

AN OPEN OR SHUT CASE?

Ontario Ombudsman Annual Report addresses municipal meetings Sunshine Law

André Marin, the Ontario Ombudsman, has released his annual report on the work of his Open Meeting Law Enforcement Team (OMLET) for the period April 1, 2011 to August 31, 2012, on municipal practices that fall under what he aptly calls the “Sunshine Law” of Ontario – namely, the requirements of section 239 of the *Municipal Act, 2001* (*City of Toronto Act, 2006*, section 190).

The statutory provisions require that, except as provided by specific exception set out in the Act, “meetings” (defined as “any regular, special or other meeting of a council, of a local board, or of a committee of either of them”) shall be open to the public.

The Ombudsman’s jurisdiction in this area flows from the right, given to any person since January 1, 2008, to request an investigation into whether a municipality or local board has complied with section 239 or a procedure by-law of the council, in respect of a meeting or part of a meeting that was closed to the public. The investigation is to be undertaken by an investigator appointed by the council for that function, or, in all other cases, by the Provincial Ombudsman (see *Municipal Act, 2001*, ss. 239.1-239.2; *City of Toronto Act, 2006*, ss. 190.1-190.2). It is noted in the report that this legislation results in the Ombudsman’s being the

investigator for 191 of Ontario’s 444 municipalities.

Since 2008, the Ombudsman has received more than 500 complaints about closed municipal meetings, 313 of them concerning municipalities that do not have their own investigator. Most complaints were resolved quickly without a need for a full investigation. In most cases investigated, it was found that the municipalities correctly followed the Sunshine Law.

The Ombudsman’s duty is to report the results of the investigation to the municipality, local board, or committee, and make recommendations to redress concerns. Such reports are required to be made available to the public, “and elected officials must ultimately answer to voters for their conduct.”

Why the OMLET Report Is Important to Every Municipality

Methodology Explained

Aside from being articulate and well-organized, the OMLET report starts off by explaining its methodology, a useful blueprint for all accountability officers. Some of the key principles and practices supported are the following:

- ▶ the objective of the inquiry is resolution and correction, not necessarily a full investigation;

- ▶ basic principles are to be followed: “accessibility, confidentiality, impartiality, and [efficient] investigation”;
- ▶ there should be no charge to the complainant;
- ▶ the complainant’s identity is not germane to the issue of compliance, and should not be included in the report;
- ▶ the investigator has the right to expect full cooperation from municipalities, their council members, and staff (the Ombudsman, in investigating the practices of various municipalities, did not always receive this; in the case of one council, 10 of its 13 members refused to be interviewed);
- ▶ the investigation includes the review of every relevant record, notice, or documentation relating to the meeting, and the procedure by-law;
- ▶ it is unnecessary, and undesirable, for witnesses to be represented by



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lawyers, including the municipality's solicitor, when giving interviews;

- ▶ an in-house solicitor would have a conflict in such circumstances in any event, unable to represent both the individual and the municipality;
- ▶ information may be subject to solicitor-client privilege (although some municipalities chose to waive such privilege in responding to the Ombudsman's investigation);
- ▶ the Ombudsman maintains confidentiality with respect to legal advice rendered to the council;
- ▶ the Ombudsman shares the proposed report with relevant officials for review and comment before it is finalized and made public;
- ▶ the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) does not prevent municipalities from cooperating with the investigation; and
- ▶ OMLET makes sure that its report is made public as soon as possible, and follows up to make sure that this legal requirement is followed.

Important Findings and Principles

While not identifying or suggesting the need for new law, the Ombudsman highlights a number of important principles and practices that should be understood and followed by every council and councillor concerning the Sunshine Law:

- ▶ an informal gathering of members may turn into a "meeting" where a number of them, constituting a quorum, enter into discussions that will further decision making or lay the groundwork for decisions;
- ▶ if a majority of the members of a municipally-created entity get together, the body may be considered a "committee," subject to the open meeting rules;
- ▶ there cannot be a vote, either formal or informal, at a closed meet-

ing, except for procedural matters or the giving of directions to officers, employees, or agents;

- ▶ a "vote" could include any determination of consensus or collective decision making, including a show of hands, nodding of heads, or silence representing assent;
- ▶ a decision to close a meeting should provide advance public notice of all items to be considered in the closed meeting, and the general nature of the matter to be considered, preferably also referring to the *Municipal Act* exception forming the basis for the decision;
- ▶ a telephone conference call or email exchange among a number of members of a council, board, or committee, relating to its business, may constitute a "meeting" that, by its nature, is not open to the public, and therefore unlawful;
- ▶ as much information as possible about what occurred during a closed meeting should be reported to the public, without undermining the reason for going *in camera*;
- ▶ councillors should be cautious about holding "informal get-togethers," including "workshops" or "retreats," because they naturally attract suspicion and conjecture, and it can be difficult to convince the public that no improper discussions took place;
- ▶ "audio or video recording of council meetings should be routine – not just the open sessions, but the closed ones, too";
- ▶ informal gatherings of a quorum of members must restrict their informal exchanges to social topics, and not the discussion of municipal issues to be dealt with by council;
- ▶ the determination of whether or not an assembly of members constitutes a "meeting" does not depend on who took the initiative to bring the get-together about (it could be a third party);
- ▶ a legal requirement that public notice of a meeting is to be provided

includes every meeting, whether held in public or not;

- ▶ the "education or training" exemption does not justify closed meetings to discuss such items as strategic planning, the official plan, or zoning by-laws;
- ▶ speculation about the prospect or possibility of litigation does not in itself satisfy the "litigation" exemption;
- ▶ problematic practices include incomplete and inaccurate meeting agendas, failure to report back publicly in an informed way about closed meetings, and adding meeting items without prior notice;
- ▶ members at a closed meeting should not stray into discussion of matters not properly the subject of *in camera* sessions, or not included in the publicly-announced decision to exclude the public;
- ▶ while the Sunshine Law *authorizes* meetings to be closed to the public during consideration of a number of specific subject-matters, this *does not require* (except in the case of MFIPPA applications) that such meetings be held *in camera*;
- ▶ in each case, it is up to the council, committee or board to decide whether or not there are supportable grounds to preclude the meeting from being witnessed by voters and other members of the public; and
- ▶ when in doubt, open the meeting.

The Ombudsman does not, in his report, discuss the relationship between the statutory requirements of the Sunshine Law, on one hand, and the provisions of the municipality's own procedure by-law, on the other (although both are within the purview of the Sunshine Law and the Ombudsman's jurisdiction to investigate non-compliance).

This is not surprising, given that, while a municipal by-law enacted pursuant to a council's statutory authority constitutes a valid law, no municipal by-law can restrict or be inconsistent with provincial legislation. In any event, the type of by-law

in question addresses only procedures to be followed with respect to public notice and proceedings of meetings. Such a by-law could not authorize the closing of a meeting required by statute to be open, or interfere in any way with public access to municipal government. Such by-laws should support, both in form and in spirit, the principles of transparency

and accessibility inherent in the provincial legislation.

Conclusion

The Ontario Ombudsman has provided an important service and information to municipalities in the OMLET report. That report, and the handy little booklet *The Sunshine Law Handbook: Open Municipal Meetings*

in Ontario, also published by the Ombudsman, originally in 2008, should be required reading for all municipal councillors, and should be incorporated in orientation sessions and regular updates to municipal members in encouraging and assisting them in complying with the law, which demands that, as a general rule, municipal business should be done in public. **MW**

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