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What is a Meeting? Municipal Councils and the Ontario Ombudsman

By Andrew Sancton (22 August 2014)

This is a working paper. Comments welcome: asancton@uwo.ca

Consider the following hypothetical events, each of which could be crucial for the making of public policy at various levels of government:

1. After meetings with their respective party caucuses, the Leader of the Government in the House of Commons meets with the house leaders of the opposition parties to decide which bills will be dealt with before a long recess and which will languish on the order paper, possibly never to be seen again.
2. A Canadian provincial cabinet meets to give its approval to, among other things, a proposal by the minister of municipal affairs to overhaul the Municipal Act, including some of the provisions relating to open meetings of municipal councils; the proposal had previously been discussed in the party caucus and modified in light of objections from backbenchers who had previously been municipal councillors.
3. A mayor of an Ontario city, worried about the fate of her pet project for downtown revitalization, meets in her office with two of her main opponents on council and successfully convinces them to use their best efforts to shift a majority of their council colleagues to the mayor's position.

Recent decisions by the Ontario ombudsman suggest that, in his view at least, the third of these hypothetical scenarios could well be illegal. In this province, the Municipal Act provides that, except in certain specified circumstances, municipal council and committee meetings must

be open to the public. If a municipality has not appointed its own “closed meeting investigator,” the provincial ombudsman is charged with investigating complaints from the public about municipal meetings that have allegedly been improperly closed. As we shall see later in this paper, much hinges on the definition of a meeting. If “meeting” is defined too narrowly, then a council wanting to do business in private can simply arrange its affairs before a formal meeting takes place. Such considerations have caused the ombudsman to state that, for a municipal meeting to take place in Ontario, “Members of council (or a committee) must come together for the purpose of exercising the power or authority of the council (or committee), or for the purpose of doing the groundwork necessary to exercise that power or authority.”¹ It is this definition that suggests that the third scenario outlined above might well be describing an illegal meeting. The object of this paper is to describe how this state of affairs came to be and what its implications are for Ontario municipal government.

Openness in parliamentary systems

The Canadian federal government and all provincial and territorial governments operate within parliamentary systems. This means that the legislature (parliament) is supreme: a government cannot stay in office unless it maintains the confidence of the legislature. The legislature also has complete control over its own procedures. In the early days of the British House of Commons, MPs apparently reported to their constituents about parliamentary business. But by Elizabethan times, practices changed:

In 1589, upon complaint by Sir Edward Hobby that matters under discussion in the House had become the subject of talk outside, the House ordered Mr Speaker to

admonish members not to speak or write of its proceedings to any person not being a member of the House. A stranger found present in the House during its debates was taken into the custody by the Serjeant at Arms and not released until he had sworn at the bar not to disclose what he had heard.²

In the eighteenth century, two members who facilitated the publication of House debates without disguising the identity of speakers were briefly committed to the Tower of London. By the time they were released, public opinion was so favorable to openness that the House never again attempted to enforce its secrecy rules. In 1812 T.C Hansard was authorized by the House to publish the debates, and such publication has continued ever since.³

The House, however, maintains its right to meet in secret and this right has been maintained in Canada by the federal parliament and provincial legislatures. An authoritative account of procedure on the Canadian House of Commons website states the following about secret meetings:

Although not explicitly provided for in the Standing Orders, the House has the privilege, the historical right and the authority to conduct its proceedings in private. This has been referred to as a “secret sitting”. The House may conduct an entire sitting or a portion of a sitting where “strangers” (anyone who is not a Member or an official of the House of Commons) are either not admitted or asked to withdraw from the galleries of the House. These meetings are regarded as sittings and are noted as such in the documents of the House. To conduct a secret sitting, the House has either adopted a special order to initiate the proceeding, or

has simply not opened the doors of the House to the public following the prayers at the beginning of a sitting.

The House has met in secret on four occasions, all during wartime.⁴

House committees are also entitled to meet in secret and do so relatively frequently. “On occasion, a committee may decide to hold an *in camera* meeting to deal with administrative matters, to consider a draft report or to receive a briefing. Subcommittees on Agenda and Procedure usually meet *in camera*.... Divulging any part of the proceedings of an *in camera* committee meeting has been ruled by the Speaker to constitute a *prima facie* matter of privilege.”⁵ Opposition members sometimes dispute the need for such secret meetings but, when there is a majority government, their protests make little difference.

It goes without saying that there are absolutely no rules prohibiting informal, secret meetings of MPs for any purpose, including of course meetings of House leaders of the kind described in the first of the hypothetical scenarios described in the opening of this paper. Furthermore, all cabinet meetings are entirely secret. Technically, such meetings are a committee of the Queen’s Privy [not Open!] Council for Canada. When cabinet ministers are appointed they must swear that: “I will in all things to be treated, debated and resolved in Privy Council, faithfully, honestly and truly declare my mind and my opinion. I shall keep secret all matters committed and revealed to me in this capacity, or that shall be secretly treated of in Council.” Similar oaths are sworn when provincial ministers are appointed to provincial executive councils.

It is easy to think of good reasons why many aspects of cabinet meetings should be secret. But what about cabinet meetings at which proposed legislation is being discussed? If

laws are to be made openly in Canada, knowing what happened in cabinet is to know what happened at the most crucial stage in the process. The debates that follow in the House of Commons are often formalities, opportunities for parties to place their positions on the public record and to appeal to the public for support. Consideration of proposed legislation in House standing committees is little different except that experts and interest groups usually get a chance to make their cases for the public record as well.

Party caucuses are also supposed to be secret. The press and public are certainly not admitted, except for the occasional photo opportunity or special party celebration. Leaks seem to be more prevalent from caucuses than cabinets, perhaps because there are no caucus oaths of secrecy. Caucus meetings of the majority party in a majority government can be just as important for the legislative process as cabinet meetings are. They provide ministers a forum in which they can test the political viability of proposed legislation; if problems are raised, important changes can be made before the general public has any idea about what is going on.

In the second of the hypothetical scenarios that began this paper a provincial government is contemplating changes in its Municipal Act, including provisions about open meetings of municipal councils. In this scenario, the minister of municipal affairs would likely consult with municipal organizations and other interested parties early in the process. But all of the decisions about exactly what provisions would or would not be included in the proposed legislation would be made behind closed doors: within the ministry; within cabinet; and perhaps within the caucus of the governing party. The debate on the floor of the legislature would likely mean very little. It would receive little or no attention from the media and would certainly not be expected to actually change the votes of any of the elected legislators. Public hearings would be held by a standing committee and important new issues might be raised, perhaps even ones that the

government had not thought of. Decisions about how to amend the legislation to take account of these problems would be again taken in private by the minister, the cabinet, or caucus. They would then be announced in the committee or the legislature, and the subsequent formalities would continue until the lieutenant-governor signed the new law, making it an act of the legislature. Municipal councils would then confront new statutory rules about conducting their business in public, but all the important decisions about these rules would have been made in private.

How municipalities are different from parliamentary systems

Canadian municipalities are different from federal and provincial parliamentary systems in four interconnected and important respects, each of which has a significant impact on the issue of open municipal meetings:

- 1) Unlike the federal and provincial governments, “A municipality has a corporate identity distinct from that of the Crown and is in no sense a representative of the Crown”.⁶
- 2) The municipal council is the legislature of the municipality but, with the possible exception of the mayor in some limited respects and for executive committees in some major Quebec municipalities, there is no distinct executive branch of the municipality other than the municipal employees, usually headed by an official known as the “city manager” or “chief administrative officer”
- 3) Except in some municipalities in Quebec and British Columbia, there are no organized political parties within municipal councils

- 4) The employees are responsible to the entire municipal council, not to a particular minister or distinct political executive.

The situation is arguably different in the cities of Montreal and Quebec City because each is required by provincial legislation to have an executive committee that has the authority to act on some matters without the approval of their respective city councils and because each mayor appoints the members from among the councillors (subject to council approval) and assigns “portfolios” to the members.

In the remaining Canadian municipalities there are few, if any, formal institutional mechanisms to provide political direction to staff from within the council, other than from the mayor himself or herself, and even with the mayor this authority is limited at best. In parliamentary systems, as we have seen, such a mechanism exists in the form of cabinets, which conduct their business privately. Until the late twentieth century, neither was there anything preventing municipal councils from conducting their meetings privately. By the mid-1980s many municipalities had included provisions within their procedural by-laws that required them to conduct their meetings in public, except in particular defined circumstances, such as when they were discussing particular individuals or negotiations about land sales or collective agreements, or when they were receiving legal advice

Are municipal party caucuses now illegal in Ontario?

There has been a longstanding debate in municipal-government circles in Canada about whether municipal political parties are desirable.⁷ There has never been any suggestion that, if they existed, it might be illegal for their elected members to meet in caucus to decide political strategy

on forthcoming council business. However, recent rulings by the Ontario ombudsman force us to consider this possibility. His rulings are important because never before has it been suggested by anyone in authority that groups of municipal councillors could not meet informally to discuss municipal business.

In a 1979 research paper for Ontario's Commission on Freedom of Information and Individual Privacy, the well-known municipal lawyer, Stanley M. Makuch, addressed the need for clear provincial legislation requiring open municipal meetings except in clearly specified circumstances. But he also added this caveat:

Private caucus meetings...should also be permitted. Some members of a municipal council may decide that they have a common political perspective and may wish to meet together to discuss positions they should take on particular issues and to formulate policy proposals and strategies for having these proposals passed....In effect, these groupings are similar to the political parties found at the federal and provincial levels of government and should be able to caucus in private under the open meetings provisions. It is necessary to be sure, however, that the term caucus is not used, as it is now by some local government bodies, as the equivalent of a meeting of the committee of the whole.⁸

Since 1979, there has been much discussion of legal issues relating to open municipal meetings but no explicit references to caucuses of municipal political parties, presumably because such parties have not existed outside British Columbia and Quebec. The issue arises because of attempts (mainly by the Ontario ombudsman) to elucidate the definition of a "meeting" that is contained in the Ontario Municipal Act. The most significant change in the relevant Ontario legislation was enacted in 1994 when it became illegal for any municipal

council or committee to meet in private unless it was for a particular reason specified in the legislation.⁹

In 2006, the Ontario legislature approved the Municipal Law Statute Amendment Act which, among other things, made it easier for citizens, after 1 January 2008, to take remedial action when they believed that councils were meeting illegally behind closed doors. Councils are required either to appoint a “closed meeting investigator” or accept, as a default option, that the Ontario ombudsman will act as the recipient of complaints about closed meetings. In cases of complaints, the investigator or the ombudsman is required to determine if the closed meeting rules were violated and, if so, to recommend improved local procedures. Neither the investigator nor the ombudsman is authorized to impose penalties or quash by-laws. Such decisions are therefore of little or no legal consequence, although political consequences can be significant. No elected official wants to run afoul of the ombudsman. His reports about closed meetings are all available on his website.¹⁰

The first such report that is of particular interest for this paper involves the City of Greater Sudbury and relates to informal meetings in the “council lounge” before and after a formal committee meeting on 20 February 2008. Ten of 13 council members (not including the mayor) participated in a discussion about how they should respond to public outrage that they had been granted priority access to purchase tickets for an Elton John concert. During the discussion, they asked the city’s General Manager for Community Development for advice about how they could return their tickets to the city-owned arena. The ombudsman received a complaint that this constituted a closed-door meeting of the council and proceeded to investigate. His investigation “involved extensive legal research, covering case law on open meetings in Ontario and other jurisdictions.”¹¹

Obviously, the key issue here is the definition of a meeting. As the ombudsman himself has pointed out on numerous occasions, the Municipal Act is not very helpful. It defines a “meeting” as any “regular, special or other meeting of a council, of a local board or of a committee of either of them.” Circular as the definition may be, it at least makes clear that the open-meetings provisions apply to committees and boards as well as full meetings of municipal councils.

The most important judicial decision relating to informal gatherings of councillors is *Southam Inc. v. Ottawa Council*. In this 1991 decision the Ontario Divisional Court ruled that meetings are deemed to have taken place if “matters which would ordinarily form the basis of Council’s business are dealt with in such a way as to move them materially along the way in the overall spectrum of a Council decision.” The Court noted that such meetings can take place even if councillors “in fact, attend without summons”. The meeting that was the subject of this particular dispute was a council “retreat” at a ski resort. It was acknowledged by everyone involved that council business was discussed. Because of the ombudsman’s decision for Greater Sudbury seventeen years later, it is important to note that in this Ottawa case *all* councillors were invited to attend and that staff were present as well.¹²

In his decision in the Greater Sudbury case, the ombudsman refers to an important 2007 decision by the Supreme Court of Canada about open municipal council meetings. He correctly quotes the Supreme Court as stating that “the words ‘committee’ and ‘meeting’ are broadly defined” in the Ontario Municipal Act. But the Court says nothing else about the definition. The ombudsman himself, however, has constantly referred to the statutory definition as “unhelpful”. Nevertheless, he states himself that the “case offers a clear mandate to those who apply this provision to give the word ‘meeting’ broad compass.”¹³ What the ombudsman fails to note is the

Court's statement that "It is uncontested that the closed meetings held on January 12 and 19, 2004, were meetings as defined in s. 238(1) since all of the members of both the Planning Committee and the Committee of the Whole were also members of the City Council."¹⁴ It is true that the case offers serious warnings to municipal councils against moving formal open sessions *in camera* without absolutely clear legislative justification. But the case is completely irrelevant to the main issue in the ombudsman's Greater Sudbury case, i.e. determining the definition of a meeting.

The ombudsman was not content to rely on the 1991 *Southam* case. Instead, he simply made up his own definition of a meeting: "For a meeting to occur, members of council or a committee must come together for the purpose of exercising the power or authority of the council or committee or for the purpose of doing the groundwork necessary to exercise that power or authority."¹⁵ He went on to state that, under this definition, meetings can occur even if a quorum of a council or committee is not present. Serial discussions, in which one or members meet on the same subject with different members, are also meetings.¹⁶

In the Greater Sudbury case, the ombudsman ruled that the members of council who were discussing the tickets for the Elton John concert would have constituted a meeting if they had exercised "the power or authority of the council" or if they had done "the groundwork necessary to exercise that power or authority". But they were not a meeting because they "just wanted to sort out what to do with the tickets".¹⁷

The ombudsman's report on this case and various subsequent reports caused many municipal councillors in Ontario to become exceptionally careful about talking business with their council colleagues outside official meetings. Conscientious municipal clerks reinforced

these concerns by briefing less attentive councillors about the relevant ombudsman's reports.

The ombudsman's position has caused Marianne Matichik, the mayor of Greater Sudbury, to say that she "won't talk to other councillors to try and get their support on any issue because it may break the rules." "I will not go out and lobby people If that makes me unsuccessful, if that means I may not get a resolution through, you know what? So be it."¹⁸

In October 2013, the ombudsman ruled that "an illegal closed meeting" was held on 23 February 2013 when seven of the fifteen members of the London city council (including the mayor) met for lunch in a "back room" of a local restaurant. No members of city staff were present, but council business was discussed. The fact that attendees fled the "meeting" when it appeared that reporters had discovered that it was taking place certainly undermined their later claims that they were not acting improperly. Nevertheless, for the purposes of this paper, the important question is this: How did the Ontario ombudsman stretch existing statutory and judicial definitions of a municipal council meeting to include an informal lunch to which only the mayor's political allies were invited and at which no staff were present? After exploring this issue, we shall return to the wider implications of the ombudsman's decision in this case.

What influenced the ombudsman's approach?

The first public reference to the desirability of regulating "informal" municipal meetings in Ontario appears have been in 2003 when the Information and Privacy Commissioner issued a paper entitled "Making Municipal Government More Accountable: The Need for an Open Meetings Law in Ontario." In it she stated that "An open meetings law must provide a clear,

precise and practical definition of a meeting”,¹⁹ but she provided no definition herself. On the subject of informal meetings, she wrote:

Most people would agree that a gathering of all municipal councillors or board members where a decision is made or formal action is taken would constitute a meeting. However, it would arguably be unreasonable and impractical to include accidental encounters or informal social gatherings between a minority of municipal councillors or board members in the definition of a meeting.

Is a gathering a “meeting” only if a majority of municipal councillors or board members are present? Does a meeting occur if municipal councillors or board members simply “deliberate” about public business or public policy? What about an exchange of e-mail messages or a debate in an Internet chat room? Would participation in electronic forums such as these constitute a “meeting?”²⁰

These are all good questions, but the Commissioner did not attempt to answer them.

The subject of informal meetings was briefly referred to when the Ontario legislature in 2004-05 debated Bill 123, a private member’s bill that proposed extending the open meetings provisions to other public bodies beyond municipalities and their associated boards and commissions. The bill was never approved, but it has a certain importance now because the ombudsman quotes approvingly²¹ its definition of a meeting:

(1) A meeting of a designated public body occurs for the purposes of this Act if the following conditions apply:

1. The meeting is one which the entire membership of the body is entitled to attend or which a specified number of members is entitled to attend, such as the meeting of a committee or other designated division of the body.
2. The purpose of the meeting is to deliberate on or do anything within the jurisdiction or terms of reference of the body, committee or other division.
3. The number of members in attendance constitutes a quorum or, in the absence of a quorum requirement in the rules or terms of reference to the body, committee or other division, a majority.

(2) A meeting includes an electronic or telephone meeting to which the conditions described in subsection (1) apply.²²

Although this definition is clearly an improvement on the definition in the Ontario Municipal Act, it is significant that it is worded in such a way that all three requirements of the definition seem to apply. It appears then that, notwithstanding the ombudsman's approval of the definition, an informal gathering of some members of council to discuss business would not constitute a meeting under this definition.

The bill is also important because, during public hearings of a legislative committee on 25 September 2005, the subject of informal meetings of municipal councillors was briefly discussed, an event in the Ontario legislature that appears not to have happened before or since.²³ The Association of Municipalities of Ontario was concerned that the definition of a meeting might prohibit groups of councillors getting together before a meeting to discuss staff reports.²⁴ On the same day of the hearings the executive secretary of the Ontario Press Council reported the following incident:

Three years ago, the mayor of Hamilton held what he described as an informal gathering attended by himself and nine of the 15 members of city council to consider concerns about the council's working relationship with senior management.

The Hamilton Spectator complained to the press council. I might add that, over the years, council has dealt with approximately half a dozen complaints from newspapers against the public or members of the public. It's a rare thing, but it does happen. The newspaper did not take issue with the idea that the meeting should be held in camera, since discussion was to focus on an identifiable employee, but its concern was that there was never a formal notice of meeting, as required under the Municipal Act. The mayor challenged the Spectator's description of the meeting as secret, saying there was no attempt to conceal the gathering from anyone who might have seen council members arriving and leaving. The press council upheld the complaint, saying the public and press should never have to learn by chance or a leak that a meeting of a municipal council has been convened...

If it's a meeting, I think it should be open. If you want to talk to another councillor about subjects that are going to be dealt with, that's another story. But a meeting is a meeting and you are supposed to publish an agenda and make a proper announcement of the meeting. I don't see why you can't do that.²⁵

In both the paper written by the Information and Privacy Commissioner and in the public hearings on Bill 123, reference was made to much tougher laws about open meetings in the United States. These laws have also been referred to approvingly by the ombudsman. It is impossible to provide a comprehensive treatment of the US situation in this article, but it is

important to know the highlights; otherwise the actions of Ontario's ombudsman seem incomprehensible. What follows is a mere sampling of the issues that have arisen in the US.²⁶

A Texas municipal lawyer opens an academic article with this paragraph:

Advising city officials about what behavior violates the *Texas Open Meetings Act*...is almost comical. Even with vast knowledge of the Act, practitioners still have trouble advising clients. Many elected officials ask if they can talk about public business with other members of the governmental body outside a properly posed meeting. Generally the answer is no.²⁷

The rest of the article explains why. The article was written prior to a decision of the United States Court of Appeals for the Fifth Circuit which rejected arguments from municipal councillors that the Texas act violated constitutional rights to freedom of speech and assembly. The court affirmed a lower-court ruling that the restrictions on officials' rights were justified because "Transparency was furthered" and because the rules did not reflect "any hostility to their views"; the restrictions were "content-neutral".²⁸

The Virginia Freedom of Information Advisory Council has helpfully advised as recently as July 2013 that the following is *not* a meeting under the relevant Virginia statute:

The gathering or attendance of two or more members of a public body at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting.²⁹

An exhaustive legal text on open meetings in the US points out that many state laws apply to meetings of party caucuses at all levels, including the state legislature. The author reports that the Colorado Supreme Court “reasoned that a legislative caucus is a de facto policy-making body because the votes determined in the caucus are normally followed on the floor of the legislature, rendering the final, official vote a pro forma act.”³⁰ When a legislative caucus is discussing public business (as opposed to internal party business), its meetings must be open.

Implications of the Ontario Ombudsman’s Decisions

In his 2013 decision about London’s “improper closed meeting”, the ombudsman concluded, as he had in other investigations, that it was possible for a “meeting” to take place in the absence of a quorum.³¹ In the case of the council as a whole, he noted that seven council members were present but that the quorum for a full council meeting is eight. However, he also stated that there was a quorum present for four of council’s six standing committees.³² His conclusion was that “some past and future council and committee issues were discussed” and that a meeting was held of the Investment and Economic Prosperity Committee to discuss an application for a grant.³³ Throughout his findings, the ombudsman made use of his own definition of a meeting, i.e. that decisions had not necessarily been made but that this gathering “laid the groundwork for...members to exercise their power and authority in making decisions”. Not surprisingly, the councillors and their lawyers have disputed both the ombudsman’s interpretation of the facts and of the law.³⁴

As noted previously, decisions by the ombudsman about closed municipal meetings are of little or no *legal* significance. The Ontario ombudsman has no legal authority to quash

municipal by-laws or to apply penalties to individual councillors. Until somebody goes to a court to ask it to quash a municipal decision because it resulted from a meeting deemed improperly closed according to the ombudsman's definition of a meeting, we shall not know if this definition merits the close attention of municipal lawyers. But the issue at hand goes far beyond legal niceties; it is profoundly important for the personal reputation of individual municipal councillors and for the health of municipal governance. If the provincial ombudsman makes a public ruling that a group of councillors has acted improperly by participating in a "secret" meeting in violation of an important provision of the Municipal Act, we can hardly expect the local citizenry to pay great attention to the finer points of municipal law. Citizens, as they should, pay attention to what the ombudsman says, regardless of the possible weaknesses in the legal foundation of his case. The lawyers for the councillors who attended the restaurant meeting in London in 2013 have rightly pointed out that uncertainty about who can talk to whom when and under what circumstances is bound to have "a chilling effect" on efforts to attract "viable, responsible and meritorious ordinary citizens to run for municipal office".³⁵

Nowhere in any of his decisions does the ombudsman explain why there is a particular imperative that municipal politicians be held to stricter standards about discussing public business in private than are politicians at other levels of government. In a shocking display of ignorance about Ontario's policy-making institutions, he wrote a 2013 newspaper op-ed piece in which he stated that federal and provincial politicians are *less* secretive than their municipal counterparts:

Imagine for a moment if the House of Commons or the Legislative Assembly decided to turn off its lights, lock the doors and take the business of running the country or the province to a secret off-site venue without notice. There they would deliberate, debate

and try to find consensus on significant issues facing the country or the province. Once their work was done, they'd reconvene in their formal legislative venue and quickly rubber-stamp all the work they did in secret.

I have no doubt that if this happened there would be a hue and cry across the province and across the country. And justifiably so.³⁶

Details that the ombudsman omits: meetings of cabinet and of party caucuses and of house leaders to determine the order of business within the legislatures are always closed. If equivalent meetings were held within municipalities, he would obviously classify them as "improper closed meetings".

While the ombudsman borrows heavily from American laws and judicial decisions, he fails to note that the federal version of such laws apply to meetings of federal agencies³⁷ (e.g. the Federal Trade Commission) and that many state laws apply to state legislatures and their committees. In such states, state legislators are just as restricted in their ability to hold informal meetings as are municipal councillors. Why is the Ontario ombudsman not launching a crusade to open up provincial decision-making? It is true that he has no legal jurisdiction right now, but the absence of jurisdiction seems never in the past to have prevented him from entering the public arena to advocate for it.

Conclusion

It is conceivable that we *do* need legal constraints against informal discussions of municipal business by small groups of councillors. If so, such rules will be exceptionally difficult to formulate. A more helpful approach might be that taken by the ombudsperson in British

Columbia. She suggests the following in assisting councillors to understand whether or not they are part of a “meeting”:

A gathering is less likely a meeting if:

- there is no quorum of board, council or committee members present
- the gathering takes place in a location not under the control of the council or

board members

- it is not a regularly scheduled event
- it does not follow formal procedures
- no voting occurs and/or
- those in attendance are gathered strictly to receive information or to receive or

provide training

A gathering is more likely a meeting if:

- a quorum of council, board or committee members are present
- it takes place at the council or board’s normal meeting place or in an area

completely under the control of the council or board

- it is a regularly scheduled event
- formal procedures are followed
- the attendees hold a vote and/or

- the attendees are discussing matters that would normally form the basis of the council's business and dealing with the matters in a way that moves them toward the possible application of the council's authority³⁸

If there are to be legislative changes in Ontario so as to clarify the definition of a “meeting”, there will at least be an opportunity for public consultation and debate (even if the most important decisions about the amendments will be taken behind closed doors. Such public consultation and debate was notably and ironically lacking in the lead-up to the Ontario ombudsman's reports on open meetings. In such discussions, we could expect media and citizen-activist interests to argue for American-style laws on open meetings. Municipal organizations would presumably favour less legislative interference. The referees would be provincial politicians who are used to doing most of their important business behind closed doors. If they decide on tough rules against informal discussion of municipal business by councillors, then they should be expected to be able to justify why municipal councillors should be held to a tougher standard than they are.

In parliamentary systems, governments make their decisions in secret but are held to account in public by oppositions. