

what you need to know about:

# closed meetings

Which local boards and committees are bound by section 239?

Has the procedure by law been reviewed and updated recently?

©2013 Local Authority Services Ltd.  
Is this a meeting?

Are the members of council, local boards and committees regularly trained in the meeting rules?

Is the reason for the closed meeting permitted by section 239?

Is it necessary to hold the meeting behind closed doors?



©2013 Local Authority Services Ltd.

# WHAT YOU NEED TO KNOW ABOUT CLOSED MEETINGS

## TABLE OF CONTENTS

Introduction.....	4
Section 1: Permitted reasons for a closed meeting under section 239.....	5
The security of the property of the municipality or local board.....	5
Personal matters about an identifiable individual, including municipal or local board employees.....	6
A proposed or pending acquisition or disposition of land by the municipality or local board.....	7
Labour relations or employee negotiations.....	7
Litigation or potential litigation.....	8
Advice that is subject to solicitor-client privilege.....	8
Consideration of a request under the <i>Municipal Freedom of Information and Protection of Privacy Act</i> ...	10
A matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.....	10
Educational or training sessions.....	11
Section 2: Process for Closed Meetings.....	12
Public resolution.....	12
Notice.....	13
Voting in a closed meeting.....	14
Who may be present at a closed meeting.....	16
Reporting out of a closed meeting.....	17
Record of closed meetings.....	18
Section 3: Procedure By-law.....	19
Section 4: Committees and local boards.....	20
Local Boards.....	20
Committees.....	21
Section 5: What is a meeting?.....	22
Section 6: Closed Meeting Investigators.....	24
Section 7: Closed Meeting Quick Reference Guide.....	25
Appendix 1: Excerpts from The Municipal Act.....	26
What is LAS (Local Authority Services Limited)?.....	Inside Back Cover

# INTRODUCTION

The theme of the 2006 amendments to *the Municipal Act* and other statutes affecting local government in Ontario was that municipal officials, both elected and staff, must be accountable and transparent. One of the primary examples is the requirement for meetings of councils, local boards and their committees to be open to the public. Notice of meetings must be provided to afford the opportunity for the public to attend, and decisions are to be made at public meetings. In fact, decisions are not permitted by a council, local board or committee when in closed session, however, votes are permitted for procedural matters and to give direction.

This booklet is intended as a resource for members of the LAS Closed Meeting Investigator Program<sup>1</sup>, to help these municipalities, including members of councils, local boards and committees, to assess existing practices for conducting closed meetings. **Questions about the appropriateness of specific closed meetings for any municipality should however be directed to your solicitor.**

The format of this booklet is that of a 'self-assessment checklist' for municipal officials and staff to assess local municipal officials' conduct. Included at the end of this booklet is a 'Closed Meeting Quick Reference Guide', which is intended as a reference for members at council and committee meetings to assess compliance with *the Municipal Act*.

This booklet is divided into topics with questions to form a self-assessment checklist. Readers are encouraged to answer questions as you proceed through the booklet. The self assessment questions contained in the booklet are intended to aid members of council, local boards, committees and senior staff in understanding the rules relating to closed meetings. Answering the questions will help you assess how well your municipality is complying with the statutory requirements for a closed meeting.

---

<sup>1</sup> For details on the LAS Program see inside back cover.

# SECTION ONE:

## Permitted reasons for a closed meeting - section 239.

There is a limited ability for councils, local boards and their committees, to hold closed meetings. The list of reasons is found in subsections (2), (3) and (3.1) of section 239 of *The Municipal Act* (included for reference in Appendix 1). The reasons include:

- ***The security of the property of the municipality or local board***
- ***Personal matters about an identifiable individual, including municipal or local board employees***
- ***A proposed or pending acquisition or disposition of land by the municipality or local board***
- ***Labour relations or employee negotiations***
- ***Litigation or potential litigation***
- ***Advice that is subject to solicitor-client privilege***
- ***Consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act****
- ***A matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act***
- ***Educational or training sessions***

Members need to be familiar with the list of permitted matters for which a closed meeting may be held. In addition, whether to move into a closed meeting is discretionary; that is, the council, local board or committee decides

whether a closed meeting is required for a particular matter. For example, if an award were being presented to someone in the community, it could be awarded at a closed meeting because it is a personal matter about an identifiable individual. Clearly though, this should be a cause for celebration and the community should be aware of the award. There would therefore be no need to meet behind closed doors.

