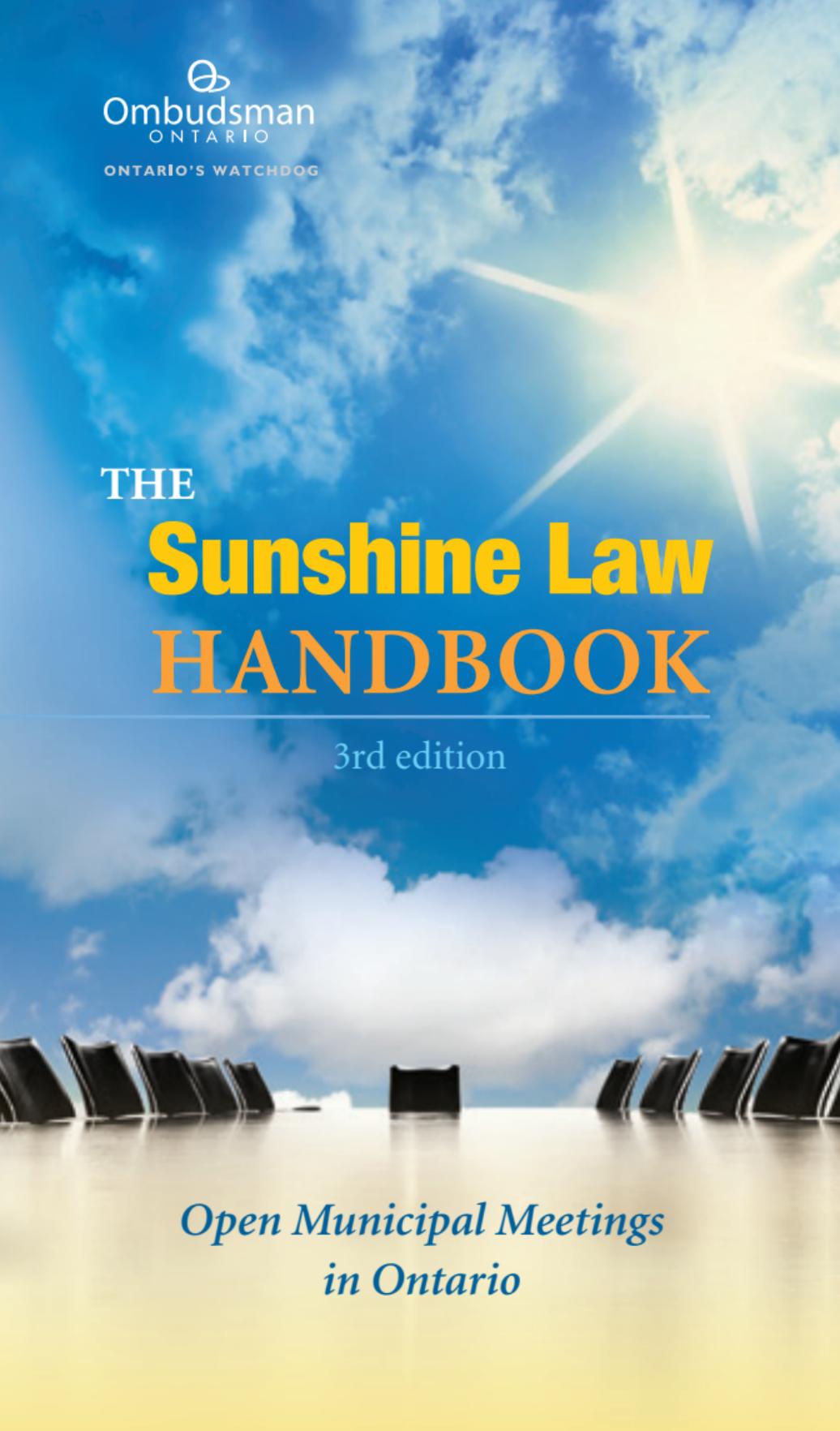


THE
Sunshine Law
HANDBOOK

3rd edition



*Open Municipal Meetings
in Ontario*

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*.
3. Give adequate advance public notice of all meetings, closed sessions and agenda items.
4. Do not add last-minute agenda items to closed sessions, except in truly urgent situations.
5. Open the meeting unless closure is specifically authorized under the *Municipal Act* and there is a real need to exclude the public.
6. Pick the right s. 239 exception before closing a meeting.
7. Pass a resolution in public that includes meaningful information about the issue to be considered – *before* closing the doors.
8. Record the meeting, including all resolutions and decisions, preferably using digital audio or video.
9. Do not hold a vote in closed session unless it is for a procedural matter or for giving directions to staff.
10. Report back publicly in open session about what occurred in closed session.

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This guide and related information is available on the Ombudsman's website, www.ombudsman.on.ca

Note: On December 9, 2014, the provincial government passed Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014*, which will extend the Ombudsman's jurisdiction to municipalities, as well as universities and school boards.

Once it is proclaimed in force, this new law will amend various sections of the Ombudsman Act and affect some aspects of the closed meeting investigation process as well.

At the time this guide was published, no date had been set for these changes to take effect. Any updates will be posted on the Ombudsman's website (www.ombudsman.on.ca), and included in future editions of this Handbook.

Message from the Ombudsman

Ontario's "Sunshine Law" ushered in a new era of local government transparency when it came into effect in 2008. The amendments to the *Municipal Act, 2001* established a public complaints system to enforce the requirement that all municipal meetings be held in public.

