



**Submission to the
Standing Committee on Social Policy
on Bill 68,
*Modernizing Ontario's Municipal Legislation Act, 2017***

**Paul Dubé
Ombudsman of Ontario
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Background: Ombudsman's role

- 1 The Ontario Ombudsman's authority to review and investigate complaints in the municipal sector began in January 2008, when my Office became the closed meeting complaint investigator for municipalities that have not appointed their own. In this role, I help to ensure that municipal councils, local boards and their committees hold meetings open to the public as required by law.
- 2 Since January 2016, we have also had the jurisdiction to investigate the administrative conduct of Ontario's municipalities, local boards and municipally-controlled corporations. Given my Office's municipal oversight experience, we have developed a unique perspective on issues relating to municipal administration that may assist the Standing Committee in its consideration of Bill 68, *Modernizing Ontario's Municipal Legislation Act, 2017*.
- 3 Based on observations gained over many years of independent and impartial oversight experience, my submission focuses on clarifying and ensuring compliance with municipal accountability measures as well as promoting best practices in local complaint resolution.

Closed meeting complaints

- 4 Under the *Municipal Act, 2001* and the *City of Toronto Act, 2006*, municipal councils, local boards and their committees must hold their meetings open to the public, subject to limited statutory exceptions. The open meeting requirements promote transparency, accessibility and accountability in municipal government. They are enforced either by locally-appointed closed meeting complaint investigators or my Office.
- 5 Bill 68 proposes several amendments relating to open meetings. There are four issues I would like to address relating to these provisions:
 1. The definition of "meeting"
 2. The definition of "local board"
 3. Response to reports on closed meeting investigations
 4. Exceptions to the open meeting requirements

Defining “meeting”

- 6 The current definition of “meeting” in s.238(1) of the *Municipal Act, 2001* and s.189(1) of the *City of Toronto Act, 2006* is uninformative and circular. It essentially defines a meeting as a meeting. This has created uncertainty amongst municipal officials about whether the open meeting requirements apply to various gatherings.
- 7 Sometimes a quorum of council members will attend a meeting called by a third party and inadvertently violate the open meeting rules. We have seen frequent examples of this in cases we have handled. For instance:
- Council for the Township of Georgian Bay broke the rules when council members participated in a January 2011 meeting arranged by a local cottagers’ association and solicited suggestions on various municipal initiatives.¹
 - Council for the Town of Fort Erie engaged in improper closed meetings when it met in April and May 2012 with the Fort Erie Economic Development Tourism Corporation and discussed its strategic plan and priorities.²
 - Council for the City of Elliot Lake violated the open meeting requirements when it attended meetings of the Nuclear Waste Management Organization and the Elliot Lake Residential Development Commission in April 2012.³
 - In September 2016, a quorum of council for the Municipality of Brockton attended an information session held by an engineer under the *Drainage Act* relating to a petition that would come before council for consideration. The council members did not realize that by attending this session as quorum, they were participating in an illegal “meeting” of council.⁴
- 8 We have also encountered situations in which informal gatherings – including over meals – have violated the open meeting rules. For example:
- In November 2012, a quorum of council for the Township of Leeds and the Thousand Islands improperly discussed council business while decorating a float for the local Christmas parade.⁵

1 <https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Georgian-Bay-letter----Jan-30-meeting.pdf>

2 <https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Fort-Erie---EDTC-April-16.pdf>

3 <https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Elliot-Lake---closing-letter.pdf>

4 [https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brockton-\(1\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Municipality-of-Brockton-(1).aspx)

5 https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/TLTI-Nov13-Final-EN_1.pdf

