to be discussed in closed session and it does not satisfy subsection 239(4) of the *Municipal Act, 2001* or section 7(D) of By-law 2018-015.

**(ii) The May 3, 2018 Meeting was Not Closed for a Permitted Purpose**

The May 3, 2018 Meeting was closed pursuant to the exceptions under clauses 239(2)(b), 239(2)(e) and subsection 239(3.1) of the *Municipal Act, 2001*.

The portion of the closed session at the April 19, 2018 Meeting relating to either of the draft MOUs with Bruce Power would not have been properly closed in accordance with the personal information exception in clause 239(2)(b) of the *Municipal Act, 2001* nor section 7(A) of the By-law 2018-015. There is no evidence that information about a specific individual was discussed by the Executive Committee in closed session. While the Executive Committee received an update regarding two (2) positions for employment, the information contained in the MOU is about an employment position generally and does not include personal information about an identifiable individual. While the MOU regarding the Nuclear Energy Consulting Services positions contained salary information, this type of general information does not constitute personal information.

Furthermore, this portion of the April 19, 2018 Meeting would not have been properly closed in accordance with the litigation or potential litigation exception in clause 239(2)(e) of the *Municipal Act, 2001* nor section 7(A) of By-law 2018-015. The exception under clause 239(2)(e) of the *Municipal Act, 2001* is to permit the Executive Committee to discuss matters that are the subject of current or potential litigation *in camera*. If the discussion relates to potential litigation, there must be a reasonable prospect of litigation.

The litigation or potential litigation exception was considered by the Ontario Court of Appeal in *RSJ Holdings v London (City)*,<sup>27</sup> where the City of London enacted an interim control by-law to halt development of student housing in the City following lengthy discussions in closed session. The Court of Appeal held that since council was considering the interim control by-law itself rather than any real or potential challenge to its legality, the subject matter being considered was not, in fact, litigation or potential litigation. The Court of Appeal noted that the matter could not be characterized to fit within the exception simply because it was introduced by the City solicitor, there was a statutory right to appeal the by-law, or because the by-law was subject to a motion to quash. The fact that there might be, or even inevitably would be, litigation arising from the enactment of the by-law did not make the subject matter under consideration potential litigation.

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<sup>26</sup> The audio-visual recording of the May 3, 2018 Meeting has no audio for approximately one minute following the Executive Committee's return from closed session. However, it appears from the video recording of the meeting that the above-noted motion was read and a vote was taken by the Executive Committee.

<sup>27</sup> 205 OAC 150, 16 M.P.L.R. (4th) 1 (Ont. C.A.); aff'd 2007 SCC 29.

There is no evidence that the subject matter of the Executive Committee's discussion in closed session was in respect of real or potential litigation regarding either MOU with Bruce Power. Accordingly, the meeting was not properly closed for the purposes of the statutory exception.

Finally, the April 19, 2018 Meeting would not have been properly closed under the education or training exception contained in subsection 239(3.1) of the *Municipal Act, 2001* and section 7(C) of By-law 2018-015 as the discussion at the meeting advanced the business of the municipality, as described in similar instances, above.

**(iii) The Report following the Closed Portion of the May 3, 2018 Meeting was Deficient**

No report was made in respect of the items discussed in closed session. Accordingly, the May 3, 2018 Meeting contravened section 7(H) of By-law 2018-015 and the Closed Meeting Procedures attached thereto as the Executive Committee failed to:

- indicate whether direction was given to staff; and
- confirm that the Committee discussed only those matters identified in the resolution to go into a closed meeting.

**(H) May 17, 2018 (the "May 17, 2018 Meeting")**

The May 17, 2018 Meeting minutes indicate that the Executive Committee proceeded to an *in camera* session between 1:05 p.m. and 1:28 p.m. to discuss, in part:

Section 239(2)(e) of the Municipal Act for litigation or potential litigation, including matters before administrative tribunals, affecting the municipality; and,

Section (3.1)1 of the Municipal Act for the purpose of educating or training members.

The Executive Committee discussed two (2) matters in closed session. The first was an update from staff on the MOU with Bruce Power regarding the Applied Research and Training Centre, including an update that a formal public announcement regarding the Centre had been made. The second matter discussed was the draft MOU with Bruce Power relating to Nuclear Energy Consulting Services.