Ontario municipalities have been required by law to hold open meetings (with narrow exceptions) for many years. But in the past, the only way to challenge a closed meeting was through the courts. Today, public complaints about closed meetings are investigated by the Ombudsman's Office – or by investigators appointed by the municipalities themselves.

"Sunshine laws" requiring open meetings have been in place in many jurisdictions, including all U.S. states, for decades. In Ontario, the complaint regime has created an excellent opportunity to raise awareness of the importance of openness in municipalities – the level of government that is literally closest to home for all of us.

At the Office of the Ombudsman of Ontario, our Open Meeting Law Enforcement Team (OMLET) specializes in investigating closed meeting complaints and in assisting municipal officials and the public with questions about the Sunshine Law.

This is the **third edition** of our guide to the law, which we have updated to reflect our years of experience in investigating closed meeting complaints. We have made this handbook available to every municipality in Ontario in the hope that it will be useful to all, no matter who their investigator is.

Many tips and legal references are included in this handy booklet, but the spirit of the legislation can be summed up in six words: **When in doubt, open the meeting.**

André Marin

Ombudsman of Ontario

January 2015

Questions about the Ombudsman

Who is the Ombudsman?

The Office of the Ombudsman was established in 1975 by the Government of Ontario to enhance the provincial government's accountability to the public. **The Ombudsman is an independent and impartial Officer of the Legislature.** The *Ombudsman Act* gives the Ombudsman's Office complete independence and the powers to oversee virtually everything the government does – it is not a department of the provincial government.

What does the Ombudsman do?

The Ombudsman's job is to investigate complaints about the provincial government – about 500 ministries, agencies, boards, commissions, tribunals and Crown corporations – and make recommendations. Investigations are evidence-based and objective. In 2013-2014, the Ombudsman's office handled about 27,000 complaints. The majority of these were quickly resolved.

The Ombudsman also investigates and reports on **broad systemic issues** within government that affect large numbers of people. The Ombudsman's recommendations in these cases have prompted the provincial government to make significant changes to its administration of property tax assessments, newborn screening and lotteries, to cite just a few examples. Although the Ombudsman's recommendations are not binding, they have been overwhelmingly accepted and implemented by the government.

Complaints about closed municipal meetings are handled by the Ombudsman's Open Meeting Law Enforcement Team (OMLET), which specializes in the investigation and resolution of complaints under the "sunshine law." The team of experienced early resolution officers, investigators and legal counsel also provides guidance and education to municipalities and members of the public on the requirements of the *Municipal Act, 2001* with respect to open meetings and best practices.

Is there a fee for the Ombudsman's services?

The Ombudsman does not charge fees to anyone who complains, 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.

Why does the Ombudsman investigate closed municipal meetings?

In 2006, the Government of Ontario amended the *Municipal Act, 2001*, giving municipalities additional powers and duties, while providing for **increased accountability and transparency**. The amendments established a mechanism for members of the public to complain when they believe that a meeting has been improperly closed to the public.¹ These provisions took effect on January 1, 2008.

All municipalities must have a closed meeting investigator, and can appoint anyone they choose, including the Ombudsman. The *Municipal Act* also empowers the Ombudsman to receive complaints about closed meetings in **all municipalities that have not appointed investigators**.

¹ The City of Toronto has the same open meeting obligations under the *City of Toronto Act, 2006*.

Pursuant to section 239.1 of the *Municipal Act, 2001*, a person may request an investigation of 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 a procedure by-law in respect of a meeting or a part of a meeting that was closed to the public.

To find out who the investigator is for a particular municipality, members of the public can call the municipality, or consult the **“Find Your Municipality”** database in our website’s **Municipal Investigations** section (www.ombudsman.on.ca).

Closed meeting investigations are focused strictly on whether or not the open meeting requirements of the *Municipal Act* have been followed. **They do not deal with any other municipal issues.**

Questions about Closed Meeting Investigations

What happens when the Ombudsman receives a closed meeting complaint?

When complaints are received about a closed meeting by a municipality,² our Office first determines whether the municipality has appointed a closed meeting investigator other than the Ombudsman. If so, the complaint is referred back to the municipality and/or its appointed investigator.

If there is no other investigator, OMLET staff review the complaint, contact the municipal clerk to explain our process, and obtain meeting documents and other relevant information.

If an investigation appears warranted, OMLET staff notify the municipality accordingly.

OMLET staff then gather additional documentary evidence and interview witnesses either by phone, Skype or in person, as warranted. For efficiency, accuracy and a complete record, we generally make audio recordings of our interviews.

When the investigation is complete, the Ombudsman shares his findings and any recommendations relating to illegal meetings, procedural violations and best practices with the relevant municipal officials. They are given a chance to respond to this. The Ombudsman then finalizes his report and sends it to the municipality.

The municipality is expected to make the report public as soon as possible. The Ombudsman then makes the report available on his website and might comment publicly on the case. Complainants are also informed of the outcome.

² Throughout this guide, except where specified or in excerpts from legislation, references to “municipalities” can be understood to include councils, local boards that are subject to the open meeting requirements, and committees of either of them.

How long does the complaints process take?