### **The security of the property of the municipality or local board**

This first exception to the open meetings rule covers more than the locks on the doors at municipal facilities. Property includes not only the physical assets of the municipality but also some of its financial records and intellectual property. Security of information and records, both in hard copy and electronic, are included in this exception.

#### Question # 1:

In your municipality, is this exception used for matters relating to security of physical assets and/or information records?    Yes    No

## PERMITTED REASONS

### Personal matters about an identifiable individual, including municipal or local board employees

The first thing to note is that this exception refers to “personal” not “personnel”. It extends beyond municipal staff.

The *Municipal Freedom of Information and Protection of Privacy Act* is a provincial statute that regulates, and prohibits in some cases, the release of municipal records. In section 2 of the Act there is a definition of “personal information”, which reads:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution

by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.”

This exception deals with personal information about an individual. It does not apply to corporations nor does it apply to business related information about an individual. While the definition in the *Municipal Freedom of Information and Protection of Privacy Act* is not binding in deciding whether a particular matter should be held in closed session or not, it does provide guidance to members as to what constitutes personal information.

The Clerk in the case of Council, or the secretary in the case of a local board, must take this definition into account when determining whether to recommend that a matter be deliberated in closed session.

**Question # 2:** In your municipality, is appropriate consideration given to what constitutes a personal matter about an identifiable individual before moving into a closed meeting?

Yes No

# PERMITTED REASONS

## A proposed or pending acquisition or disposition of land by the municipality or local board

It makes sense that a council or local board may meet in closed session to direct staff, a lawyer or agent respecting the acquisition or disposition of real property. It would be patently unreasonable for a council or local board to give instructions in public to someone negotiating on behalf of the municipality or local board.

Land in this instance includes land, buildings and fixtures. Conveyances include lease, license, easement or outright sale. The conveyance may be for valuable consideration or at a nominal price.

This exception does not include the decision to authorize the acquisition or disposition of lands. A municipality may only acquire or dispose of land by by-law, which must be enacted at an open meeting of council.

### Question # 3:

In your municipality, is the meeting closed only for the purpose of giving direction or receiving information when dealing with an acquisition or disposition of land?

Yes No

## Labour relations or employee negotiations

This exception allows senior administrators to meet with council or a local board in a closed meeting to obtain instructions, or to provide an update on labour relations or employee negotiations.

Examples could include:

- discussing a bargaining strategy for collective bargaining with a union,
- a staff reorganization, or
- compensation for non-union or unionized employees.

### Question #4:

In your municipality, is the meeting closed only for the purpose of senior management obtaining instructions from council or providing an update on labour relations or employee negotiations? Yes No

# PERMITTED REASONS

## Litigation or potential litigation

It is imperative that councils and local boards can be briefed and given direction on matters that are either being litigated or where the likelihood of litigation is real, in a closed meeting environment.

For the purpose of the closed meeting exception the word “litigation” includes both court and administrative tribunal proceedings. For example, a closed meeting could be held to prepare for an upcoming hearing before the Ontario Municipal Board.

### Question #5:

In your municipality, is the meeting closed only for the purpose of being briefed, or giving instructions on a matter under litigation, or in circumstances where there is a real and imminent possibility of litigation potential litigation?                      Yes      No

## Advice that is subject to solicitor-client privilege

The council or local board is the client and is entitled to receive advice from its lawyer. The advice may be given with the lawyer present or it may be given through staff. If the lawyer is not present it is recommended that the legal advice be provided in writing by the lawyer to the members at the closed meeting.

Before council or a local board convenes a closed meeting using this exception, staff should confirm with the lawyer that the advice being given qualifies as advice that is subject to solicitor-client privilege.

## The Nature of Solicitor-Client Privilege

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. It ensures that clients will feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system may properly function<sup>2</sup>.

The Supreme Court of Canada adopted the following statement to explain solicitor-client privilege:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance

<sup>2</sup> Smith v. Jones, [1999] 1 S.C.R. 455, at para. 46.



