

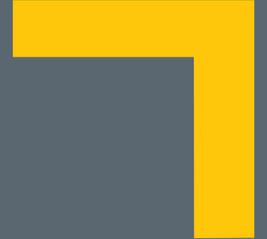
A Primer on Closed Meetings

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Meetings

Open Meeting Rule

- municipal councils and local boards (and committees) must conduct their meetings in an open public forum

239 (1) Except as provided in this section, all meetings *shall* be open to the public.

- the open meeting rule is a requirement for *all* meetings of council and local boards (including committees)

What is a Meeting?

“Meeting”

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

“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.
- former Ontario Ombudsman had used own “working definition” of meeting which provided that any gathering of members that laid the groundwork for council business constituted a “meeting”

What is a Meeting?

Established Jurisprudence

Southam Inc. v. Ottawa (City) (1991), 10 M.P.L.R. (2d) 76 (Div. Ct.):

- tripartite test:
 - whether council members (or a majority of them) are invited to attend;
 - whether the matters discussed would ordinarily form the basis of council's business; and
 - whether those matters are dealt with in such a way as to move them *materially* along the way in the overall spectrum of an ultimate decision

Exceptions – s. 239(2)

- a meeting can be closed to the public if an exception to the open meeting rule applies
- limited exceptions to the open meeting rule depending upon *subject matter* are set out in ss. 239(2), (3) and (3.1):
 - security of the property of the municipality
 - personal matters about an identifiable individual
 - proposed or pending sale or acquisition of land
 - labour relations and employment negotiations
 - litigation or potential litigation matters
 - advice subject to solicitor-client privilege
 - a matter that may be considered *in camera* in other statute

New Exceptions

- new closed meetings exceptions in s. 239(2) - all relating to exemptions under the *Municipal Freedom of Information and Protection of Privacy Act*:
 - (h) information explicitly supplied in confidence to the municipality... by Canada, a province or territory or a Crown agency [**s. 9 of MFIPPA**]
 - (i) a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence to the municipality..., 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 [**s. 10 of MFIPPA**]

New Exceptions

- additional exceptions in s. 239(2) (cont.):
 - (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 [**s. 11(a) of MFIPPA**]
 - (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 [**s. 11(e) of MFIPPA**]
- all exceptions in s. 239(2) are *discretionary*

Additional Exceptions

- further mandatory exceptions to the rule under s. 239(3)
 - MFIPPA request where council is the head
 - ongoing investigation by municipal or Ontario Ombudsman or closed meeting investigator
- additional permissive exception under s. 239(3.1)
 - training and education purposes where no matter is dealt with in a way that materially advances the business or decision-making of the council, local board or committee

Procedural Requirements

- before going into closed session, s. 239(4) makes it mandatory for the council, local board or committee to state by **resolution**:
 - the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting, or
 - in the case of a meeting for education and training purposes, the fact of the holding of the closed meeting, the general nature of its subject-matter and that it is to be closed under subsection 239(3.1)

Voting

- a meeting *shall not* be closed during the taking of a vote, unless an exception under s. 239(6) applies - s. 239(5)
- a meeting *may* be closed during the taking of a vote if **both** of the following apply - s. 239(6):
 - the meeting is permitted or required to be closed by s. 239(2) or (3); 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

Record Keeping

- all resolutions, decisions and other proceedings at a closed meeting *shall* be recorded “without note or comment” - s. 239(7)
- the records required by s. 239(7) *shall* be made by:
 - the clerk, in the case of a meeting of council, or
 - the appropriate officer, in the case of a meeting of a local board of committee

Investigations - Investigator

239.1(1) A person may request that an investigation of whether a municipality or local board has complied with s. 239 or a procedure by-law under s. 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 s. 239.2(1); or
- (b) by the Ombudsman appointed under the *Ombudsman Act*, if the municipality has not appointed an investigator referred to in s. 239.2(1).

Investigations

239.2 (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.

239.2 (12) If a municipality or a local board receives a report from a closed meeting investigator stating that a closed meeting was held contrary to s. 239, the municipality shall pass a resolution stating how it intends to address the report.

Common Pitfalls

- subject matter (meeting closed for an improper purpose)
- failure to comply with procedural requirements, including the applicable procedure by-law
- improper voting
- improper or insufficient record keeping
- failure to “report out” in open session

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