Strict timelines are set for investigations. Some investigations may take longer than others, depending on the individual circumstances and complexity of the issues. The Ombudsman may also use his discretion under the *Ombudsman Act* to decide not to investigate, for instance, where he finds a complaint to be frivolous or vexatious.

About 70% of all OMLET complaints are resolved within a month.

What are the Ombudsman's powers in an investigation?

Under the *Ombudsman Act*, the Ombudsman and his staff **have the power to:**

- Make inquiries of such persons as they think fit [s. 18(3)];
- Require the municipality to provide information, documents or anything they believe relates to the investigation [s. 19(1)];
- Summons and examine witnesses under oath, including complainants, officers or employees of the municipality, or anyone else relevant to the investigation [s. 19(2)];
- Enter and inspect (upon notification to the municipality) any premises the municipality occupies [ss. 25(1) and 25(2)].

Ombudsman investigations are conducted in private. Municipal solicitors or parties other than the witness are not normally present during interviews.

Are complaints confidential?

Any information received relating to a complaint **cannot be disclosed**, except where permitted by the *Ombudsman Act*. The Ombudsman's Office is also not subject to the application of freedom of information and privacy legislation.

The Ombudsman **does not release the identity of complainants** without consent. The identity of a specific complainant is normally not relevant to a closed meeting investigation, which focuses on whether or not the meeting was properly closed under the law.

When does the Ombudsman report on his investigations?

The Ombudsman sets out his findings in each investigation in a report, including his opinion and recommendations to address any contraventions of the open meeting law. The report is provided to the municipality. Once provided with an Ombudsman report, the municipality is required **to make it available to the public**.³ Reports are also made public on the Ombudsman's website, www.ombudsman.on.ca.

If a complaint raises a broader public policy issue of relevance throughout the province, the Ombudsman has the option to **table his report with the Legislature**, and also make it available to the public.

In addition, each year the Ombudsman publishes and tables with the Legislature **an annual report** on his Office's OMLET operations and investigations.

What are the consequences for the municipality?

Unlike in some U.S. jurisdictions whose “sunshine laws” include the possibility of fines or jail, there are no penalties in Ontario for holding an illegal closed meeting. Although the municipality must make the Ombudsman's findings public, his recommendations are not binding; it is up to the municipality to decide whether or not to accept and implement them.

³ *Ombudsman Act*, RSO 1990, c. O.6, as amended, s.14(2.6).

Questions about the Open Meeting Requirements

Why are open meetings important?

In the 2007 case, *London (City) v. RSJ Holdings Inc.*, the Supreme Court of Canada described how the impetus for open meetings reform in Ontario in the 1990s was in the interest of “fostering democratic values and responding to the public’s demand for more accountable municipal government.” The justices noted that open meetings are required if there is to be “robust democratic legitimacy.” 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.**”

The Ombudsman considers the principles of **accountability, transparency and integrity** in interpreting section 239 and in conducting closed meeting investigations.

Whose meetings must be open to the public?

The *Municipal Act, 2001* provides that municipal councils and most local boards and their committees are required to hold meetings that are open to the public, **subject to some limited exceptions.**

What is a “committee”?

The *Municipal Act* defines “committee,” for the purposes of the open meeting provisions, to mean **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 may also designate certain bodies to be committees.

What are “local boards”?

Local boards subject to the open meeting requirements are: 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. A board of management of a business improvement area (BIA) is also considered to be a “local board.” School boards and conservation authorities are not considered “local boards” for the purpose of the open meeting law.

The *Municipal Act, 2001* specifically excludes police services boards and public library boards from the open meeting requirements of the Act. For the purpose of the open meetings law electrical companies incorporated by municipalities under s.142 of the *Electricity Act, 1998* are **not considered to be local boards**.

In addition, certain municipal corporations are not considered local boards.⁴ Whether a corporation is subject to the open meeting law depends on its date of incorporation and other factors established under regulation and by the courts.⁵

⁴ *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, s. 203, and O.Reg 599/06, or its predecessor, O.Reg. 168/03.

⁵ June 12, 2014 letter to City of Elliot Lake <http://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake---June-2014.pdf>

Must all meetings be open to the public?

No. A municipal or local board meeting, or part of a meeting, **may be closed** to the public if the subject of the meeting deals with any of the following:

- The security of the property of the municipality;
- Personal matters about an identifiable individual, including municipal employees;
- A proposed or pending acquisition or disposition of land by the municipality;
- Labour relations or employee negotiations;
- Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality;
- Advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- A matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.

A meeting may also be closed if it is held for the purpose of **educating or training** the members, so long as no member discusses or otherwise deals with any matter during the closed meeting in a way that materially advances the business or decision-making of the council, local board or committee. Meetings closed under the education or training exception must be for educational or training purposes **only**. Other topics cannot be discussed in such sessions. Presenters and trainers should be advised in advance of the permissible scope of these meetings and any materials to be used should be vetted to ensure they are consistent with the educational or training purpose of the meeting.

In addition, meetings **must be closed** if the subject matter of the meeting relates to 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.

Why does the legislation permit closed meetings?

While transparency of municipal governance should be maximized as far as possible, the *Municipal Act, 2001* recognizes that there may be certain 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.

It is important to note, however, that eight of the nine exceptions to the rule requiring meetings to be open to the public are discretionary – in other words, **even if the body can legally close its doors**, the legislation leaves it the flexibility, in the interests of transparency and accountability, to **keep the doors open**.