# PERMITTED REASONS

permanently protected from disclosure by himself or by the legal adviser, except the protection be waived<sup>3</sup>.

Communication will only be found to be subject to solicitor-client privilege if it is:

- (i) between a client and his or her solicitor, where the solicitor is acting in a professional capacity;
- (ii) made in relation to the seeking or receiving of legal advice; and
- (iii) intended to be confidential<sup>4</sup>.

Although at one time the privilege was restricted to communications exchanged only during the course of litigation, it has been extended by judicial interpretation to cover any consultation for legal advice, whether litigious or not<sup>5</sup>.

## Question #7:

In your municipality, is the solicitor's advice given to council or the local board in person or in writing?

Yes      No

## Question #6:

In your municipality, is the advice a proper subject matter for solicitor-client privilege?

Yes      No

<sup>3</sup> Solosky v. The Queen, [1980] 1 S.C.R. 821, at p. 835 ("Solosky"); See also, Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860, at pp. 872-873 ("Descôteaux").

<sup>4</sup> Solosky, *ibid*, at p. 837.

<sup>5</sup> Solosky, *ibid*, at p. 834.

## PERMITTED REASONS

### Consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act*

Unlike all of the discretionary exceptions referred to above that are found in subsection 239 (2) of the *Municipal Act*, the exception in subsection (3) is mandatory. That is, if council, a local board, or commission is the head of the institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act* then it must meet in closed session for the consideration of a request. Council has no discretion.

The head of the institution under that Act determines what records will be released when a request is made. In most municipalities, council has delegated the responsibility of “the head” to a member of staff, usually the Clerk, in which case this exception to the open meeting rule would not apply.

#### Question #8:

Has council delegated the responsibilities of the head for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*?

Yes No

### A matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act

There may be circumstances where council will hold a closed meeting for a matter under a statute other than the *Municipal Act*. The statute authorizing the closed meeting will indicate whether council has discretion to hold the meeting in public or closed session, or it may require that the session be closed. Municipal staff should advise council in this regard.

For example, the *Emergency Management and Civil Protection Act* imposes certain closed meeting requirements.

#### Question #9:

If a meeting is being closed under a statute other than the *Municipal Act*, is staff clearly advising members what Act and whether it is discretionary or mandatory to close the meeting to the public?

Yes No

# PERMITTED REASONS

## Educational or training sessions

Subsection 239 (3.1) was added to the *Municipal Act* in Bill 130, the 2006 amendments. The subsection reads as follows.

(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.

Ongoing training of members of council, local boards or committees is a necessity. There is discretion whether the training is done in public or at a closed meeting. If the council, local board or committee chooses to receive training at a closed meeting then the restrictions found in subsection (3.1) apply. When utilizing this reason for a closed meeting there can be no debate on an issue, and no member may encourage other members to support a particular position. This restriction includes merely discussing a matter in a manner that is intended to assist in understanding the business of the municipality or local board.

There is also a requirement for a public resolution authorizing the closed meeting that must specifically identify that the purpose of the meeting is for training in accordance with (3.1). Also, council, a local board or committee is not able to consider motions at the meeting, where the motion would advance the business of the municipality or local board.

This exception has been used by some municipalities to train new councils at the beginning of a term; however, the question to ask is: **why is it necessary to conduct training in closed meetings?** Much of the training provided to members could and should be done at an open meeting.

### Question #10:

In your municipality, is the public resolution authorizing a closed meeting for education and training setting out the requirements of section 239?

Yes No

### Question #11:

In your municipality, are members precluded from offering opinions or advancing the business during meetings closed to the public for education and training? Yes No

## SECTION TWO:

### Process for Closed Meetings

#### Public Resolution

Before holding a closed meeting council, a local board or a committee must pass a resolution at a public meeting. This resolution has two aspects:

- it must state the fact that a closed meeting is to be held, and
- the public resolution must state the general nature of the matter or matters to be considered at the closed meeting.

More than one item for consideration can be included in the public resolution. For clarity you need to state the nature of each item whether the same nature or not.

The level of detail provided in the public resolution will depend on the circumstances of each item. At a minimum the wording of the exception in subsection 239(2) should be used. However, if more information about the general nature of the item to be considered can be made public without detrimentally affecting the municipal position, or that of an affected person, then it is recommended that it be included in the public resolution.