- In January 2015, a quorum of council members for the Village of Casselman crossed the line between social exchange and business when they had lunch with developers to hear their opinions about reinvigorating the local development process.⁶
- 9 During the Ministry of Municipal Affairs' consultation on the Municipal Legislation Review, my Office encouraged clarification of the definition of "meeting" through legislative amendment. I am encouraged by the proposed revised definition of "meeting" contained in s.26(1) of Schedule 1 and s.21(1) of Schedule 2 to Bill 68. However, I believe that a more nuanced approach to the concept of meeting is necessary to preserve the intent of the open meeting requirements.
 - 10 The proposed meeting definition in s.238(1) of the *Municipal Act, 2001* reads:
 - "meeting" means any regular, special or other meeting of a council, or 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.
 - 11 The definition proposed for s.189(1) of the *City of Toronto Act, 2006* is identical, except for a reference to the word "city" before "council."
 - 12 Based on my experience with enforcement of the open meeting rules, I am concerned by the proposed definition's reference to a meeting taking place when "a quorum of members is present." Quorum is an important concept in determining whether a municipal gathering is a "meeting" subject to open meeting requirements. A municipal entity cannot validly conduct business without the minimum number of members required to constitute quorum. However, the proposed definition suggests that sufficient members of a council or local board must be physically present to establish quorum.
 - 13 My interpretation of this requirement is supported by the amendment proposed by s.26(2) of Schedule 1, introducing s.238(3.1). This provision would allow municipal councils, local boards and their committees to permit members to participate in open meetings through electronic means, provided they were not counted when determining quorum. It would provide municipalities with the same authority relating to electronic participation in meetings currently exercised by the City of Toronto (see s.189(4) of the *City of Toronto Act, 2006*.)

⁶ [https://www.ombudsman.on.ca/Resources/Reports/Village-of-Casselman-\(2\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Village-of-Casselman-(2).aspx)

- 14 I understand the policy reasons why official “meetings” would be restricted to situations where the requisite number of members is physically present. This requirement reinforces that the public is entitled to attend municipal meetings and witness democratic decision-making in process. However, the proposed amendments might have unintended consequences and reduce the transparency of municipal government. The current open meeting requirements are not restricted to meetings where a quorum of members is physically present. Again, several cases we have handled illustrate this point. For example:
- In 2009, our Office issued a report about council for the Township of Nipissing, which had exercised its decision-making authority through serial telephone conversations.⁷ This was a serious breach of the requirement to hold meetings open to the public.
- 15 However, under Bill 68, as now drafted, this type of conduct would escape censure. We have also found instances when municipal officials have violated the open meeting requirements by conducting business out of public view by discussing issues and making decisions over email. For example:
- In April 2015, council for the Town of Essex modified its council prayer in this manner⁸ and that same month, the Economic Development Committee for the Township of McKellar discussed an appointment to the Committee and voted on it through email and by phone.⁹

The proposed quorum requirements could insulate such exchanges from scrutiny and drive municipal decision-making back into the shadows.

7 Investigation into Council of the Township of Nipissing Special Meeting of April 25, 2008 <https://www.ombudsman.on.ca/Files/Sitemedia/Documents/Resources/Reports/Municipal/nipissingfinaleng.pdf>; <https://www.ombudsman.on.ca/Resources/Reports/Township-of-McKellar.aspx>; see also August 2014, Township of Joly, <https://www.ombudsman.on.ca/Files/sitemedia/files/Township-of-Joly-Closing-Letter-final.pdf> council members attended the municipal office at various times on the same day to sign a resolution; 2015, Village of Casselman, [https://www.ombudsman.on.ca/Resources/Reports/Village-of-Casselman-\(2\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Village-of-Casselman-(2).aspx) a quorum of council attended the municipal office separately to sign a letter to staff; 8 <https://www.ombudsman.on.ca/Resources/Reports/Town-of-Essex.aspx>

9 Investigation into whether the Economic Development Committee for the Township of McKellar held illegal closed meetings on May 5, 2015 and by email between April 12 and 24, 2015 <https://www.ombudsman.on.ca/Resources/Reports/Township-of-McKellar.aspx>; See also: **Investigation into a complaint about a meeting held by Council for the Township of Leeds and the Thousand Islands over email in February 2016, online:** [https://www.ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands-\(4\).aspx](https://www.ombudsman.on.ca/Resources/Reports/Township-of-Leeds-and-the-Thousand-Islands-(4).aspx); September 10, 2015, Amberley Gavel Ltd. Report to The Council of The Township of the Archipelago Regarding the Investigation of Closed Meetings of the Council of the Township of The Archipelago and Council’s Human Resources Committee, for discussion of using electronic mail in breach of the open meeting requirements.