Following the *in camera* session, the minutes of the May 17, 2018 Meeting indicate that a vote was taken in open session in respect of the MOU with Bruce Power regarding the Business Investment and Business Research positions, and the following motion was carried:

That a by-law be introduced authorizing the execution of a Memorandum of Understanding between the Corporation of the County of Bruce and Bruce Power to establish cost sharing arrangements of the Business Investment Specialist and a Business Manager for the Applied Research Centre.<sup>28</sup>

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<sup>28</sup> The audio-visual recording of public portion of the May 17, 2018 Meeting indicate that the language in the first motion carried by the Executive Committee was slightly different than the language reflected in the meeting minutes. The Warden instead stated:

The May 17, 2018 Meeting minutes indicate that a second vote was then taken in open session in respect of the MOU with Bruce Power regarding the Applied Research and Training Centre, and the following motion was carried:

That a by-law be introduced authorizing the execution of a Memorandum of Understanding between the Corporation of the County of Bruce and Bruce Power to support the Ontario Nuclear Innovation Applied Research Centre.

**(i) The May 17, 2018 Resolution to go into Closed Session was Deficient**

The resolution to go into closed session that was passed at the May 17, 2018 Meeting provided no information about the matters to be discussed in closed session and therefore does not satisfy the requirements under subsection 239(4) of the *Municipal Act, 2001* nor section 7(D) of By-law 2018-015.

**(ii) The May 17, 2018 Meeting was Not Closed for a Permitted Purpose**

The May 17, 2018 Meeting was closed pursuant to the exceptions under clause 239(2)(e) and subsection 239(3.1) of the *Municipal Act, 2001*.

In our view, the May 17, 2018 Meeting was not properly closed in accordance with the litigation or potential litigation exception in clause 239(2)(e) of the *Municipal Act, 2001* and section 7(A) of By-law 2018-015. The exception under clause 239(2)(e) of the *Municipal Act, 2001* is to permit the Committee to discuss matters that are the subject of current or potential litigation *in camera*. As noted above, if the discussion relates to potential litigation, there must be a reasonable prospect of litigation. There is no evidence that either of the matters discussed in closed session related to actual ongoing litigation. Furthermore, there is no evidence that the matters discussed in closed session related to potential litigation.

The May 17, 2018 Meeting was also not properly closed in accordance with under the education or training exception contained in subsection 239(3.1) of the *Municipal Act, 2001* and section 7(C) of By-law 2018-015 as the discussion at the meeting advanced the business of the municipality, as described in similar instances, above.

**(iii) The Report following the Closed Portion of the May 17, 2018 Meeting was Deficient**

No report was made in respect of the items discussed in closed session. Although the Executive Committee passed motions in respect of both items discussed, a report should have been made in open session to confirm that the Executive Committee discussed only those matters identified in the resolution to go into a closed meeting in accordance section 7(H) of By-law 2018-015 and the Closed Meeting Procedures.

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That a by-law be introduced authorizing the execution of a Memorandum of Understanding between the Corporation of the County of Bruce and Bruce Power to continue to provide Nuclear Energy Emergent Energy Consulting Services.

This difference in language has no bearing on our investigation, but is noted.



## (2) Improper Vote by Council to Access Krug Reserve Fund

The Complaint alleged that Council improperly voted to approve the use of funds from the Krug Reserve Fund for the acquisition of certain lands in closed session, and that the vote was in contravention of subsection 239(5) of the *Municipal Act, 2001*. While the Complaint did not specify the date upon which the alleged motion or motions to use funds from the Krug Reserve Fund was passed, it asserted that a vote or votes occurred between February 1, 2018 and March 22, 2018.

There were two (2) Council meetings during this period, which occurred on February 1, 2018 and on March 1, 2018. Council did not go into closed session during either meeting and Council passed no motions that related to use of the Krug Reserve Fund in open session. Accordingly, there is no evidence that Council contravened the requirement in subsection 239(5) of the *Municipal Act, 2001* that votes be open to the public, which is also required by section 7(E) of the Procedural By-law.

We note that we were advised by the Clerk that Council itself rarely conducts closed meetings. Instead, closed meetings typically occur when Council is sitting as a committee (in this case, as the Executive Committee or the Museum Committee). It is the County's practice that all committee resolutions will then be adopted by Council through its approval of the committee meeting minutes.

## CONCLUSIONS

Based on the foregoing, we conclude that the County failed to comply with the closed meeting requirements contained in section 239 of the *Municipal Act, 2001* and in its Procedural By-law at the Executive Committee meetings held on April 14, 2016, February 1, 2018, March 22, 2018, April 5, 2018, April 19, 2018, May 3, 2018 and May 17, 2018.

In particular, we have determined that the County:

- failed to provide sufficient detail in the resolutions to go into closed session in accordance with subsection 239(4) of the *Municipal Act, 2001* and its Procedural By-law<sup>29</sup> at the Executive Committee meetings on April 14, 2016, March 22, 2018, April 5, 2018, April 19, 2018, May 3, 2018 and May 17, 2018;
- improperly closed the portions of the Executive Committee meetings related to the Applied Research and Training Centre and the MOUs with Bruce Power regarding certain shared employment positions in contravention of subsections 239(2) and (3.1) of the *Municipal Act, 2001* and its Procedural By-law<sup>30</sup> at the Executive Committee meetings on April 14, 2016, February 1, 2018, March 22, 2018, April 5, 2018, April 19, 2018, May 3, 2018 and May 17, 2018;

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<sup>29</sup> Section 6(D) of By-law 2016-013 and section 7(D) of By-law Nos. 2018-001 and 2018-015.

<sup>30</sup> Sections 6(A) and (C) of By-law 2016-013 and sections 7(A) and (C) of By-law Nos. 2018-001 and 2018-015.

- conducted an improper vote at the closed meetings on February 1, 2018, March 22, 2018, April 5, 2018 and April 19, 2018 in accordance with subsection 239(6) of the *Municipal Act, 2001* and section 7(E) of By-law No. 2018-001 and 2018-015, because, while the votes were for the permitted purpose of giving direction to staff, we have concluded that these meetings were closed for an improper purpose; and
- failed to adequately report on what transpired during closed session in accordance with subsection 239(6) of the *Municipal Act, 2001* and its Procedural By-law<sup>31</sup> at the Executive Committee meetings on February 1, 2018, March 22, 2018, April 5, 2018, April 19, 2018, May 3, 2018 and May 17, 2018.

We further conclude that the Executive Committee did not contravene the closed meeting provisions of the *Municipal Act, 2001* or By-law 2016-013 during the June 9, 2016 Meeting, and that Council did not contravene the closed meeting provisions of the *Municipal Act, 2001* or its Procedural By-law at the February 1, 2018 or March 1, 2018 meetings.

## RECOMMENDATIONS

We are aware that in December 2019, the County received a Closed Meeting Investigation Report in respect of a number of closed meetings of the Bruce County Museum Committee which occurred between May 2018 and January 2019.<sup>32</sup> This report recommended the following:

County staff should familiarize themselves, and members of Council and Committees with the proper application of the requirements of Section 239 of the *Municipal Act* and reaffirm their commitment to open and transparent local government as cited in their procedure bylaw.

We note that a training session for members of Council and County staff entitled “Closed Session Best Practices” was held at the County on February 13, 2020.

We agree with the recommendations contained in the 2019 report, and provide the following additional recommendations based on our investigation into the County’s practices at the Executive Committee and Council meetings that were the subject of this Complaint.

### (1) Resolution to go into Closed Session

As part of our investigation, we reviewed the Executive Committee’s current practice for resolutions to go into a closed session. We note that these resolutions now identify the matter or matters that will be discussed in closed session and the exception that relates to each matter. This practice is in compliance with section 239 of the *Municipal Act, 2001* and the Procedural By-law.

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<sup>31</sup> Section 6(H) of By-law 2016-013 and section 7(H) of By-law No. 2018-001 and 2018-015.

<sup>32</sup> Local Authority Services, *Report to the Corporation of the Council of the County of Bruce Regarding the Investigation of the Closed Sessions of the Bruce County Museum Committee Meetings of May 17, 2018; July 5, 2018; July 12, 2018; October 4, 2018 and January 3, 2019* (December 2019: Amberley Gavel Ltd.).

