



Open Meetings

Guide for Municipalities

INFORMATION AND BEST PRACTICES

FOURTH EDITION

Independent Impartial Confidential Free

www.ombudsman.on.ca

1-800-263-1830

Top 10 tips for municipal officials

1. Know and follow the *Municipal Act, 2001* and your procedure by-law's open meeting requirements.
2. Make sure you have a procedure by-law that complies with the *Municipal Act* – every municipality and local board is required to have one.
3. Give adequate advance public notice of all meetings, including the time and location of all meetings.
4. Keep meetings open to the public unless closure is specifically authorized under the *Municipal Act* and there is a real need to exclude the public.
5. Pick the right s. 239 exception before closing a meeting.
6. Pass a resolution in public that includes meaningful information about the issue to be considered (not just the exception) – *before* closing the doors.
7. Record the meeting, including all decisions, by taking minutes, and preferably also by recording audio or video.
8. Stay on topic – don't stray from the subject stated in the resolution.
9. Do not hold a vote in closed session unless it is for a procedural matter or to give directions to staff or officials.
10. To the extent possible, report back publicly in open session about what occurred in closed session.

TABLE OF CONTENTS

Message from the Ombudsman.....	2
Ontario's open meeting requirements.....	5
The Ombudsman and closed meeting investigations.....	13
Exceptions to the open meeting rules	17
Excerpts of relevant legislation	29
Making a complaint.....	38

Copyright 2019, Ombudsman of Ontario (previously published as *The Sunshine Law Handbook*, editions in 2008, 2009 and 2014).

This guide, along with the Ombudsman's open meeting reports and letters, can be downloaded and printed from the Ombudsman's website, www.ombudsman.on.ca. To request hard copies, email thewatchdog@ombudsman.on.ca.

See also the regularly updated digital **digest of open meeting cases** on the Ombudsman's website to search cases by subject, municipality or keyword.

Please note that this guide is provided for information purposes only and should not be considered or relied upon as legal advice.

Message from the Ombudsman

This guide is intended as a quick reference to Ontario's open meeting rules, as set out in legislation. The guiding principle has always been that municipal councils must meet in public, except in certain specific circumstances. The spirit of the law can be summed up in six words:

When in doubt, open the meeting.

Municipalities have been required to hold open meetings throughout Ontario's history – and rightly so, given the importance of local governments to our everyday lives. But the average person had little recourse to question meetings that were closed to the public until a complaints system was established in 2008.

Since then, all municipalities have been required to have an investigator to deal with complaints about closed meetings and determine whether or not the open meeting rules were violated. The Ombudsman is the investigator for all municipalities that have not appointed their own.

Over the years, this Office's hundreds of investigations and reports have made a significant contribution to the field of what many jurisdictions call "sunshine law."

We publish this guide after every municipal election and provide it to all municipal clerks and council members, whether they use the Ombudsman as their investigator or not.

We have also created a searchable, regularly updated digital digest of our open meeting cases, to assist municipal officials and anyone else who has an interest in this fascinating area of law. Our **digital digest of open meeting cases**, available on our website, can be searched by topic, keyword and municipality, and is the first such resource of its kind in Ontario.

Both of these tools are intended to ensure consistent standards of transparency in communities across the province.

On that note, I want to remind all Ontarians that our Office can also help them with general complaints about municipalities, school boards or any of the more than 1,000 provincial government and broader public sector bodies that we oversee. Please feel free to consult our website or call our staff at 1-800-263-1830 to find out how we can help.



Paul Dubé
Ombudsman of Ontario



Ontario's open meeting requirements

GENERAL QUESTIONS

Why are open meetings important?

The Supreme Court of Canada answered this question in its decision in the 2007 case, *London (City) v. RSJ Holdings Inc.* The judges noted “the public’s demand for more accountable municipal government” and stated that open meetings are essential to “robust democratic legitimacy” of local administrations. They also observed that section 239 of the *Municipal Act, 2001* “was intended to increase public confidence in the integrity of local government by **ensuring the open and transparent exercise of municipal power.**”

Must all municipal meetings be open to the public?

Yes, **with some limited exceptions.** The Act recognizes that there may be situations in which the privacy of an individual should be respected, or where open meetings would not serve the public interest or the interests of the municipality.

If a subject fits within one of the exceptions, it can be discussed in a closed meeting, provided that the municipality follows all the procedural rules, including giving notice of the meeting, passing a resolution to close the meeting, and keeping closed session minutes. During the closed meeting, the discussion should stay on topic and be limited to the subject area stated in the resolution.

What are the exceptions?