In the closed meeting, council, the local board or committee is limited to the consideration of those items expressly referred to in the

public resolution. There can be no discussion or consideration of any other matter at the closed meeting.

The public resolution must be passed before the closed meeting. It may be passed immediately before the closed meeting or to authorize a closed meeting at a specified date and time in the future.

Council may also move into a closed meeting in the middle of a public debate. Where council wishes to deliberate a matter or receive information that falls within one of the exceptions it may move into a closed session once the public resolution is passed.

If a closed meeting is to be held for education or training, then the public resolution must state that the meeting is closed under subsection (3.1) in addition to the general nature of the subject matter.

#### Question # 12:

In your municipality, is there a public resolution passed by council authorizing every closed meeting?

Yes No

# THE PROCESS

## Question # 13:

In your municipality, does the public resolution authorizing the closed meeting provide sufficient detail of the general nature of the matter(s) to be considered?

Yes No

## Question # 14:

In your municipality, are only matters authorized by the public resolution considered at a closed meeting?

Yes No

## Notice

Section 238 requires that every municipality and local board have a procedure by-law. It also requires that the procedure by-law provide for notice to the public of all meetings, both open and closed. This includes regular and special meetings of the council, local boards and committees. The form and nature of this notice is to be set out in the municipal procedure by-law. This is a key element of ensuring transparent and accountable local government.

If notice is given of a public meeting and a closed meeting forms part of that meeting then no specific notice is required for the closed portion of the meeting. On the other hand, if a meeting is being held that is closed to the public then public notice is required.

## Question # 15:

In your municipality, is public notice given by the clerk for all meetings of council and committees, both open and closed?

Yes No

## Question # 16:

In your municipality, is the notice given for meetings in compliance with your municipality's procedure by-law?

Yes No

# THE PROCESS

## Voting at a Closed Meeting

The question of voting at closed meetings has been confusing for councils, committees, and staff. The general principle found in subsection 239 (5) provides that “a meeting shall not be closed during the taking of a vote”. Some have read this and concluded that there can be no votes during a closed meeting; subsection 239 (6) does, however, provide an exception to this general principle:

### 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.

Section 244 provides that except in the case of votes for the appointment of a head of council or presiding officer, no vote shall be taken by ballot or by any other method of secret voting, and every vote so taken is of no effect.

### For clarity:

Subsection 239(6) sets forth the conditions required to hold a vote during a closed meeting:

- the meeting is closed in accordance with subsections (2) or (3), which contain the list of permitted reasons to hold a closed meeting.
- the vote is for a procedural matter, which would include motions such as approving the minutes of a previous closed meeting, adjournment or deferring consideration of a motion.
- the vote is for giving directions or instructions to staff or persons retained by the municipality, but cannot be a decision or corporate act. The motion should clearly direct staff or an agent to undertake a certain action.

For example, it would be appropriate for council to pass a motion directing the CAO to negotiate the acquisition of land. The motion would set out the details of the instructions so that both members and the CAO are clear on the direction. The motion would not give the CAO authority to commit the municipality, instead any final agreement would come back to council for approval.

# THE PROCESS

Recommended practice is for all direction motions to be in writing. When possible the motion should be prepared in advance of the meeting and provided to members along with a written report so that members can be prepared for the meeting.

There is no authority for votes other than those authorized in section 239, to be conducted in a closed meeting; this would include “straw votes” or requests for consensus.

Municipalities and local boards are encouraged to use a standard form for all direction motions presented at a closed meeting. It should read as follows:

- THAT (fill in the officer or agent) is hereby directed to (fill in the direction).

For example:

THAT the Chief Administrative Officer is hereby directed to negotiate the acquisition of the property municipally known as 2 Main Street with an upset limit of \$100,000 and report back to...

## Question # 17:

In your municipality, are procedural motions and motions for giving direction the only motions presented at closed meetings?

Yes No

## Question # 18:

In your municipality, are written motions presented in closed meetings?

Yes No

## Question # 19:

In your municipality, is a standard form utilized for direction motions?

Yes No

# THE PROCESS

## Who may be present at a closed meeting?

The council, local board or their committee determines who may attend a meeting that has been closed in accordance with section 239.