**(2) Instructions to Staff in Closed Session**

The Closed Meeting Procedures attached to the Procedural By-law recommend that votes for procedural matters or for giving directions or instructions to officers, employees or agents of the municipality should be done by way of a formal motion. We agree with this procedure and strongly encourage the Executive Committee to act in this manner in the future.

**(3) Report following Closed Session**

We recognize (and the Procedural By-law reflects) that information should be limited when reporting out to the extent required to ensure that the purpose for closing the meeting in the first place is respected. However, in each of the meetings that were the subject of the Complaint, it is our view that more information could have been provided.

We note that the Procedural By-law requires the Chair to state in his or her report upon resuming the open session: (1) the matters that were considered in closed session and (2) confirmation that no motions were carried in closed other than procedural motions or directions to staff. By way of example, the Chair could report that the Executive Committee “received information, made decisions and provided direction to staff regarding the Applied Research and Training Centre, and no other motions were carried”.

We recommend that the County ensures it reports out on matters that occur in closed session in as accurate and detailed a manner as is reasonable given the nature of the closed session subject matter in question. This recommendation is in furtherance of the concept of open and transparent local government.

This Report has been prepared for and is forwarded to Council for its consideration. Subsection 239.2(11) of the *Municipal Act, 2001* provides that this Report be made public. Subsection 239.1(12) provides that Council shall pass a resolution stating how it intends to address this Report.

AIRD & BERLIS LLP



Meaghan Barrett

Closed Meeting Investigator for The Corporation of the County of Bruce

Dated this 6th day of July, 2020

append.

**ATTACHMENT “A”**

The relevant portions of both By-laws 2016-013 and 2018-001/2018-015 are reproduced below, with revisions highlighted in red.

<b>Extracts of By-law 2016-013</b>	<b>Extracts of By-laws 2018-001 and 2018-015</b>
<p><b>5. Meetings open to the public</b></p> <p>All meetings shall be open to the public except as provided in sections 6 (A), (B) and (C).</p>	<p><b>6. Open Meetings</b></p> <p>Except as authorized under this By-law, all meetings shall be open to the public except for matters that qualify for consideration as a closed meeting as provided in section 7 (A), (B) and (C).</p>
<p><b>6. Meetings Closed to the Public</b></p> <p><b>(A)</b> A meeting or part of a meeting may be closed to the public if the subject matter being considered is:</p> <ul style="list-style-type: none"> <li>i. The security of the property of the municipality or local board;</li> <li>ii. Personal matters about an identifiable individual, including municipal or local board employees;</li> <li>iii. A proposed or pending acquisition or disposition of land by the municipality or local board;</li> <li>iv. Labour relations or employee negotiations;</li> <li>v. Litigation or potential litigation, including matters before administrative tribunals affecting the municipality or local board;</li> <li>vi. Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;</li> <li>vii. A matter in respect of which a Council, Board, Committee or other body may hold a closed meeting under another Act.</li> </ul>	<p><b>7. Closed Meetings</b></p> <p><b>(A)</b> A meeting or part of a meeting may be closed to the public if the subject matter being considered is:</p> <ul style="list-style-type: none"> <li>i. The security of the property of the municipality or local board;</li> <li>ii. Personal matters about an identifiable individual, including municipal or local board employees;</li> <li>iii. A proposed or pending acquisition or disposition of land by the municipality or local board;</li> <li>iv. Labour relations or employee negotiations;</li> <li>v. Litigation or potential litigation, including matters before administrative tribunals affecting the municipality or local board;</li> <li>vi. Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;</li> <li>vii. A matter in respect of which a Council, Board, Committee or other body may hold a closed meeting under another Act;</li> <li>viii. Information explicitly supplied in confidence to the municipality or local board by Canada, a province or a territory or a Crown agency of any of them;</li> </ul>