A municipal or local board meeting, or part of a meeting, **may be closed** to the public if the subject of the meeting

falls within one of the **14** exceptions set out in s. 239 of the Act. In brief, these include matters that relate to:

- The security of the property of the municipality
- Personal matters about an identifiable individual
- Acquisition or disposition of land
- Labour relations
- Litigation
- Advice subject to solicitor-client privilege
- Education or training
- Information explicitly supplied in confidence to the municipality
- A trade secret or certain specific information supplied in confidence to the municipality, or that belongs to the municipality and has monetary value
- A plan or instruction to be applied to negotiations

For more on the exceptions, see pages 17-29.

Must meetings be closed if they fall within those exceptions?

Not always. In fact, 12 of the 14 exceptions are **discretionary**, meaning that whenever possible, municipalities should opt to discuss these subjects in public, in the interest of transparency. The legislation leaves them the flexibility to **keep the doors open**.

The two exceptions that state meetings **must** be closed relate to:

- Requests under the *Municipal Freedom of Information and Protection of Privacy Act*
- An ongoing investigation by the Ontario Ombudsman or the municipality's closed meeting investigator or ombudsman

TERMS AND DEFINITIONS

What is a “meeting”?

The *Municipal Act, 2001*, s.238(1) defines “meeting” as 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.

To determine whether a discussion “materially advances” council business or decision-making, the Ombudsman considers the extent to which the discussions moved forward the business of the municipality. Discussions, debates or decisions that are intended to lead to specific outcomes are likely to materially advance business or decision-making, whereas mere receipt or exchange of information is unlikely to do so.

What is a “quorum”?

A quorum is the minimum number of members of a body **required to be present** at a meeting in order for a body to exercise its power or authority. Often, this number is 50% plus one, but quorum may be defined differently by legislation or by-law.

Does the term “meeting” include informal gatherings outside of council chambers?

Informal gatherings for social purposes are **not** considered to be “meetings.” However, if the purpose of the gathering is to **discuss business** of the council, local board or committee and/or to make decisions, it is more likely to be deemed a “meeting” that is subject to the open meeting requirements.

The purpose of the open meeting rules is not to discourage council members from informal or social interactions, but to ensure such gatherings are not used as a pretext for conducting council business away from public view.

What about “meetings” conducted over the phone or by email?

As the definition of meeting requires a quorum of members to be present, a meeting cannot occur over email or other remote forms of communication.

Although emails and other remote forms of communication are not subject to the open meeting rules, municipalities should endeavour to apply consistent standards of transparency and openness, regardless of the means of communication. The open meeting rules call for discussions that advance council business or decision-making to take place in public. Any exchange wherein council votes, reaches consensus, provides direction or input to staff, or discusses or debates a proposal, course of action, or strategy should be reserved for official meetings of a council, local board, or committee.

What is a “committee”?

For the purposes of the open meeting provisions, a committee is defined as **any advisory or other committee**, subcommittee or similar entity of which at least 50% of the members are also members of one or more councils or local boards. A procedure by-law can also designate certain bodies to be committees.

Committees must follow the open meeting rules, including providing public meeting notice, recording minutes, passing a resolution before closing a meeting, and restricting the discussion during the closed meeting to matters that fit within the exceptions.

What are “local boards”?

Local boards subject to the open meeting requirements include municipal service boards, transportation commissions, boards of health, planning boards, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities. For instance, the board of management for a business improvement area (BIA) is a “local board.”

Bodies that are **not** considered “local boards” under the *Municipal Act* and/or that are not subject to the open meeting requirements include:

- School boards
- Conservation authorities
- Police services boards
- Public library boards
- Hydro companies incorporated by municipalities under s. 142 of the *Electricity Act*
- Certain municipal corporations

In 2018, the Ontario Court of Appeal found that the City of Hamilton’s Property Standards Committee and Election Compliance Audit Committee are not “local boards” for the purposes of the open meeting rules, because neither body provided “services which are integral to the day-to-day operation of the business” of the city.

PROCEDURE BY-LAWS AND PUBLIC NOTICE

What is a municipality required to address in its procedure by-law?

Every municipality and local board is required to **pass a procedure by-law** governing the calling, place and proceedings of meetings. The procedure by-law must also provide for **public notice** of meetings. This should set out the method of giving notice and how far in advance the notice will be given. For example, it might specify that

notice of a meeting shall be provided 72 hours in advance by posting the agenda on the municipality's website.

When a municipality decides to close a meeting or part of a meeting, it has to comply not only with the requirements of the *Municipal Act, 2001*, but **also with any additional requirements of its procedure by-law.**

What specific procedure must be followed to close a meeting?

The municipality, local board, or committee must state **by resolution in open session** that a closed meeting will be held and state the general nature of each matter to be considered at the closed meeting. The resolution authorizing a closed meeting must be made in advance and cannot be retroactively amended.

