Information and Privacy Commissioner of Ontario

Comments of the Information and Privacy Commissioner of Ontario on the Proposed Open Meeting Amendments in Bill 68

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Commissioner
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Open meetings are a necessary and foundational component of open government. They allow the public to scrutinize the activities of elected officials and public servants to ensure that they are acting in the public interest. This enhances the public's ability to hold elected officials accountable and facilitates public participation in the policy and decision-making process of government. Except when necessary, municipal public officials should conduct their business in open meetings, not behind closed doors. Accordingly, the *Municipal Act* requires all meetings to be open to the public, subject to limited exceptions defined in the legislation.

Bill 68, *Modernizing Ontario's Municipal Legislation Act, 2017* (Bill 68) proposes, among other things, to amend the open meeting exceptions at section 239(2) of the *Municipal Act* and section 190(2) of the *City of Toronto Act*.[1] The proposed amendments would permit a municipality or local board to close all or part of a meeting to the public if the subject matter being considered is:

> (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.

The Office of the Information and Privacy Commissioner of Ontario (IPC) is responsible for ensuring compliance with the *Freedom of Information and Protection of Privacy Act*, which applies to the provincial public sector, and the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), which applies to the municipal public sector. In accordance with these statutes, the IPC acts independently of government to uphold and promote the public's access to information and privacy rights.

1 The amendments to the *Municipal Act* are found at section 27 of Schedule 1 of Bill 68, and the amendments to the *City of Toronto Act* are found at section 22 of Schedule 2 of Bill 68. For ease of reference, we only refer to the relevant provisions of the *Municipal Act*. The text of the relevant sections of the *Municipal Act* are set out in **Appendix A**.

Our submission focusses exclusively on the proposed amendments to the open meeting exceptions, which are substantially similar to the exemptions from the right of access in *MFIPPA*, namely, sections 9(1)(a)(b) and (d) (relations with other governments), 10(1)(a) (third party information), and 11(a) and 11(e) (economic and other interests). The text of the relevant sections of *MFIPPA* are set out in **Appendix B**.

The IPC is gravely concerned about these proposed amendments for the following reasons:

- there is no demonstrable need for the expansion of the exceptions to the open meeting requirement in the *Municipal Act,* and
- the proposed amendments will negatively impact the public's right of access to records under *MFIPPA*.

Accordingly, we recommend that the proposed amendments be struck from Bill 68. Alternatively, the impact on the public's right of access should be addressed by a simple amendment, as outlined below.

We note that Ontario's Ombudsman made a number of proposals related to Bill 68. His experience with closed meeting investigations provides him with a unique and informed perspective on this matter. The IPC defers to his expertise in this area and references his submission as it relates to our concerns.

WHAT IS THE JUSTIFICATION FOR EXPANDING THE OPEN MEETING EXCEPTIONS?

At the time of first reading of Bill 68, the IPC contacted the Ministry of Municipal Affairs to discuss the implications of the proposed amendments. We asked for evidence of the need for the proposed amendments and for specific examples of the limitations of the existing open meeting exceptions.

Our understanding is that the proposed amendments were the result of a Municipal Legislation Review conducted by the Ministry in 2015. Therefore, we expected the Ministry to explain how municipalities are inhibited from effectively conducting government business under the current legislation. For example, we expected to hear evidence of:

- forced disclosure of confidential information,
- complaints about harm from disclosure, and
- the inability to have a frank discussion about municipal business.

Other than being advised that municipalities require more flexibility to close a meeting to consider "increasingly sophisticated matters," we have not been provided with evidence that would justify the need for these amendments.

In his submission, the Ombudsman stated that expanding the circumstances when municipalities may close meetings requires caution, and local government business should be conducted in the open unless there are strong and compelling reasons not to do so. In particular, he expressed concern about the proposed new exception (k), which relates to "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." The Ombudsman's view is that this language is extremely broad and might permit closed door discussions of items that are currently required to take place in public view. The IPC shares this concern and thinks it is an excellent example of why the Ministry should justify the need for all the proposed amendments related to closed meetings.