Should staff be in attendance? The clerk, deputy clerk or acting clerk, as delegated by the clerk, must be present to record the proceedings of a meeting of council, and an officer must be present to record the proceedings of a meeting for a committee or local board. The person taking the minutes must be knowledgeable in the requirements for the taking of minutes as set out in subsection 228 (1) of the *Municipal Act*.

It is the practice in many municipalities to have all department heads present at all closed meetings of council. This is a matter for council to determine. Members of council, local boards and their committees should be wary of holding closed meetings with anyone present, aside from municipal or board staff and advisors or agents of the municipality or local board.

Members should also familiarize themselves with the requirements imposed by the *Municipal Conflict of Interest Act* with respect to closed meetings.

Question # 20:

In your municipality, are all department heads present at closed meetings of council?

Yes

No



# THE PROCESS

## Reporting Out of a Closed Meeting

There is no requirement in the *Municipal Act* for council, a local board or committee to report out in a public session after the completion of a closed meeting. It is however a recommended practice as it helps close the loop in terms of the transparency of the closed meeting process.

### **What would get reported out and what should not?**

After a closed meeting, the chair of the closed meeting should verbally announce in the open meeting that a closed meeting was held. It is useful to follow the form of the public resolution in reporting out. Using the example of the resolution whereby the CAO was directed to negotiate the acquisition of land as on page 15 of this booklet, the meeting Chair would state:

“A closed meeting was held. The one item considered was a matter respecting the acquisition of property. There is nothing further to report.”

If at the next closed meeting the CAO reported to council that satisfactory negotiations had been concluded and was now ready for council approval at a public meeting by the enactment of a by-law, then the report out would be different:

“A closed meeting was held. The one item considered was a matter respecting the acquisition of property. The Clerk has been

directed to place a by-law before council for the acquisition of 2 Main Street.”

There should **not** be a motion passed in open session which authorizes an action taken in the closed meeting. It is not required and may have the effect of making public the records of the closed meeting.

### Question # 21:

In your municipality, is there appropriate verbal reporting at the public meeting following a closed meeting?

Yes

No

# THE PROCESS

## Record of Closed Meetings

Minutes must be taken and kept of all meetings of council, local boards and committees. That includes both meetings open to the public and closed meetings.

Section 239, subsections (7) and (8) set out the requirements for taking minutes. In the case of a meeting of council the minutes shall be taken by the clerk, deputy clerk or acting clerk. Minutes of local boards or committees shall be taken by an appropriate officer. In the case of committees of council, the clerk should determine who will take the minutes, and that person should be trained in how to record the proceedings in accordance with the legislation. The minute-taker cannot be a member of council, the local board or committee.

Minutes are the corporate record. The clerk or person authorized to take the minutes must do so in accordance with subsection 239 (7) which requires that the resolutions, decisions and other proceedings be recorded “without note or comment”. This is a clear indication that the minutes are not to be a full account of all that transpired at the meeting including who said what on a particular issue. Rather, the minutes are a record of the actions taken.

### Question # 22:

In your municipality, are council, local board and committee proceedings recorded without note or comment?

Yes No

### Question # 23:

In your municipality, is the clerk, acting clerk or deputy clerk recording the proceedings of council?

Yes No

### Question # 24:

In your municipality, is an appropriate officer, trained by the clerk, taking the minutes of local board and committee meetings?

Yes No

## SECTION THREE:

### Procedure By-Law

As indicated earlier, every municipality and local board must have a procedure by-law. This key document determines not only the rules for conducting meetings of council and its committees, but also sets out the governance model, i.e. the committee structure for the organization. This by-law should be reviewed by council or the local board at least once during each term of council.

It is important that the procedure by-law provide sufficient notice to the public for all meetings.

#### Question # 25:

In your municipality, has council or the local board reviewed the procedure by-law during the current term of council?

Yes      No

# SECTION FOUR:

## Committees and Local Boards

### **What entities are required to comply with Section 239?**

The rules for closed meetings extend beyond council itself. Section 238 defines “committees” and “local boards” for the purposes of the closed meeting rules in section 239.

### **Local boards**

The general definition of local board is found in section 1 of the *Municipal Act*:

“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.