The resolution to go into a closed meeting should provide a **general description of the issue** to be discussed in a way that maximizes the information available to the public **while not undermining the reason for excluding the public.** When meetings are closed for the purpose of **educating or training** members, the relevant subsection of the Act must also be cited. However, as a best practice, the relevant exceptions **should always be indicated in the resolution**, in addition to each subject for discussion. The resolution should clearly identify which exception pertains to which subject.

What information should be included in a public notice of a meeting?

The *Municipal Act, 2001* requires municipalities to establish a procedure by-law that provides for public notice of meetings, but the Act **does not specify the notice content.** This should be set out in the municipality's procedure by-law.

For example, many procedure by-laws require that an agenda be publicly posted in advance of a meeting, listing the matters to be discussed. **Adequate notice should include the date, time and place of the meeting**, to facilitate the public's right to attend and observe.

It is the Ombudsman's view that, wherever possible, advance public notice should include information about all open and closed portions of a meeting, and meaningful information about **all items to be considered**. The Ombudsman discourages the practice of having "standing" closed sessions and recommends that notices and agendas accurately reflect the specific matters intended to be discussed at a particular meeting.

VOTING AND RECORDS

Can votes be taken during a closed meeting?

Generally, meetings cannot be closed to the public during the taking of a vote. Voting in a closed meeting is only permitted if the closed meeting **is otherwise authorized and** the vote is for a **procedural matter** or for **giving directions or instructions** to officers, employees, agents of the municipality, or persons under contract. All votes should be taken formally, in accordance with the procedure by-law, and recorded in the closed meeting minutes. Decisions should **not** be made by straw poll, show of hands or general consensus.

Are members of the public entitled to participate in a meeting?

There is **no automatic right to speak or participate** in a meeting. There is a distinction between a citizen's right to participate and his or her right to observe municipal government in progress. The open meeting requirements set out in section 239 of the *Municipal Act* permit the public to **observe the political process**.

Each municipality is required to have a procedure by-law, which may set out a process for members of the public to address council. Questions about the process should be referred to the municipal Clerk.

Must a record be kept of the closed meeting?

All resolutions, decisions and other proceedings that take place must be recorded, **whether the meeting is open or closed.**

The Act does not require municipalities to create verbatim transcripts of meetings, but minutes should be more detailed than just a list of resolutions. The record of a closed meeting should include reference to the location, time of commencing and adjourning the meeting, and the names of attendees. There should also be a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered, motions (including names of the movers and seconders), and all votes taken or direction given.

The Ombudsman recommends that all municipalities also make audio or video recordings of all meetings – open and closed – to ensure the most thorough record possible. After meeting behind closed doors, they should report in the open session on what transpired in the closed session, providing as much detail as the subject matter permits.

The Ombudsman and closed meeting investigations

Who is the Ombudsman?

The Ombudsman is an impartial officer of the Ontario Legislature, independent of the government and all political parties, who resolves and investigates complaints from the public about administrative problems in more than 1,000 provincial public sector bodies. The Ombudsman's role and powers are set out in the *Ombudsman Act*.

What does the Ombudsman do?

The role of the Ombudsman is to enhance governance by promoting transparency, accountability and fairness in government and the public sector.

Most of the Ombudsman's work involves receiving and assessing complaints in an impartial manner and resolving them informally wherever possible. The Ombudsman does not advocate for complainants and investigations are undertaken only when matters cannot be otherwise resolved. Investigations – including those that may involve broad systemic issues – are evidence-based and objective. When appropriate, the Ombudsman makes recommendations for constructive change.

Although the Ombudsman's recommendations are not binding, they have been overwhelmingly accepted and implemented, prompting significant bureaucratic reforms.

In the field of open meetings, the Ombudsman makes findings on whether or not municipal meetings complied with the open meeting rules, and may make recommendations or suggest best practices for improvement. Ombudsman staff who specialize in open meetings can also provide guidance and education to municipalities

and members of the public on the open meeting requirements and best practices.

Who can complain about a closed meeting?

Anyone can file a complaint; it is not necessary to be a resident of the municipality in question.

Section 239.1 of the *Municipal Act, 2001* provides that a person may request an investigation into whether a municipality or local board has:

- i. complied with section 239 of the Act (which sets out the open meeting requirements); or,
- ii. complied with the municipality's procedure by-law in respect of a meeting or a part of a meeting that was closed to the public.

What does it cost?

The Ombudsman does not charge fees to complainants, or to any organization that is the subject of a complaint. Fees are discouraged by ombudsmen around the world because they can act as a barrier to legitimate complaints.

Are complainants identified?

No. Complaints to the Ombudsman are confidential, and **the identity of complainants is not released** in any of our cases without consent. The complainant's identity is not usually relevant to a closed meeting investigation, which focuses only on whether or not the meeting was closed according to the law.