What is a “meeting”?

The *Municipal Act, 2001* defines “meeting” as any regular, special or other meeting of a council, of a local board or of a committee of either of them.⁶ This definition is quite circular.

The courts have considered whether gatherings held without the usual procedural trappings associated with municipal meetings are caught by the open meeting rules. For instance, in one case,⁷ a municipal committee held an in-camera “workshop.” The purpose of the workshop was to review the committee’s terms of reference and to consider objectives. It was held in a lounge, not in the regular committee room, and media were excluded. No report to council was ever made of the proceedings. The Ontario Court of Appeal held that the workshop was in fact a “meeting.”

In another case,⁸ a city council held an in-camera “retreat” at a ski resort. On the first day’s agenda were many items the council would ordinarily address. On the second day, items such as decorum at meetings, relations with staff and councilor salaries, were discussed. The Divisional Court held that the “retreat” was in fact a “meeting,” noting that matters that would ordinarily be the subject of council business were discussed, in part to make action-taking decisions and to materially move along a number of matters.

⁶ s.238(1).

⁷ *Southam Inc. v. Hamilton-Wentworth (Regional Municipality) Economic Development Committee* (1988), 66 O.R. (2d) 213 (Ont. C.A.).

⁸ *Southam Inc. v. Ottawa (City)* (1991), 5. O.R. (3d) 726 (Ont. Div. Ct.).

Based on the principles of accountability, transparency and openness underscoring the Sunshine Law and reflected in relevant court cases, the Ombudsman developed the following working definition to describe those gatherings subject to the open meeting requirements:

A meeting occurs when members of a council, local board or committee come together for the purpose of exercising their power or authority, or for the purpose of doing the groundwork necessary to exercise that power or authority.⁹

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. The presence of a quorum is an important indicator of whether a “meeting” has occurred, since a body can take official action when it has a quorum.

Does the term “meeting” include such things as informal gatherings, informal discussions and attendance at social functions?

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

⁹ Ombudsman Report: *Don't Let the Sun Go Down on Me*, Investigation into the City of Greater Sudbury meeting of February 20, 2008 (April 25 2008).

Are meetings conducted over the phone or by email subject to the open meeting requirements?

A “meeting” is not limited to a physical gathering. A teleconference, sequential telephone or email conversation conducted for the purpose of exercising the power or authority of a council, local board or one of their committees or for the purpose of doing the groundwork necessary to exercise that power or authority may constitute a “meeting” subject to the open meeting requirements.¹⁰ Serial telephone calls or emails are, by their nature, closed to the public.

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.

How does a procedure by-law affect the ability of a municipality to close a meeting?

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**.

¹⁰. Ombudsman Report: Investigation into the Township of Nipissing April 25, 2008 meeting (February 6, 2009)

Must a specific procedure be followed to close a meeting?

Yes. 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**. (See *Farber v. Kingston (City)*, 2007 ONCA 173.) In the case of meetings for the purpose of educating or training members, the subsection of the *Municipal Act, 2001* authorizing meeting closure for this purpose must also be cited. However, as a best practice, the relevant exceptions should always be indicated in connection with each subject for discussion.

What information should a public notice of a meeting contain?

The *Municipal Act, 2001* requires municipalities to establish a procedure by-law governing their meetings. The by-law must provide for public notice of meetings, but the Act **does not specify the content** of that notice.

In practice, many procedure by-laws require that an agenda be publicly posted, listing the matters to be discussed, in advance of a meeting. Some municipalities also provide that items arising after an agenda has been posted are to be included in an addendum, which must also be publicly posted. This is generally for items of an urgent nature.

In the case of items that arise without advance public notice, many procedure by-laws require approval of all members in attendance, or a resolution suspending the normal meeting rules, before they can be considered.

It is the Ombudsman's view that 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 session items and recommends that notices and agendas accurately reflect the specific matters intended to be discussed at a particular meeting. In addition, adequate notice should not only include the date of the meeting, but also its time and place, in order to facilitate the public's right to attend and observe open portions of municipal meetings.

Can subjects not identified in the public notice and resolution authorizing a closed meeting be considered during the meeting?

Items that have not been the subject of advance public notice should only be considered if all procedural requirements have been met, and the matter is urgent. **These circumstances should be rare.** Items can only be discussed in a closed meeting if they come within the exceptions to the open meeting requirements and have been expressly identified in the resolution authorizing the closed meeting. If matters are introduced in a closed session that were not identified in the resolution authorizing the session, participants in the meeting are individually and collectively responsible for ensuring that no discussion of the issue takes place.

Can votes be taken during a closed meeting?

Generally, meetings cannot be closed to the public during the taking of a vote. However, voting in a closed meeting is 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. Informal voting on issues through a "straw poll," "show of hands" or "secret ballot" is not permissible.

Does the “Sunshine Law” entitle members of the public to participate in a meeting?

No. 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**.

Must a record be kept of the closed meeting?

Yes. All resolutions, decisions and other proceedings that take place must be recorded without comment, **whether the meeting is open or closed**.

A proper record of a closed meeting should include reference to the location, time of commencing and adjourning the meeting and the names of attendees. A detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered, motions (including who introduced the motion and seconders) and all votes taken or direction given should also be part of the official record.