- 16 Accordingly, I propose that a new section be added to the *Municipal Act, 2001* and *City of Toronto Act, 2006*, prohibiting members of council, local boards or their committees from materially advancing business or decision-making through electronic or other means. I believe that the following provision would reconcile the interest in limiting municipal meetings to physical gatherings and the need to preserve and promote transparency and accountability in local government:

Proposed new s.239 (1.1) *Municipal Act, 2001*:

Council, a local board or a committee of either of them shall not materially advance business or decision-making through electronic or serial communication.

Proposed new s. 190 (1.1) of the *City of Toronto Act, 2006*

City council, a local board or a committee of either of them shall not materially advance business or decision-making through electronic or serial communication.

Defining “local board”

- 17 It is my Office’s experience that some municipal bodies do not realize they are local boards, and therefore subject to the open meeting requirements. Both the *Municipal Act, 2001* and *City of Toronto Act, 2006* contain definitions of “local board” that list general categories of bodies coming within the definition that are “established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities.”¹⁰ However, the definition is refined further for different purposes. For instance, police services boards and public library boards are not considered local boards for the purpose of application of the open meeting requirements.¹¹
- 18 Although the general definition of local board is broad in scope, some organizations don’t realize that they come within this description. Many local board appointees are members of the public without past experience in municipal government or with the open meeting requirements. In addition, while regulations specify that municipal services corporations are not local boards,¹² it is often

10 Ss.1(1), 238(1) *Municipal Act, 2001*, ss.3(1), 190(7), *City of Toronto Act, 2006*. [ALSO: *Municipal Act* – ss. 10(6); 223.1; 269(1); 390; and *COTA* – ss. 433]

11S. 238(1) *Municipal Act, 2001*, s.190(7), *City of Toronto Act, 2006*.

12 S.21(1) *Municipal Services Corporations O.Reg 599/06*, *Municipal Act, 2001*; s.21(1) *City Services Corporations O. Reg 609/06*, *City of Toronto Act, 2006*.

unclear whether a municipal corporation is actually a municipal *services* corporation, or whether it is a local board required to abide by the open meeting rules. In my Office's role as a closed meeting complaint investigator, we have found several bodies to be local boards that had been previously unaware of this status. These organizations failed to follow the open meeting requirements because they did not know they were subject to them. For instance:

- The Township of Russell's Minor Variance Committee did not realize that it was a local board required to follow the open meeting rules.¹³
- The Niagara Central Airport Commission, a corporation that operates an airport on behalf of four municipalities, also failed to follow the rules, unaware that they applied.¹⁴

Having a clear and comprehensive definition of "local board" would assist local board members in complying with the open meeting rules as well as other obligations such as those established by the *Municipal Conflict of Interest Act*.

19 The courts have not provided a definitive interpretation of "local board," but our Office has identified four criteria relevant to the determination of whether an entity is a local board, based on a review of case law:¹⁵

1. The entity must be carrying on the "affairs of the municipality" (as required by legislation);
2. A direct link with the municipality must be found (either by way of legislation or authority from the municipality);
3. There must be a connection to or control by the municipality; and
4. There must be an element of autonomy.

20 The Standing Committee may wish to consider adding a definition of "local board" to both the *Municipal Act, 2001* and *City of Toronto Act, 2006*, which reflects these principles. In addition, there is no public policy purpose served by excluding municipal services corporations from the open meeting rules. All municipal corporations that would otherwise qualify as local boards through

13 <https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Russell---Sept-2.pdf>

14 <https://www.ombudsman.on.ca/Files/sitemedia/Images/Reports/Niagara-Sept20-tagged.pdf> see also Investigation into a meeting held by the City of Hamilton's Election Compliance Audit Committee on July 15, 2015 [https://www.ombudsman.on.ca/Resources/Reports/City-of-Hamilton-\(5\).aspx](https://www.ombudsman.on.ca/Resources/Reports/City-of-Hamilton-(5).aspx) (this case is currently the subject of a judicial review application brought by the City of Hamilton); Investigation into a complaint about meetings held by the Ad Hoc Committee of the Town of Goderich's Recreation Board of Management from July 2015 to May 2016 <https://www.ombudsman.on.ca/Resources/Reports/Town-of-Goderich.aspx>.

15 <https://www.ombudsman.on.ca/Files/sitemedia/Documents/Elliot-Lake---June-2014.pdf>

application of the four criteria above should be considered local boards that are subject to the open meeting requirements. These changes would provide clarity for municipal sector bodies and more consistent application of the principles of transparency, accessibility and openness in municipal governance.

21 I propose that the definition of “local board” be amended as follows:

Proposed new wording for ss.1(1) and 238(1) *Municipal Act, 2001* (in bold):

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, **and which:**

- (1) carries on the affairs of the municipality;**
- (2) is directly linked to the municipality by legislation or authority derived from the municipality;**
- (3) is connected to or controlled by the municipality; and**
- (4) has an element of autonomy.**

s.238(1)

In this section and in sections 239 to 239.2,

...

“local board” does not include police services boards or public library boards **but does include municipal services corporations;**

Proposed new wording for ss.3(1) and 190(7) *City of Toronto Act, 2006* (in bold):

s.3(1)

“local board” means a city 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, **and which:**

- (1) carries on the affairs of the city;**
- (2) is directly linked to the city by legislation or authority derived from the municipality;**

- (3) is connected to or controlled by the city; and
- (4) has an element of autonomy.

s.190(7)

In this section and in sections 239 to 239.2,

...

“local board” does not include police services boards or public library boards **but does include city services corporations;**

Response to closed meeting reports

- 22 Bill 68 proposes that a municipality or a local board that receives a report from a closed meeting investigator appointed under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* will be required to pass a resolution stating how it intends to address the report.¹⁶ However, the same obligation does not apply to closed meeting complaint investigation reports issued by my Office. To ensure consistency and promote greater accountability, this requirement should apply equally to reports that I make to municipalities and local boards. The following modifications could be made to the Bill to achieve this:

Proposed new wording for s.28, Schedule 1 *Municipal Act, 2001* (in bold), amending s.239.2(12):

(12) If a municipality or a local board receives a report under subsection (10) **or under s.14.1(7) of the *Ombudsman Act***, the municipality or the local board, as the case may be, shall pass a resolution stating how it intends to address the report.

Proposed new wording for s.23, Schedule 2 *City of Toronto Act, 2006* (in bold), amending s.190.2 (11.1):

(12) If the City or a local board receives a report under subsection (10) **or under s.14.1(7) of the *Ombudsman Act***, the City or the local board, as the case may be, shall pass a resolution stating how it intends to address the report.

16 S.28 of Schedule 1 would amend s.239.2 of the *Municipal Act, 2001* by adding subsection (12): s. 23 of Schedule 2 would amend s.190.2 of the *City of Toronto Act, 2006* by adding subsection (11.1).

Exceptions to the open meeting rules

- 23** The open meeting provisions of the *Municipal Act, 2001* and *City of Toronto Act, 2006* are remedial legislation promoting accessibility, transparency and accountability in municipal governance. Any exceptions to the rule that meetings should be open to the public should be limited and narrowly interpreted. Bill 68 proposes that several exceptions be added to the list, as follows:

Schedule 1, Municipal Act, 2001

27. Subsection 239(2) of the Act is amended by adding the following clauses:

(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.

Schedule 2, City of Toronto Act, 2006

22. Subsection 190(2) of the Act is amended by striking out “or” at the end of clause (f) and by adding the following clauses:

(h) information explicitly supplied in confidence to the City 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 City 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 City 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 City or local board.

- 24** Expanding the circumstances when municipalities may meet behind closed doors requires caution. The remedial nature of the open meeting rules should be respected and the exceptions drafted as narrowly as possible.
- 25** I am particularly concerned about proposed new exception (k), which speaks generally about “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 a municipality or local board.” The language of this clause is extremely broad and might permit discussions about numerous items, which currently must take place in public view, to occur behind closed doors.
- 26** My fellow Officer of the Legislature, the Information and Privacy Commissioner, has recommended that the proposed amendments to the exceptions to the open meeting requirements be struck from Bill 68 unless the Ministry of Municipal Affairs provides detailed justification for expanding the exceptions to the open meeting requirements. Or, in the alternative, if evidence justifying the need for the proposed open meeting exemptions is presented, that Schedules 1 and 2 of Bill 68 be amended.
- 27** The Information and Privacy Commissioner is the expert in access to information issues in Ontario’s municipal sector, and I fully support his submission relating to these proposed exceptions. The public’s right to witness local government conduct business and make decisions should not be removed unless there are strong and compelling reasons to do so.

Local complaints resolution

Complaint policies

- 28 My Office encourages all municipalities to develop policies and procedures to provide a transparent and consistent method for dealing with public complaints. Many have implemented local complaint processes. At present, the City of Toronto is the only municipality required to establish a formal complaint mechanism through appointment of a city Ombudsman. However, legislating that all municipalities must, at a minimum, have a complaint process would enhance municipal administration throughout the province. This change could be accomplished by adding a clause to s.270(1) of the *Municipal Act, 2001*, setting out the subjects on which a municipality must adopt and maintain a policy.
- 29 For instance, Bill 68 could be amended by adding the following to s.33 of Schedule 1:

Proposed new s.270 (1) 9 Municipal Act, 2001:
270(1)

...

9. Resolving public complaints against the municipality, local boards, or a committee of either of them.

Fees

- 30 My Office's services, both as a closed meeting complaint investigator and overseer of public sector administration, are free of charge to those who file and respond to complaints. This is consistent with public sector principles of accessibility and accountability. Unfortunately, there are several municipalities that charge fees to individuals who wish to lodge complaints under various accountability mechanisms. In some cases, the fee is returnable if the complaint is supported. My Office is aware of 12 municipalities that charge for closed meeting investigations, three that set fees for complaining to an integrity commissioner and one that requires payment to access a municipal ombudsman. The fees charged range from \$5 to \$250, with one municipality charging individuals \$500 per complaint, if they file more than two.
- 31 The price for municipal accountability should not be borne by individual constituents who raise concerns. There should be no financial barrier to filing complaints with a closed meeting investigator, municipal ombudsman, integrity commissioner or other municipal oversight body. Enhanced accessibility to

municipal accountability mechanisms could be achieved by adding the following section to the *Municipal Act, 2001* and *City of Toronto Act, 2006*:

Proposed new s.391(1.2) to the *Municipal Act, 2001* and s.259(1.2) to the *City of Toronto Act, 2006*

No fees shall be charged to persons for filing a complaint to a closed meeting complaint investigator, ombudsman, integrity commissioner, lobbyist registrar or auditor general.

Integrity commissioners

32 I fully support Bill 68's provisions relating to mandatory codes of conduct and use of the services of an integrity commissioner to enforce them. However, I am concerned that without clear legislative direction, some municipalities may limit public access to integrity commissioners. For instance:

- The City of Brantford does not allow members of the public to bring complaints under its code of conduct.
- The City of Oakville, while allowing the public to bring complaints, will not forward the complaint to the integrity commissioner without council endorsement.

33 In the case of applications to an integrity commissioner about an alleged contravention of the *Municipal Conflict of Interest Act*, Bill 68 proposes that "any person" can apply to the commissioner.¹⁷ Similar wording should be used to ensure the right of all members of the public to file complaints with local integrity commissioners. For instance, the provision requiring establishment of codes of conduct could be modified as follows:

Proposed new wording for s.18, Schedule 1 *Municipal Act, 2001* (in bold), amending s.223.2(1):

A municipality shall establish codes of conduct for members of the council of the municipality and of its local boards, **which provide for any person to complain about an alleged contravention of the code.**

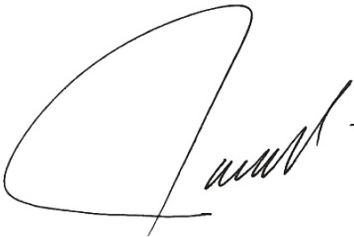
Proposed new wording for s.15, Schedule 2 *City of Toronto Act, 2006* (in bold), amending s.157(1):

¹⁷ S.22, Schedule 1, introducing s.223.4.1(2); s.18, Schedule 2, introducing s.160.1(2).

157. (1) The City shall establish codes of conduct for members of city council and members of local boards (restricted definition), which provide for any person to complain about an alleged contravention of the codes.

Conclusion

- 34 As an independent and impartial overseer of municipal administration, I have an interest in ensuring fair, transparent, and accountable municipal administration. I appreciate the Standing Committee's consideration of my comments on Bill 68. Adoption of my proposed modifications to the Bill would enhance municipal governance and strengthen municipal oversight for the benefit of Ontario's citizens.



Paul Dubé
Ombudsman of Ontario