Does the Ombudsman investigate closed meetings in all municipalities?

No. All municipalities must have a closed meeting investigator – either the Ombudsman or another investigator of their choice. If another investigator is appointed, the Ombudsman cannot review complaints about closed meetings in that municipality.

Anyone can find out who the investigator is for a particular municipality by consulting the database in our website's **Municipal Closed Meetings** section, or by calling the municipality in question.

How are complaints about closed meetings different from complaints to the Ombudsman about other municipal issues?

The Ombudsman's role is to resolve and investigate complaints about public sector bodies within his jurisdiction, and as an office of last resort. Complaints about municipalities can result in informal resolutions, referrals, best practice suggestions, or formal investigations and recommendations to improve and strengthen local governance and accountability.

This role is distinct from the Ombudsman's function as a closed meeting investigator, which focuses narrowly on whether or not the open meeting rules were followed. More information about our work on general municipal issues is available on our website and in the Ombudsman's reports (Annual Reports and reports on specific municipal investigations).

What happens in a closed meeting investigation?

Our first step is to determine whether or not the Ombudsman is the closed meeting investigator for the municipality in question. If the municipality has appointed its own investigator, the complaint is referred accordingly.

If the Ombudsman is the investigator, our staff review the complaint, contact the municipality's clerk and obtain meeting documents and other relevant information for the Ombudsman to determine whether an investigation is warranted.

The Ombudsman's usual steps in such an investigation are as follows:

- The municipality is notified in writing.
- Ombudsman staff gather relevant information, including interviewing witnesses and reviewing documents as warranted. (The *Ombudsman Act* requires that our investigations be conducted in private.)
- Based on the evidence gathered, the Ombudsman makes findings that are shared with the municipality before any report is made public.
- The Ombudsman's report is finalized and sent to the municipality, which is expected to make it public as soon as possible. It is then also published on the Ombudsman's website, and complainants are informed of the outcome of the case.

If the investigation finds that the municipality violated the open meeting rules, the *Municipal Act* requires council to pass a resolution stating how it intends to respond to the report.

What are the consequences for the municipality?

Unlike in some U.S. jurisdictions, where breaking the open meeting laws can result in a fine or even jail time, there are no penalties in Ontario for holding an illegal closed meeting.

If the Ombudsman finds a municipality violated the open meeting rules, the municipality must make the Ombudsman's report public, and it must pass a resolution setting out how it intends to address the report. Ombudsman recommendations are not binding; it is up to the municipality to decide whether or not to accept and implement them.

Exceptions to the open meeting rules

GENERAL INFORMATION

All meetings of a council, local board, or committee of either must be open to the public, unless the subject matter fits within one of the 14 exceptions to that rule, identified in s. 239 of the *Municipal Act, 2001*. The exceptions should be interpreted narrowly.

Discretionary exceptions:

Twelve of the exceptions are discretionary, meaning it is not mandatory to close meetings to deal with these subjects. **When in doubt, open the meeting.**

Meetings may be closed if they are about:

1. The security of the property of the municipality [s. 239(2)(a)]
2. Personal matters about an identifiable individual, including municipal employees [s. 239(2)(b)]
3. A proposed or pending acquisition or disposition of land by the municipality [s. 239(2)(c)]
4. Labour relations or employee negotiations [s. 239(2)(d)]
5. Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality [s. 239(2)(e)]
6. Advice that is subject to solicitor-client privilege, including communications necessary for that purpose [s. 239(2)(f)]
7. A matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act [s. 239(2)(g)]
8. Information supplied in confidence to the municipality by another level of government [s. 239(2)(h)]

9. Third-party information supplied in confidence to the municipality (e.g., a trade secret or scientific, technical, commercial, financial or labour relations information) [s. 239(2)(i)]
10. Information (e.g., a trade secret or scientific, technical, commercial, or financial information) that belongs to the municipality and has monetary value [s. 239(2)(j)]
11. A position, plan, procedure, criteria, or instruction to be applied to negotiations [s. 239(2)(k)]
12. Educating or training members of the council, local board or committee [s. 239(3.1)]

Mandatory exceptions:

The other two exceptions are mandatory. Meetings **must be closed** if they are about:

13. The consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act*, if the council, board, commission or body is the head of an institution for the purposes of that Act [s. 239(3)(a)]
14. An ongoing investigation respecting the municipality by the Ontario Ombudsman, an appointed municipal ombudsman, or an appointed closed meeting investigator [s. 239(3)(b)]

GUIDE TO THE DISCRETIONARY EXCEPTIONS

Although every case is assessed on its own merits, here are some guidelines to the exceptions and examples of how the Ombudsman has interpreted them in investigations. For the latest case examples and full reports, please see the digital **digest of open meeting cases** on our website, which can be searched by keyword, topic and municipality.