<p><b>(B) Other Criteria</b></p> <p>A meeting or part of a meeting shall be closed to the public if the subject matter being considered is,</p> <p>(a) a request under the Municipal Freedom of Information and Protection of Privacy Act, if the council, board, commission or other body is the head of an institution for the purposes of that Act; or</p> <p>(b) an ongoing investigation respecting the municipality, a local board of a municipally-controlled corporation by the Ombudsman appointed under the Ombudsman Act, an Ombudsman referred to in subsection 223.13(1) of this Act, or the investigator referred to in subsection 239.2(1).</p> <p><b>(C)</b> A meeting of 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:</p> <p>i. The meeting is held for the purpose of educating or training the members;</p>	<p>ix. A trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality or local board, which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;</p> <p>x. A trade secret or scientific, technical, commercial or financial information that belongs to the municipality or local board and has monetary value or potential monetary value; or</p> <p>xi. A position, plan, procedure or criteria or instruction to be applied to any negotiations carried on or to be carried on by or on behalf of the municipality or local board.</p> <p><b>(B) Other Criteria</b></p> <p>A meeting or part of a meeting shall be closed to the public if the subject matter being considered is,</p> <p>(a) a request under the Municipal Freedom of Information and Protection of Privacy Act, if the council, board, commission or other body is the head of an institution for the purposes of that Act; or</p> <p>(b) an ongoing investigation respecting the municipality, a local board of a municipally-controlled corporation by the Ombudsman appointed under the Ombudsman Act, an Ombudsman referred to in subsection 223.13(1) of this Act, or the investigator referred to in subsection 239.2(1).</p> <p><b>(C) Educational or Training Sessions</b></p> <p>A meeting of 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:</p> <p>i. The meeting is held for the purpose of educating or training the members;</p>
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<p>ii. At the meeting, no member discusses or otherwise deals with any matter in any way that materially advances the business or decision-making or the Council, Local Board or Committee.</p> <p><b>(D)</b> Before holding a meeting or part of a meeting that is to be closed to the public, a Municipality or Local Board or Committee of either of them shall state by resolution:</p> <p>i. The fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting, or;</p> <p>ii. In the case of a meeting that is an educational or training meeting, the fact of the holding of the closed meeting, the general nature of its subject matter and that it is to be closed as an educational or training meeting.</p> <p><b>(E)</b> As provided in Section 239(5) of the Municipal Act, S. O. 2001, c. 25, a meeting shall not be closed to the public during the taking of a vote except if it is for a procedural matter or for giving directions or instructions to officers.</p> <p><b>(F)</b> Section 239.1 of the Municipal Act, S. O. 2001, c. 25 permits a person to request an investigation of whether Council has complied with the requirements of the Municipal Act or this Procedural By-law governing a meeting or part of a meeting that was closed to the public.</p> <p><b>(G)</b> Upon resuming open session, the Chair shall state:</p> <p>(a) the matters which were considered and;</p> <p>(b) confirmation that no motions were carried in closed other than procedural motions or directions to staff.</p>	<p>ii. At the meeting, no member discusses or otherwise deals with any matter in any way that materially advances the business or decision-making or the Council, Local Board or Committee.</p> <p><b>(D) Resolution</b></p> <p>Before holding a meeting or part of a meeting that is to be closed to the public, a Municipality or Local Board or Committee of either of them shall state by resolution:</p> <p>i. The fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting, or;</p> <p>ii. In the case of a meeting that is an educational or training meeting, the fact of the holding of the closed meeting, the general nature of its subject matter and that it is to be closed as an educational or training session.</p> <p><b>(E)</b> As provided in Section 239(5) of the Municipal Act, S. O. 2001, c. 25, a meeting shall not be closed to the public during the taking of a vote. <del>except if it is for a procedural matter or for giving directions or instructions to officers.</del></p> <p><b>(F)</b> <del>Despite Section 244, a meeting may be closed to the public during a vote if,</del></p> <p><del>i. subsection (2) or (3) permits or requires the meeting to be closed to the public; and,</del></p> <p><del>ii. 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.</del></p> <p><b>(G)</b> Section 239.1 of the Municipal Act, S. O. 2001, c. 25 permits a person to request an investigation of whether Council has complied with the requirements of the Municipal Act or this Procedural By-law governing a meeting or part of a meeting that was closed to the public.</p>
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	<p><b>(H)</b> Upon resuming open session, the Chair shall state:</p> <p>(a) the matters which were considered and;</p> <p>(b) confirmation that no motions were carried in closed other than procedural motions or directions to staff.</p> <p><b>(I)</b> The Closed Meeting Procedures as adopted by County Council are attached as Appendix "A".</p>
<p><b>21. Standing Committees of Council</b></p> <p><b>(N) Committee Rules of Procedure</b></p> <p>It is the responsibility of each Committee to adhere to the same rules of procedure governing the procedures of Council as prescribed by this by-law. It shall be the duty of the Chair of each Committee to see that the business is conducted in accordance with such rules.</p>	<p><b>23. Standing Committees of Council</b></p> <p><b>(N) Committee Rules of Procedure</b></p> <p>It is the responsibility of each Committee to adhere to the same rules of procedure governing the procedures of Council as prescribed by this by-law. It shall be the duty of the Chair of each Committee to see that the business is conducted in accordance with such rules.</p>
<p><b>22. Duties of the Committees</b></p> <p><b>(C) Executive Committee</b></p> <p>The Executive Committee is responsible for matters that are outside the authority and responsibility of all other Standing Committees, generally related to the long-term strategic goals and operational management of the County of Bruce.</p>	<p><b>24. Duties of the Committees</b></p> <p><b>(C) Executive Committee</b></p> <p>The Executive Committee is responsible for matters that are outside the authority and responsibility of all other Standing Committees, generally related to the long-term strategic goals and operational management of the County of Bruce. <b>Responsibilities also include administration related to County Council and legislation affecting the County.</b></p>