The Ombudsman recommends that all municipalities make audio or video recordings of all meetings – both open and closed – to ensure the most thorough record possible, and encourages municipalities, committees or local boards to report publicly in open session about what transpired in closed session, providing as much detail as the subject matter permits.

How the Ombudsman Interprets the s. 239 Exceptions

Although every case is assessed on its own merits, here are some guidelines and examples of how the Ombudsman has interpreted and applied the eight discretionary exceptions to the open meeting requirements.

“Security of the property” – s. 239(2)(a)

Includes:

- Discussions relating to protection of property from physical loss or damage and the protection of public safety in relation to this property.

Does not include:

- Matters relating to the financial interests of the municipality
- Discussions of strategy with respect to municipal infrastructure or growth
- Discussions regarding strategy with regard to municipal property

Case examples (available online):

- **Township of Russell (May 5, 2014 meeting):** Discussions related to financial interests, municipal growth, future planning and negotiation strategy did not fit within this exception.
- **City of Niagara Falls (December 12, 2011 and January 24, 2012 meetings):** Discussion of security concerns with respect to a member of the public did not fit within this exception.
- **City of Welland (Spring 2014 meetings):** Discussions of a bid to host a sporting event did not fit within this exception.

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

Includes:

- Discussions of opinions about an identified individual
- Examination of a municipal employee’s performance or conduct
- Discussion of nominees for appointment to a committee
- Discussion of an investigation of an individual’s possible violation of law

Does not include:

- Discussion of council members’ remuneration or expenses and related policy
- Discussion of general working relations between council and staff
- Discussion about an individual in his/her professional or official capacity

Case examples (available online):

- **City of Timmins (June 17, 2014 meeting):** Discussion of an investigation of a resident’s contravention of a zoning by-law fit within this exception.
- **Township of Midland (July 22, 2013 meeting):** Discussion of a councillor’s request for reimbursement of legal fees did not fit within this exception, as they related to the councillor’s professional capacity.

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

Includes:

- When the bargaining position of the municipality needs to be protected with respect to buying or selling property
- Discussions of lease agreements or easements relating to the municipality’s property interests

Does not include:

- General discussions of real estate market volatility and its impact on land values

Case examples (available online)

- **Town of Ajax (May 23, 2013 committee meeting):** Discussion of an encroachment on municipal land and consideration of a possible sale of the property properly fit within the exception.
- **City of Hamilton (June 27, 2011 committee meeting):** Discussion of potential acquisition of land by a school board, which is not a “local board” under the Act, did not fit within the exception.

“Labour relations or employee negotiations” – s.239(2)(d)**Includes:**

Discussions involving:

- collective bargaining
- staff compensation or vacation
- hiring or firing staff, or disciplinary proceedings
- grievances under a collective agreement
- voluntary exit program
- review of staff workload and working relationships

Does not include:

- Discussions of litigation against employees

Case examples (available online)

- **Township of Leeds and the Thousand Islands (February 19, 2013 meeting):** Discussion of senior staff compensation fit within this exception, but the meeting was illegal because no public notice was provided.
- **Township of Bonfield (October 8, 2013 committee meeting):** Discussion relating to ongoing labour negotiations fit within this exception.

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

Includes:

- Discussions of ongoing litigation involving the municipality, including proceedings before administrative tribunals
- Discussion of litigation that is a real likelihood, against or by the municipality
- Discussions about deciding whether or not to litigate

Does not include:

- Speculation that litigation may arise in future, or where there is no evidence of any current or future legal proceedings
- Meetings where an outside party is present (thereby waiving legal privilege)

Case examples (available online):

- **Municipality of Bluewater (August 27, 2013 meeting):** Discussion of advice from the municipality’s solicitor about a proposed by-law as a means to resolve pending litigation fit within this exception.
- **Township of Ryerson (Sept 24, 2012 meeting):** Discussion of a complaint related to zoning did not fit within this exception, as there was no pending litigation or notice of any intent to take legal action.
- **Town of Orangeville (September 9, 2013 meeting):** Discussion of possible litigation relating to a property lease fit within this exception, but the meeting became illegal when the property owner joined the meeting.

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

Includes:

- Communication between the municipality and its solicitor, in seeking or receiving legal advice intended to be confidential (to ensure municipal officials can speak freely with their lawyer without fear of disclosure)

Does not include:

- Situations where the privileged communication is disclosed to third parties;
- Discussions that do not directly refer to legal advice

Case examples (available online):

- **Town of Carleton Place (July 23, 2013 meeting):** Discussion of advice from the town's solicitor about an easement issue and a pending lawsuit against the town fit within this exception.
- **Township of Ryerson (July 9, 2013 meeting):** Discussion of a letter from the township's solicitor did not fit within this exception, because the document did not include specific legal advice, just a draft proposal for consideration by a third party, who was at the meeting.
- **Town of Ajax (May 23, 2013):** Discussions about a report on which the municipality's solicitor was consulted did not fit within the exception because the solicitor provided no specific legal advice at the meeting or in the report.

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

- Discussions solely for the purpose of educating and/or training council members

Does not include:

- Discussions that advance council business or decision-making

Case examples (available online):

- **Township of Brudenell, Lyndoch and Raglan (March 19, 2014 meeting):** A presentation to educate council on fire services delivery fit within this exception.
- **Town of Moosonee (August 26, 2013 meeting):** Information about grants, directly relating to town business, did not fit within this exception.
- **City of Welland (April 2014 meeting):** Discussions relating to the city's economic development strategy did not fit within this exception.

Legislation Relating to Open Meetings

MUNICIPAL ACT, 2001

The open meeting provisions apply to municipal councils and local boards and their committees. The Act generally defines what a local board is. Other sections of the Act exclude police services boards and public library boards from the open meeting requirements.

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 procedure by-law relating to meetings. These by-laws must make provision for public notice of meetings.

PROCEDURE BY-LAW

Procedure by-law

Definitions

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

“committee” means any advisory or other committee, sub-committee 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. (“réunion”) 2001, c. 25, s. 238 (1); 2006, c. 32, Sched. A, s. 102 (1, 2).

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).

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 obligation and exceptions.

Meetings

Meetings open to public

239.(1) Except as provided in this section, all meetings shall be open to the public. 2001, c. 25, s. 239 (1).

Exceptions

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

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. 2001, c. 25, s. 239 (2).

Other criteria

- (3) A meeting shall be closed to the public if the subject matter relates to the consideration of 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. 2001, c. 25, s. 239 (3).

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).

Open meeting

- (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 relating to investigations came into force January 1, 2008.

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.

Powers and duties

(2) Subject to this section, in carrying out his or her functions under subsection (1), the investigator may exercise such powers and shall perform such duties as may be assigned to him or her by the municipality. 2006, c. 32, Sched. A, s. 104.

Matters to which municipality is to have regard

(3) In appointing an investigator and in assigning powers and duties to him or her, the municipality shall have regard to, among other matters, the importance of the matters listed in subsection (5). 2006, c. 32, Sched. A, s. 104.

Same, investigator

(4) In carrying out his or her functions under subsection (1), the investigator shall have regard to, among other matters, the importance of the matters listed in subsection (5). 2006, c. 32, Sched. A, s. 104.

Same

(5) The matters referred to in subsections (3) and (4) are,

- (a) the investigator's independence and impartiality;
- (b) confidentiality with respect to the investigator's activities; and
- (c) the credibility of the investigator's investigative process. 2006, c. 32, Sched. A, s. 104.

Delegation

(6) An investigator may delegate in writing to any person, other than a member of council, any of the investigator's powers and duties under this Part. 2006, c. 32, Sched. A, s. 104.

Same

(7) An investigator may continue to exercise the delegated powers and duties, despite the delegation. 2006, c. 32, Sched. A, s. 104.

Status

- (8) An investigator is not required to be a municipal employee. 2006, c. 32, Sched. A, s. 104.

Application

- (9) Subsection 223.13 (6) and sections 223.14 to 223.18 apply with necessary modifications with respect to the exercise of functions described in this section. 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.

See: 2006, c. 32, Sched. A, ss. 104, 192 (2).

The following provisions applying to a municipal ombudsman also apply to investigators appointed to investigate closed meeting complaints.

223.13 Powers paramount

- (6) The powers conferred on the Ombudsman under this Part may be exercised despite any provision in any Act to the effect that any such decision, recommendation, act or omission is final, or that no appeal lies in respect of them, or that no proceeding or decision of the person or organization whose decision, recommendation, act or

omission it is shall be challenged, reviewed, quashed or called in question. 2006, c. 32, Sched. A, s. 98.

Investigation

223.14 (1) Every investigation by the Ombudsman shall be conducted in private. 2006, c. 32, Sched. A, s. 98.

Opportunity to make representations

(2) The Ombudsman may hear or obtain information from such persons as he or she thinks fit, and may make such inquiries as he or she thinks fit and it is not necessary for the Ombudsman to hold any hearing and no person is entitled as of right to be heard by the Ombudsman, but if at any time during the course of an investigation it appears to the Ombudsman that there may be sufficient grounds for him or her to make any report or recommendation that may adversely affect the municipality, a local board, a municipally-controlled corporation or any other person, the Ombudsman shall give him, her or it an opportunity to make representations respecting the adverse report or recommendation, either personally or by counsel. 2006, c. 32, Sched. A, s. 98.

Application of *Ombudsman Act*

(3) Section 19 of the *Ombudsman Act* applies to the exercise of powers and the performance of duties by the Ombudsman under this Part. 2006, c. 32, Sched. A, s. 98.

Same

(4) For the purposes of subsection (3), references in section 19 of the *Ombudsman Act* to “any governmental organization”, “the *Freedom of Information and Protection of Privacy Act*” and “the *Public Service of Ontario Act, 2006*” are deemed to be references to “the municipality, a local board or a municipally-controlled corporation”, “the *Municipal Freedom of Information and Protection of Privacy Act*” and “this Act”, respectively. 2006, c. 32, Sched. A, s. 98; 2006, c. 35, Sched. C, s. 134 (3).

Duty of confidentiality

223.15 (1) Subject to subsection (2), the Ombudsman and every person acting under the instructions of the Ombudsman shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part. 2006, c. 32, Sched. A, s. 98.

Disclosure

(2) The Ombudsman may disclose in any report made by him or her under this Part such matters as in the Ombudsman's opinion ought to be disclosed in order to establish grounds for his or her conclusions and recommendations. 2006, c. 32, Sched. A, s. 98.

Section prevails

(3) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*. 2006, c. 32, Sched. A, s. 98.

No review, etc.