Note: Each exception is discussed in brief in this section; for the full text of the exceptions as they appear in the legislation, see pages 31-33.

Security of municipal property – s. 239(2)(a)

Includes discussions about:

- Protection of municipally-owned property from physical loss or damage
- Loss or damage can be corporeal (like vandalism) or incorporeal (like fraud)

Does not include discussions about:

- The financial interests of the municipality
- Strategy with respect to municipal infrastructure or growth
- Strategy with regard to municipal property, including its purchase or sale

Case examples:

- **Town of Deep River (October 2017):** Discussion about a police service consultation plan did not fit within the exception, as it did not deal with potential threats, loss, or damage to municipal property.
- **Town of Grimsby (November 2016):** Discussion about obtaining a valuation of a municipally-owned corporation did not fit within the exception, since there was no apparent threat of loss or damage.
- **City of Port Colborne (November 2015):** Discussion about the potential sale of municipally-owned shares did not fit within the exception. Even if a public discussion could have affected the value of shares, it was not about the security of municipal property.
- **Village of Burk's Falls and Armour Township (October 2015):** A closed meeting to discuss a potential amalgamation did not fit within the exception, despite a potential depreciation of municipal assets, because it did not relate to any specific property owned by the municipalities, and the protection of that property.

- **City of Welland (November 2014):** Discussions of a marketing plan did not fit within this exception, despite the city wanting to protect its competitive position relative to other municipalities; discussion was not about protecting the marketing plan from loss or damage.

Personal matters about an identifiable individual – s. 239(2)(b)

Includes discussions about:

- Scrutiny of an individual's performance or conduct, including municipal staff
- Candidates for a job or committee, including education and employment history
- Investigation of an individual's possible violation of law

Does not include discussions about:

- An individual in their professional or official capacity
- Council members' remuneration or expenses and related policy
- General working relations between council and staff
- Salary bands, a hiring process, or staff reorganization
- Information already in the public realm

Case examples:

- **Township of Lanark Highlands (January 2018):** Scrutiny of a council member's conduct and behaviour went beyond professional information and fit within the exception for personal matters.
- **Town of Georgina (November 2017):** Discussion of an organizational review as part of a service delivery review would not have fit in the exception, except that council discussed the performance of specific employees (i.e., personal matters) in relation to restructuring options.

- **City of Welland (November 2017):** Discussion about the process to be used to appoint a new member of council did not fit in the exception, as no personal information was discussed.
- **City of London (February 2017):** Discussion about the education, employment history, and qualifications of candidates for Integrity Commissioner fit within the personal matters exception.
- **Municipality of Temagami (February 2017):** Discussion about unproven allegations against a member of council fit within the exception.

Acquisition or disposition of land – s.239(2)(c)

Includes discussions about:

- Buying or selling municipal land, when the bargaining position of the municipality could be impacted by a public discussion of the matter
- Leased property, easements, or subdivision agreements relating to the municipality's property interests

Does not include discussions about:

- Speculation regarding prospective acquisition or disposition of land, where no bargaining position yet exists
- Real estate market volatility and its impact on land values in general
- Discussions when the other party to a transaction is present

Case examples

- **Town of Fort Erie (April 2018):** Discussion about a potential property-related partnership with a post-secondary institution did not fit in the exception, because council was in the early stages of decision-making and had not taken any practical steps towards acquiring land.

- **City of Timmins (April 2017):** Discussion about a proposed land transaction did not fit in the exception, because the other party to the transaction was present at the meeting.
- **City of Port Colborne (November 2015):** Discussion about a non-profit organization buying a house from a private individual did not fit within the exception, because the municipality was not party to the transaction and therefore had no bargaining position to protect.

Labour relations or employee negotiations - s.239(2)(d)

Includes discussions about:

- Unionized and non-unionized employees
- Compensation, benefits, or vacation for specific employees
- Staff performance, conduct, discipline, hiring, and firing
- Changes to workload or roles of specific employees
- Grievances under a collective agreement

Does not include discussions about:

- Council members, including their remuneration
- Organizational reviews
- Discussions of litigation against employees

Case examples:

- **Township of Pelham (April 2018):** Discussion about the conduct and performance of a town employee fit within the exception.
- **Township of North Huron (January 2018):** When dozens of firefighters attended a closed meeting to talk to council about their working conditions, the discussion fit in the exception, as it occurred during an ongoing labour dispute.
- **Town of Georgina (November 2017):** Discussion about the performance of particular employees in the context of organizational restructuring fit in the exception.

- **Township of Baldwin (December 2014):** Discussion about the qualifications of candidates for a staff position fit within the exception.

Litigation or potential litigation – s.239(2)(e)

Includes discussions about:

- Ongoing litigation involving the municipality, including proceedings before administrative tribunals
- Litigation that is a real prospect, against or by the municipality
- Deciding whether or not to litigate in a specific case

Does not include discussions about:

- Speculation that litigation may arise in future, or where there is no evidence of any current or future legal proceedings
- Litigation that has concluded

Case examples:

- **Town of Carleton Place (October 2017):** Discussion about a contentious public statement by the Mayor did not fit in the exception, as there was no evidence of any reasonable prospect of litigation.
- **Municipal of St.-Charles (June 2017):** Discussion of written legal advice pertaining to ongoing legal proceedings fit within the exception.
- **City of Timmins (May 2017):** Discussion of council's concerns about an unsuccessful bidder in a procurement process did not fit in the exception, as it was mere speculation that litigation might occur.
- **County of Norfolk (November 2016):** Discussion about the development of a site-specific zoning by-law fit in the exception, because an identifiable individual planned to file an appeal of the by-law to the Ontario Municipal Board.

Advice subject to solicitor-client privilege – s. 239(2)(f)

Includes discussions about:

- Communication between the municipality and its solicitor, to seek or receive legal advice intended to be confidential (to ensure municipal officials can speak freely with their lawyer without fear of disclosure)
- Legal advice where the lawyer is not present, such as where advice was provided in writing

Does not include discussions about:

- A topic where the privilege has been waived, such as where a third party is present
- A topic other than the legal advice itself
- Whether or not to seek legal advice

Case examples:

- **Town of Pelham (April 2018):** Discussion of a report by an external consultant on the town's financial information fit in the exception, because the consultant acted as an interpreter to allow the lawyers to provide legal advice.
- **Township of Lanark Highlands (January 2018):** Discussion of written advice from the township's solicitor fit in the exception, but at several points went beyond the legal advice; those portions of the meeting did not fit in the exception.
- **Town of Deep River (October 2017):** Discussion about a police service consultation plan did not fit in the exception; council had received legal advice on the plan in past, but it was not discussed during the meeting.
- **Township of Adelaide-Metcalf (June 2012):** By inviting a developer into the closed meeting to discuss a proposal, the township waived privilege and the discussion did not fit in the exception.

Matters that can be discussed in camera under another Act – s. 239(2)(g)

Includes discussions:

- That are explicitly permitted to be discussed in a closed meeting by an Act other than the *Municipal Act, 2001*

Does not include discussions:

- Where another Act might imply that a matter is sensitive, but does not explicitly state that the matter can be discussed in a closed meeting

Case examples:

- **Municipality of Brockton (February 2017):** A closed information session attended by a quorum of council under the *Drainage Act* did not fit in the exception, as that Act does not provide for holding a closed meeting.
- **Town of Grimsby (May 2017):** A meeting council attended of shareholders for a municipally-owned hydro company did not fit in the exception, because the *Business Corporations Act* does not permit a closed meeting.
- **City of Hamilton (April 2015):** Discussion by council of a matter that the *Police Services Act* permits a police services board to discuss in camera fit the exception.

Information supplied in confidence by another level of government – s. 239(2)(h)

Includes discussion about information:

- Provided to the municipality by another level of government (Canada, a province or territory, or a crown agency), and
- Explicitly supplied to the municipality or local board in confidence, i.e., marked confidential by the other level of government

Does not include discussions:

- Where the municipality determines the matter should be confidential, rather than the other level of government

Information supplied in confidence by a third party – s. 239(2)(i)

Includes discussions about information that:

- Falls into one of the listed types: trade secret, scientific, technical, commercial, financial, or labour relations information;
- Was supplied confidentially, whether explicitly or implicitly, to the municipality by a third party; and
- If disclosed, could reasonably be expected to cause harm, either by prejudicing significantly the competitive position or interfering significantly with the contractual or other negotiations of a person, group of persons or organization

Does not include discussions:

- Where the information did not come from a third party
- Where there is only a merely possible or speculative risk of harm if the information were to be disclosed

Information belonging to the municipality – s. 239(2)(j)

Includes discussions about information that:

- Falls into one of the listed types: trade secret, scientific, technical, commercial, or financial information
- Belongs to the municipality or local board; and
- Has monetary value or potential monetary value

Does not include discussions where:

- The municipality or local board has no proprietary or ownership interest in the information
- There is no evidence that the municipality or local board could sell the information for money

Plans and instructions for negotiations – s. 239(2)(k)**Includes discussions:**

- About a position, plan, procedure, criteria, or instruction;
- Where the information is intended to be applied to negotiations carried on by the municipality or local board; and
- The negotiations are ongoing or will be carried out in the future

Does not include discussions:

- In the absence of related negotiations
- Where negotiations are concluded

Education or training – s. 239(3.1)**Includes discussions:**

- Held solely for the purpose of educating and/or training council members; presenters and trainers should be advised in advance of the permissible scope of the meeting, and their materials vetted to ensure they do not materially advance decision-making

Does not include discussions:

- That materially advance council business or decision-making
- About subjects that are not for the purpose of educating or training

Case examples:

- **City of Oshawa (July 2016):** A meeting with representatives of a local utilities company to discuss a potential merger did not fit in the exception, because the information presented and questions asked materially advanced council's business and decision-making.
- **Township of Russell (January 2016):** A closed session to train council on the principles of strategic planning fit in the exception, as there was no decision-making or discussion of specific municipal priorities or plans.
- **Village of Casselman (April 2015):** When council met with local developers, it did not fit in the exception as it was not general in nature and was related to council business.

Excerpts of relevant legislation

MUNICIPAL ACT, 2001

The open meeting provisions apply to municipal councils, local boards, and committees of either.

Interpretation

s. 1(1) “local board” means a municipal service board, transportation commission, public library board, board of health, police services board, planning board, or any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities, excluding a school board and a conservation authority; (“conseil local”)

Municipalities and local boards are required to have a procedural by-law relating to meetings. These by-laws must make provision for public notice of meetings.

Procedure by-law

Definitions

238 (1) In this section and in sections 239 to 239.2,

“committee” means any advisory or other committee, subcommittee or similar entity of which at least 50 per cent of the members are also members of one or more councils or local boards; (“comité”)

“local board” does not include police services boards or public library boards; (“conseil local”)

“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. (“réunion”) 2001, c. 25, s. 238 (1); 2006, c. 32, Sched. A, s. 102 (1, 2); 2017, c. 10, Sched. 1, s. 25 (1).

Procedure by-laws respecting meetings

(2) Every municipality and local board shall pass a procedure by-law for governing the calling, place and proceedings of meetings. 2001, c. 25, s. 238 (2).

Notice

(2.1) The procedure by-law shall provide for public notice of meetings. 2006, c. 32, Sched. A, s. 102 (3).

Outside municipality

(3) The procedure by-law may provide that meetings be held and public offices be kept at a place outside the municipality within an adjacent municipality. 2001, c. 25, s. 238 (3).

Electronic participation

(3.1) The applicable procedure by-law may provide that a member of council, of a local board or of a committee of either of them, can participate electronically in a meeting which is open to the public to the extent and in the manner set out in the by-law provided that any such member shall not be counted in determining whether or not a quorum of members is present at any point in time. 2017, c. 10, Sched. 1, s. 25 (2).

Same

(3.2) The applicable procedure by-law shall not provide that a member of council, of a local board or of a com-

mittee of either of them, can participate electronically in a meeting which is closed to the public. 2017, c. 10, Sched. 1, s. 25 (3).

Presiding officer

(4) The procedure by-law may, with the consent of the head of council, designate a member of council, other than the head of council, to preside at meetings of council. 2006, c. 32, Sched. A, s. 102 (4).

Secret ballot

(5) A presiding officer may be designated by secret ballot. 2006, c. 32, Sched. A, s. 102 (4).

The open meeting provisions set up the general obligations and exceptions.

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;
- (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. 2001, c. 25, s. 239 (2); 2017, c. 10, Sched. 1, s. 26.

Other criteria

- (3) A meeting or part of a meeting shall be closed to the public if the subject matter being considered is,
- (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

- (b) an ongoing investigation respecting the municipality, a local board or 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). 2014, c. 13, Sched. 9, s. 22.

Educational or training sessions

(3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:

1. The meeting is held for the purpose of educating or training the members.
2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee. 2006, c. 32, Sched. A, s. 103 (1).

Resolution

(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. 2001, c. 25, s. 239 (4); 2006, c. 32, Sched. A, s. 103 (2).

Voting

(5) Subject to subsection (6), a meeting shall not be closed to the public during the taking of a vote. 2001, c. 25, s. 239 (5).

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. 2001, c. 25, s. 239 (6).

Record of meeting

(7) A municipality or local board or a committee of either of them shall record without note or comment all resolutions, decisions and other proceedings at a meeting of the body, whether it is closed to the public or not. 2006, c. 32, Sched. A, s. 103 (3).

Same

(8) The record required by subsection (7) shall be made by,

- (a) the clerk, in the case of a meeting of council; or
- (b) the appropriate officer, in the case of a meeting of a local board or committee. 2006, c. 32, Sched. A, s. 103 (3).

Record may be disclosed

(9) Clause 6 (1) (b) of the *Municipal Freedom of Information and Protection of Privacy Act* does not apply to a

record of a meeting closed under subsection (3.1). 2006, c. 32, Sched. A, s. 103 (3).

The following sections relate to closed meeting complaint investigations.