Given the importance of open meetings, and absent justification for the expansion of the exceptions, the amendments at section 239(2) of the *Municipal Act*, and the corresponding amendments to the *City of Toronto Act* should be struck from Bill 68 unless the Ministry provides detailed justification for expanding the exceptions to the open meeting requirement.

WHAT IS THE EFFECT OF THE PROPOSED AMENDMENTS ON ACCESS RIGHTS UNDER *MFIPPA*?

Ontario's freedom of information legislation supports open and transparent government by giving the public a right of access to information held by municipalities. This right of access is subject to limited and specific exemptions. We are concerned that the proposed amendments negatively impact the public's right of access to government-held information by broadening the scope of the exemption from the right of access in section 6(1)(b) (closed meetings) of *MFIPPA* (see **Appendix B**).

The exemption at section 6(1)(b) enables an institution, such as a municipality, to refuse to disclose a record that reveals the substance of deliberations of a meeting of a council, if a statute authorizes a closed meeting.

In the context of an access to information request, municipalities frequently cite section 239(2) of the *Municipal Act* as authority for holding a meeting in the absence of the public. Accordingly, the expansion of the closed meeting exceptions in the *Municipal Act* has a corresponding effect on the exemption in section 6(1)(b) of *MFIPPA*. That is, by expanding the circumstances when municipal governments can hold a closed meeting, the proposed amendments also expand the scope of the exemption to the right of access under *MFIPPA*.

Our concern about the expansion of the scope of the closed meeting exemption at section 6(1)(b) is compounded by the fact that *MFIPPA*'s public interest override does not apply to that exemption. The public interest override at section 16 of *MFIPPA* (see **Appendix B**) overrides certain exemptions to the general right of access. In other words, even where an exemption may apply, the public interest override would enable disclosure if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. This gives the public a right of access to records that should be disclosed as a matter of public interest.

The public interest override applies to records that are exempt under sections 9, 10 and 11 of *MFIPPA*, among others. If those records or parts of records are also found to be exempt under section 6(1)(b), the public would lose its right to claim the public interest override. Therefore, the broadening of section 6(1)(b) allows a municipality to withhold a record, even in the face of a compelling public interest in disclosure.

WHAT HARM WILL RESULT IF THE PROPOSED AMENDMENTS ARE PASSED?

Our concern about the negative impact of the proposed open meeting exemptions on the public's right of access under *MFIPPA* is not theoretical. As noted above, the language of the proposed amendment at section 239(2)(i) of the *Municipal Act* is almost identical to the language of section 10(1)(a) of *MFIPPA,* which is frequently relied on by municipalities to refuse to disclose contracts in response to access to information requests. Municipalities often interpret the exemption at section 10(1)(a) in an overly broad manner to deny the public access to contracts. In access appeals, the IPC has consistently held that section 10(1)(a) does not permit the withholding of contracts – a finding that has also been consistently upheld by the courts.

If added to the closed meeting provisions of the *Municipal Act,* section 239(2)(i) will inevitably be relied on by municipalities to consider procurement issues and contracts in camera. They will then rely on section 6(1)(b) of *MFIPPA* to deny access to the records involved. This would be a huge step backwards because it poses significant limits on the public's ability to scrutinize local government spending and undermines municipal government accountability and transparency.

Transparency in the procurement process is important because it fosters clarity and accountability around government spending and encourages more efficient spending of public resources. Open contracting also improves public confidence and trust, and increases fairness and competition in procurement processes.

The proposed amendment at section 239(2)(i) runs contrary to the current trend in international, national and local government levels towards more transparency in procurement. For example, *Canada's Draft Action Plan on Open Government 2.0* states that parties "must understand that the open, proactive disclosure of contracting data is one of the conditions of doing business with the Government of Canada." It adds:

> Moving forward, planned enhancements to the Government of Canada's approach to open contracting will increase Canadians' knowledge of how their tax dollars are being spent on procurement activities.