223.16 No proceeding of the Ombudsman under this Part shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of the Ombudsman is liable to be challenged, reviewed, quashed or called in question in any court. 2006, c. 32, Sched. A, s. 98.

Testimony

223.17 (1) The Ombudsman and any person acting under the instructions of the Ombudsman shall not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to his or her knowledge in the exercise of his or her functions under this Part. 2006, c. 32, Sched. A, s. 98.

Same

(2) Anything said or any information supplied or any document or thing produced by any person in the course of

any investigation by or proceedings before the Ombudsman under this Part is privileged in the same manner as if the inquiry or proceedings were proceedings in a court. 2006, c. 32, Sched. A, s. 98.

Effect on other rights, etc.

223.18 The rights, remedies, powers, duties and procedures established under sections 223.13 to 223.17 are in addition to the provisions of any other Act or rule of law under which any remedy or right of appeal or objection is provided for any person, or any procedure is provided for the inquiry into or investigation of any matter, and nothing in this Part limits or affects any such remedy or right of appeal or objection or procedure. 2006, c. 32, Sched. A, s. 98.

OMBUDSMAN ACT

Function of Ombudsman

14.(1) The function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his, her or its personal capacity. R.S.O. 1990, c. O.6, s. 14 (1).

...

Application

(2.1) Subsections (2.2) to (2.6) apply if a municipality has not appointed an investigator referred to in subsection 239.2 (1) of the *Municipal Act, 2001* or if the City of Toronto has not appointed an investigator referred to in subsection 190.2 (1) of the *City of Toronto Act, 2006*, as the case may be. 2006, c. 32, Sched. C, s. 40.

Investigation

(2.2) The Ombudsman may investigate, on a complaint made to him or her by any person,

- (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. 2006, c. 32, Sched. C, s. 40.

Non-application

- (2.3) Subsections 14 (4) and 18 (4) and (5), sections 20 and 21 and subsections 22 (1) and 25 (3) and (4) do not apply to an investigation under subsection (2.2). 2006, c. 32, Sched. C, s. 40.

Interpretation

- (2.4) For the purposes of an investigation under subsection (2.2),
- (a) the references in subsections 18 (1) and 25 (2) to “head of the governmental organization” shall be deemed to be a reference to “municipality or local board”;
 - (b) the references in subsections 18 (3) and (6), 19 (1) and (2) and 25 (1) to “governmental organization” shall be deemed to be references to “municipality or local board”;
 - (c) the reference in subsection 19 (3) to the *Public Service of Ontario Act, 2006* shall be deemed to be a reference to the *Municipal Act, 2001* or the *City of Toronto Act, 2006*, as the case may be; and
 - (d) the reference in subsection 19 (3.1) to the *Freedom of Information and Protection of Privacy Act* shall be deemed to be a reference to the *Municipal Freedom of Information and Protection of Privacy Act, 2006*, c. 32, Sched. C, s. 40; 2006, c. 35, Sched. C, s. 134 (4).

Ombudsman's report and recommendations

(2.5) If, after making an investigation under subsection (2.2), the Ombudsman 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 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. 2006, c. 32, Sched. C, s. 40.

Publication of reports

(2.6) The municipality or local board shall ensure that reports received under subsection (2.5) by the municipality or local board, as the case may be, are made available to the public. 2006, c. 32, Sched. C, s. 40.

...

Proceedings of Ombudsman

18.(1) Before investigating any matter, the Ombudsman shall inform the head of the governmental organization affected of his or her intention to make the investigation. R.S.O. 1990, c. O.6, s. 18 (1).

Investigation to be in private

(2) Every investigation by the Ombudsman under this Act shall be conducted in private. R.S.O. 1990, c. O.6, s. 18 (2).

Where hearing necessary

(3) The Ombudsman may hear or obtain information from such persons as he or she thinks fit, and may make such inquiries as he or she thinks fit and it is not necessary for the Ombudsman to hold any hearing and no person is

entitled as of right to be heard by the Ombudsman, but, if at any time during the course of an investigation, it appears to the Ombudsman that there may be sufficient grounds for him or her to make any report or recommendation that may adversely affect any governmental organization or person, the Ombudsman shall give to that organization or person an opportunity to make representations respecting the adverse report or recommendation, either personally or by counsel. R.S.O. 1990, c. O.6, s. 18 (3).

...

Breach of duty or misconduct

(6) If, during or after an investigation, the Ombudsman is of opinion that there is evidence of a breach of duty or of misconduct on the part of any officer or employee of any governmental organization, the Ombudsman may refer the matter to the appropriate authority. R.S.O. 1990, c. O.6, s. 18 (6).

Evidence

19.(1) The Ombudsman may from time to time require any officer, employee or member of any governmental organization who in his or her opinion is able to give any information relating to any matter that is being investigated by the Ombudsman to furnish to him or her any such information, and to produce any documents or things which in the Ombudsman's opinion relate to any such matter and which may be in the possession or under the control of that person. R.S.O. 1990, c. O.6, s. 19 (1).

Examination under oath

(2) The Ombudsman may summon before him or her and examine on oath,

(a) any complainant;

(b) any person who is an officer or employee or member of any governmental organization and who, in the Ombuds-

man's opinion, is able to give any information mentioned in subsection (1); or

- (c) any other person who, in the Ombudsman's opinion, is able to give any information mentioned in subsection (1),

and for that purpose may administer an oath. R.S.O. 1990, c. O.6, s. 19 (2).