Section 238 modifies this definition by stating that for the purposes of the closed meeting rules in section 239, a local board does not include a police services board or a public library board.

Reading the two sections together, the definition of what boards are required to comply with the section 239 closed meeting rules is:

- a municipal service board,
- transportation commission,
- board of health,
- 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.

### Question # 26:

In your municipality, are all of the local boards subject to the section 239 requirements familiar with those requirements?

Yes      No

# COMMITTEES & BOARDS

## Committees

The definition of committee in section 238 has caused considerable confusion. It provides that, for the purposes of section 239, a committee means,

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

Council or local board committees are exempted from the closed meeting rules if there are more members of the public on the committee than members of council. As an example: if council created a committee of three members two of whom are members of council then this committee would be bound by the section 239 requirements. If however, council created a three person committee with two members of the public and one member of council, the committee would not be bound by the closed meeting rules.

Council may choose to have the section 239 requirements apply to all of its committees. It would do so by wording its procedure by-law to provide that the closed meeting rules in section 239 apply to all committees. This would be a demonstration of transparency beyond the legislated requirement. It is important to advise all committees in writing if this is a council's approach so that they are aware of the requirements for meetings, including closed meetings.

If council or a local board creates a committee consisting solely of one member

of council or the local board, one hundred percent of the membership of the committee would be members of the council or local board. As such, when that member met with staff or members of the public in his/her capacity as a committee, it would be a meeting, and all requirements of section 239 and the municipal procedure by-law would apply: i.e. public notice, resolutions, agenda, minutes, etc. Councils should exercise care before creating one person committees.

### Question # 27:

In your municipality, are municipal officials, elected and administrative, familiar with the committees that fall within the section 238 definition of “committee”?      Yes      No

### Question # 28:

In your municipality, does the council or local board require, in the procedure by-law, that all committees comply with the closed meeting rules in section 239?      Yes      No

### Question # 29:

In your municipality, are any committees composed solely of one member of council complying with the provisions of section 239 and the municipal procedure by-law?      Yes      No

## SECTION FIVE:

### What is a meeting?

There is an expectation in the *Municipal Act* that local governments will make decisions and set policy in an open and transparent way. The legislative requirements require that decisions are made at duly constituted meetings, that is meetings conducted in accordance with the procedure by-law, with respect for requirements such as quorum and decisions made by majority votes of those present at the meeting.

#### ***Are there circumstances when the presence of a majority of members of council at an event would constitute a meeting of council?***

Maybe; the test is not the number present but rather what is the purpose of the gathering. If, for example all members of council are present at a memorial service for a citizen, this would not constitute a meeting of council. This could however change if the members gathered after the service to discuss a municipal matter. If a discussion deals with council issues or advances the business of the municipality it would be a meeting.

#### ***Do the members have to be physically present to constitute a meeting?***

If decisions are being made or municipal business advanced using electronic means by all or a majority of members then that very well could be a meeting.

One of the expectations on members of municipal councils is that they will influence other members. It is part of the job. For example, it is normal practice for members to speak one on one with other members about an issue before council. All members (council, local boards and committees) should however be cautious when getting together or communicating electronically as a group outside the formal municipal meeting structure.

It is imperative that members of council, local boards and their committees be trained in the legislative requirements related to open meetings. This training should be ongoing, and it falls upon the clerk to ensure that members of council, local boards and their committees are trained and familiar with the requirements. The training should extend to include the public.

## MEETING DEFINED

### Question # 30:

In your municipality, do members avoid the use of electronic devices for gathering consensus on upcoming municipal issues?

Yes No

### Question # 31:

In your municipality, is there regular training offered for members of council, members of local boards, members of their committees, and senior staff related to the open meeting requirements?

Yes No

©2013 Local Ac...

## SECTION SIX:

### Closed Meeting Investigators

Since 2008 any person may request an investigation as to whether a municipality or local board has complied with section 239 of the *Municipal Act* or its procedure by-law when it held a meeting closed to the public. It is important to note that the investigation is in regards to whether there has been compliance with the requirements in section 239 and the procedure by-law, not on the actual decision(s) made during a closed meeting.