In Ontario, one of the purposes of the *Broader Public Sector Procurement Directive* is to ensure that publicly funded goods and services are acquired "through a process that is open, fair, and transparent." In addition, Ontario's *Open Data Directive* includes requirements that:

- all new Ontario Government contracts with vendors shall indicate that procurement contract data should be published in a timely manner, unless specifically excluded, and
- vendors shall agree that financial data of contracts are not considered commercially sensitive and may be released.

Ontario's municipalities are at the forefront of open government in the province. The proposed amendment at section 239(2)(i) of the *Municipal Act* is a step backward from transparency and accountability in government procurement, and could undermine the excellent strides made in open government within the municipal sector.

HOW CAN THESE CONCERNS BE RESOLVED?

Unless there is compelling evidence to support the need for the proposed amendments, the best way to address our concerns is to strike them from the bill. However, if it is considered necessary to expand the circumstances in which municipal councils and local boards can hold closed meetings, our concerns about the impact that such an expansion would have on access rights under *MFIPPA* must be addressed before the government moves forward.

We recommend that Bill 68 be amended to remove paragraphs (h), (i), (j) and (k) of section 239(2) of the *Municipal Act* and section 190(2) of the *City of Toronto Act* from the scope of the exemption at section 6(1)(b) of *MFIPPA*, similar to the current provision at section 239(9) of the *Municipal Act* (see **Appendix A**). Specifically, the IPC recommends that:

> Schedule 1 of Bill 68 be amended as follows:
>
> **27.1 Section 239 of the Act is amended by adding the following subsection:**
>
> **Same**
>
> (10) Clause 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* does not apply to a record that reveals the substance of deliberations of a meeting closed under paragraphs (h), (i), (j) or (k) of section 239(2) of this Act.

Schedule 2 of Bill 68 be amended as follows:

22.1 Section 190 of the Act is amended by adding the following subsection:

Same

(11) Clause 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* does not apply to a record that reveals the substance of deliberations of a meeting closed under paragraphs (h), (i), (j) or (k) of section 190(2) of this Act.

This would provide that a freedom of information request could not be refused simply because a record was discussed in a closed meeting. Rather, disclosure of the record would have to be considered directly under sections 9, 10, and 11 of *MFIPPA*.

Such an amendment would address our concerns with respect to the public's right of access under *MFIPPA* and maintain the status quo. It would ensure there is no further erosion of the public's access rights, regardless of whether a meeting is held in camera.

CONCLUSION

The IPC is concerned that the proposed amendments in Bill 68 would broaden the circumstances in which councils and local boards may exclude the public from important decision-making, including by limiting access to information.

The proposed amendments will frustrate open and accountable government, inhibit open procurement practices, and limit the public's existing right of access to records under *MFIPPA*. Moreover, we have not been provided with sufficient information to suggest that the amendments are necessary to the effective operation of municipal councils and local bodies.

To address our concerns, we recommend:

1. The amendments at section 239(2) of the *Municipal Act* and the corresponding amendments to the *City of Toronto Act* be struck from Bill 68 unless the Ministry of Municipal Affairs provides detailed justification for expanding the exceptions to the open meeting requirements.

2. Alternatively, if evidence justifying the need for the proposed open meeting exemptions is presented, that Schedules 1 and 2 of Bill 68 be amended, in the manner noted above, to remove paragraphs (h), (i), (j) and (k) of section 239(2) of the *Municipal Act* and section 190(2) of the *City of Toronto Act* from the scope of the exemption at section 6(1)(b) of *MFIPPA*.

APPENDIX A – RELEVANT SECTIONS OF THE *MUNICIPAL ACT*

Meetings open to public

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

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.

[…]

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.

[…]

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).

APPENDIX B – RELEVANT SECTIONS OF THE *MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

Draft by-laws, etc.

6. (1) A head may refuse to disclose a record,

[…]

(b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

Relations with governments

9. (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

(a) the Government of Canada;

(b) the Government of Ontario or the government of a province or territory in Canada;

[…]

(d) an agency of a government referred to in clause (a), (b) or (c);

[…]

Third party information

10. (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[…]

Economic and other interests

11. A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

[…]

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

[…]

Exemptions not to apply

16. An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Information and Privacy
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