...

Providing personal information despite privacy Acts

- (3.1) A person who is subject to the *Freedom of Information and Protection of Privacy Act* or the *Personal Health Information Protection Act, 2004* is not prevented by any provisions in those Acts from providing personal information to the Ombudsman, when the Ombudsman requires the person to provide the information under subsection (1) or (2). 2004, c. 3, Sched. A, s. 94.

...

Privileges

- (5) Every person has the same privileges in relation to the giving of information, the answering of questions, and the production of documents and things as witnesses have in any court. R.S.O. 1990, c. O.6, s. 19 (5).

Protection

- (6) Except on the trial of any person for perjury in respect of the person's sworn testimony, no statement made or answer given by that or any other person in the course of any inquiry by or any proceedings before the Ombudsman is admissible in evidence against any person in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Ombudsman shall be given against any person. R.S.O. 1990, c. O.6, s. 19 (6).

...

Prosecution

(8) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with any requirement of the Ombudsman under this section. R.S.O. 1990, c. O.6, s. 19 (8).

Fees

(9) Where any person is required by the Ombudsman to attend before him or her for the purposes of this section, the person is entitled to the same fees, allowances, and expenses as if he or she were a witness in the Superior Court of Justice, and the provisions of any Act, regulation or rule in that behalf apply accordingly. R.S.O. 1990, c. O.6, s. 19 (9); 2006, c. 19, Sched. C, s. 1 (1).

...

Proceedings not to be questioned or to be subject to review

23. No proceeding of the Ombudsman shall be held bad for want of form, and, except on the ground of lack of jurisdiction, no proceeding or decision of the Ombudsman is liable to be challenged, reviewed, quashed or called in question in any court. R.S.O. 1990, c. O.6, s. 23.

Proceedings privileged

24.(1) No proceedings lie against the Ombudsman, or against any person holding any office or appointment under the Ombudsman, for anything he or she may do or report or say in the course of the exercise or intended exercise of his or her functions under this Act, unless it is shown that he or she acted in bad faith. R.S.O. 1990, c. O.6, s. 24 (1).

Idem

- (2) The Ombudsman, and any such person as aforesaid, shall not be called to give evidence in any court, or in any proceedings of a judicial nature, in respect of anything coming to his or her knowledge in the exercise of his or her functions under this Act. R.S.O. 1990, c. O.6, s. 24 (2).

Idem

- (3) Anything said or any information supplied or any document or thing produced by any person in the course of any inquiry by or proceedings before the Ombudsman under this Act is privileged in the same manner as if the inquiry or proceedings were proceedings in a court. R.S.O. 1990, c. O.6, s. 24 (3).

Power of entry of premises

- 25.**(1) For the purposes of this Act, the Ombudsman may at any time enter upon any premises occupied by any governmental organization and inspect the premises and carry out therein any investigation within his or her jurisdiction. R.S.O. 1990, c. O.6, s. 25 (1).

Notice of entry

- (2) Before entering any premises under subsection (1), the Ombudsman shall notify the head of the governmental organization occupying the premises of his or her purpose. R.S.O. 1990, c. O.6, s. 25 (2).

...

Offences and penalties

- 27.** Every person who,

- (a) without lawful justification or excuse, wilfully obstructs, hinders or resists the Ombudsman or any other person in the performance of his or her functions under this Act; or

- (b) without lawful justification or excuse, refuses or wilfully fails to comply with any lawful requirement of the Ombudsman or any other person under this Act; or
 - (c) wilfully makes any false statement to or misleads or attempts to mislead the Ombudsman or any other person in the exercise of his or her functions under this Act,
- is guilty of an offence and liable on conviction to a fine of not more than \$500 or to imprisonment for a term of not more than three months, or to both. R.S.O. 1990, c. O.6, s. 27.

Making a Complaint in 3 Easy Steps

Anyone can complain about a closed municipal meeting – you do not have to live in the municipality you are complaining about. Here's how:

1. Find out who the investigator is for the municipality you wish to complain about. Do this by:
 - Calling the municipality
 - Checking the “Find Your Municipality” list in the “Municipal Matters” section of our website, www.ombudsman.on.ca ; or
 - Calling our Office at 1-800-263-1830.
2. If the municipality has appointed its own investigator, the Ombudsman cannot handle your complaint – you will need to consult the municipality to file it.
3. If the Ombudsman is the investigator for the municipality in question, you may file your complaint directly to our Office by:
 - Calling our complaint intake line at 1-800-263-1830, Monday to Friday between 9 a.m. and 4:30 p.m. (or TTY: 1-866-411-4211);
 - Completing a Closed Meeting Complaint Form online at www.ombudsman.on.ca; (you may also download and print out the form – it asks you to provide basic details about the meeting, such as time and place, and the subject, if known);
 - Sending an e-mail to info@ombudsman.on.ca;
 - Faxing your complaint to (416) 586-3485;
 - Mailing your complaint to:
Office of the Ontario Ombudsman
483 Bay Street
10th Floor, South Tower
Toronto, Ontario M5G 2C9; or
 - Appearing in person at the address above. An appointment is recommended and can be made by calling the complaint intake line at 1-800-263-1830.

If you have any questions about any of the above, feel free to call or e-mail our Office.

THE

Sunshine Law HANDBOOK

Open Municipal Meetings in Ontario

3rd edition

“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



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