**ATTACHMENT "B"**





## Appendix "A" The Corporation of the County of Bruce

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### Closed Meeting Procedures

Effective Date: March 1, 2016

Revision Date:

Reviewed by Staff:

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#### 1. Coverage

This procedure applies to Council, Committees, Sub-Committees and Local Boards of the County of Bruce.

#### 2. Purpose

This procedure defines the process on when closed meetings are to be held and the processes to be followed. The County of Bruce supports the principles of open and accountable governance. There are circumstances, however, where it is necessary to hold a closed meeting.

#### 3. Procedure

##### Agenda

Agendas shall include closed meeting items, when required, including information surrounding the nature of the closed meeting item. The Agenda will also include confidential reports for discussion and Minutes for approval.

##### Confidential Reports

Whenever possible, written closed meeting reports are preferred over verbal reports as the former provides for a more detailed account of the confidential record. Whenever possible, written reports are to be distributed in advance in order to ensure that Council or Committee is prepared for any decisions they may need to consider in relation to a closed meeting discussion.

Staff who are considering labelling a report "confidential", and therefore to be considered a closed meeting matter, should, if necessary, seek advice from the Chief Administrative Officer or Clerk to ensure that the subject matter meets the criteria for a closed meeting discussion.

##### Resolution to go into a Closed Meeting

A resolution to go into a closed meeting should voluntarily disclose as much information as possible about the subject matter to be discussed to provide transparency and accountability to the public. The reason must meet the criteria as set out in Section 239 of the Municipal Act, 2001 as amended.

If Council or a Committee is going into a closed meeting under Section 239 then the resolution must also include the following:

- Notation that the meeting is going into closed session under Section 239 of the Municipal Act

- A description of the subject matter to be discussed and the fact that the meeting is being closed under the specific subsection.

#### **Discussion and Voting**

Voting during closed meetings is restricted to procedural matters or for giving directions or instructions to officers, employees or agents of the municipality or committee of either of them or persons retained by or under a contract with the municipality.

It is recommended that where voting is permitted that formal motions be utilized for voting.

The Warden or Chair shall prohibit discussion of any matter that was not disclosed in the resolution authorizing the closed meeting.

#### **Minutes**

Closed meeting minutes are taken by the Recording Secretary. In the event the Recording Secretary is excused from the closed portion of the meeting, the C.A.O. will document the proceedings. The authority for the responsibility of minutes has been delegated to the C.A.O. by the Director of Corporate Services.

Once back in the open meeting the Warden or Chair shall confirm that the Council or Committee discussed only those matters identified in the resolution to go into a closed meeting and that this shall be recorded in the minutes.

#### **Approval of Closed Meeting Minutes**

Closed meeting minutes shall be approved at the next closed meeting.

#### **Circulation of Closed Meeting Minutes and Confidential Reports**

Closed meeting minutes and confidential reports shall be circulated to the members electronically, in advance of the meeting, to allow members time to read the minutes and reports.

Recipients shall not copy, forward or in any way share the confidential information. It is recommended the email containing the confidential information related to the closed meeting be deleted immediately following the closed meeting.