Investigation

239.1 A person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,

- (a) by an investigator referred to in subsection 239.2 (1); or
- (b) by the Ombudsman appointed under the *Ombudsman Act*, if the municipality has not appointed an investigator referred to in subsection 239.2 (1). 2006, c. 32, Sched. A, s. 104.

Investigator

239.2 (1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an investigator who has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a local board has complied with section 239 or a procedure by-law under subsection 238 (2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation. 2006, c. 32, Sched. A, s. 104.

...

Report and recommendations

(10) If, after making an investigation, the investigator is of the opinion that the meeting or part of the meeting that was the subject-matter of the investigation appears to have been closed to the public contrary to section 239 or to a procedure by-law under subsection 238 (2), the

investigator shall report his or her opinion and the reasons for it to the municipality or local board, as the case may be, and may make such recommendations as he or she thinks fit. 2006, c. 32, Sched. A, s. 104.

Publication of reports

(11) The municipality or local board shall ensure that reports received under subsection (10) by the municipality or local board, as the case may be, are made available to the public. 2006, c. 32, Sched. A, s. 104.

Requirement to pass resolution re report

(12) If a municipality or a local board receives a report from a person referred to in clause 239.1 (a) or (b) reporting his or her opinion, and the reasons for it, that a meeting or part of a meeting that was the subject-matter of an investigation by that person appears to have been closed to the public contrary to section 239 or to a procedure by-law under subsection 238 (2), the municipality or the local board, as the case may be, shall pass a resolution stating how it intends to address the report. 2017, c. 10, Sched. 1, s. 27.

OMBUDSMAN ACT

Specific powers of investigation re municipalities, local boards

14.1 (3) If a person makes a request under clause 239.1 (b) of the *Municipal Act, 2001* or clause 190.1 (1) (b) of the *City of Toronto Act, 2006*, the Ombudsman may, as the case may be, investigate,

- (a) whether a municipality or local board of a municipality has complied with section 239 of the *Municipal Act, 2001* or a procedure by-law under subsection 238 (2) of that Act in respect of a meeting or part of a meeting that was closed to the public; or

- (b) whether the City of Toronto or a local board of the City has complied with section 190 of the *City of Toronto Act, 2006* or a procedure by-law under subsection 189 (2) of that Act in respect of a meeting or part of a meeting that was closed to the public. 2014, c. 13, Sched. 9, s. 7 (1).

...

Report and recommendations

(7) If, after completing an investigation under subsection (3), the Ombudsman is of opinion that the meeting or part of the meeting that was the subject-matter of the investigation appears to have been closed to the public contrary to section 239 of the *Municipal Act, 2001* or to a procedure by-law under subsection 238 (2) of that Act or contrary to section 190 of the *City of Toronto Act, 2006* or to a procedure by-law under subsection 189 (2) of that Act, as the case may be, the Ombudsman shall report his or her opinion, and the reasons for it, to the municipality or local board, as the case may be, and may make such recommendations as he or she thinks fit. 2014, c. 13, Sched. 9, s. 7 (1).

Reports to be public

(8) The municipality or local board shall ensure that reports received under subsection (7) by the municipality or local board, as the case may be, are made available to the public. 2014, c. 13, Sched. 9, s. 7 (1).

Ombudsman may publish report

(9) The Ombudsman may, after making a report under subsection (7), publish the report or otherwise make it available to the public. 2014, c. 13, Sched. 9, s. 7 (1).

Making a complaint

Anyone can complain about a closed municipal meeting. Here's how:

Find out who the investigator is for the municipality by:

- Calling the municipality
- Checking the “**Municipal Closed Meetings**” database on the Ombudsman’s website, or
- Calling our Office at 1-800-263-1830

If the municipality has appointed its own investigator, the Ombudsman does not have jurisdiction to handle the complaint. Our Office will refer such complaints to the municipality or the relevant investigator.

If the Ombudsman is the investigator for the municipality, our Office can take the complaint via:

- Our complaint intake telephone line: 1-800-263-1830, Monday to Friday, 9 a.m. to 4:30 p.m. (or TTY: 1-866-411-4211)
- The confidential complaint form on our website: www.ombudsman.on.ca
- E-mail: info@ombudsman.on.ca
- Fax:(416) 586-3485
- Mail:
Office of the Ontario Ombudsman
483 Bay Street
10th Floor, South Tower
Toronto, Ontario M5G 2C9
- In person: By appointment, 1-800-263-1830

General questions about our process or the open meeting rules are also welcome, via our website, email or 1-800 line.



“The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law.”

*Hon. Madam Justice Louise Charron,
Supreme Court of Canada*

Independent Impartial Confidential Free

www.ombudsman.on.ca
1-800-263-1830

 @Ont_Ombudsman
 OntarioOmbudsman