Councils and local boards are able to appoint an investigator to review these complaints. If the council or local board has not appointed an investigator, at the time of the complaint, then the investigation will be undertaken by the provincial Ombudsman whose powers and duties for closed meeting investigations are found in the *Municipal Act*. The powers and duties are the same for all closed meeting investigators

When council or a local board is deciding whether to appoint an investigator, the *Municipal Act* requires it to consider the independence, impartiality and credibility of the investigator and the investigator's process. In addition, there is a duty of confidentiality with respect to the investigator's activities, including the identity of the complainant. The municipality should

also consider the expertise and practical municipal experience of the investigator.

An investigation should result in a report from the investigator to the council or local board, as the case may be. The Act requires that the report be made available to the public. The recommended practice is to include the report on the next regular meeting of council or the local board or on the agenda of a special meeting held in advance of the next regular meeting called for the purpose of receiving the report.

#### Question # 32:

In your municipality, has council appointed a closed meeting investigator who is knowledgeable in the requirements of municipal legislation?      Yes      No

#### Question # 33:

In your municipality, if there has been an investigation, was the report made available to the public in a timely manner?      Yes      No      N/A



# SECTION SEVEN:

## Closed Meeting Quick Reference Guide

This guide is to assist members of councils, local boards and their committees in determining whether a closed meeting is in compliance with section 239 of the *Municipal Act*. Members are encouraged to bring this with them to all closed meetings and should refer to the various sections of the What You Need to Know About Closed Meetings booklet for more detailed information.

You must answer “YES” to all questions to be in compliance with the *Municipal Act*.

Below is intended as a reference for members at council and committee meetings to assess compliance with the *Municipal Act*.

1) ***Was a resolution passed before going into the closed meeting stating that there will be a closed meeting AND also the general nature of the matter(s) to be deliberated?***

YES NO

2) ***Was public notice of the meeting given by the Clerk or local board/committee secretary?***

YES NO

3) ***Is the subject matter of the closed meeting a permitted reason for holding a closed meeting?***

YES NO

4) ***Were the only votes taken at the closed meeting for either procedural matters or giving direction?***

YES NO

5) ***Was the discussion at the closed meeting limited to the matter(s) referred to in the public resolution authorizing the meeting?***

YES NO

6) ***Was the Clerk (in case of council) or the secretary (in the case of a local board or committee) in attendance to take the minutes?***

YES NO

## Excerpts from the *Municipal Act*

### Procedure by-law

#### Definitions

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

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

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

“meeting” means any regular, special or other meeting of a council, of a local board or of a committee of either of them. (“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).

#### 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).

## **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.

## What is LAS (Local Authority Services Limited)?

LAS was created in 1992 by the Association of Municipalities of Ontario (AMO) as a wholly owned subsidiary company, but with its own Board of Directors and governance. LAS is incorporated under the laws of Ontario and is mandated to work with Ontario municipalities, as well as organizations from the broader public sector.

LAS offers a Closed Meeting Investigator Service to any interested Ontario municipality. Currently 133 local governments take advantage of this cost effective LAS program.

This program helps municipalities proactively respond to 2008 changes to the *Municipal Act* related to 'Closed Meeting' Investigations, which allow for any person to request that an investigation be undertaken respecting whether a municipality, local board, or a committee of either, has complied with the closed meeting rules contained within the Act.

LAS chose to offer this service because it is complementary to our existing program of providing services where value can be enhanced through group procurement, and because it helps to demonstrate that

municipalities are mature, accountable orders of government, capable of managing their own affairs.

LAS Program members are provided with various educational materials, such as this booklet, to help ensure continued learning related to the closed meeting rules.

To deliver this program, LAS has contracted a third party, Amberley Gavel Ltd., which completes all required investigation activities. Their investigators are located throughout the province, some are bilingual, and all have extensive municipal expertise and experience.

Were the minutes prepared in a manner required by the  
Municipal Act?

What was reported out in public after the closed meeting?

Were the proper people in attendance at the meeting?

Were the votes at the closed meeting properly taken?

Has the public resolution been passed in a proper form?



200 University Avenue, Toronto, ON., M5H 3C6  
p: 416.971.9856  
f: 416.971.6191  
e: [las@las.on.ca](mailto:las@las.on.ca)  
[www.las.on.ca](http://www.las.on.ca)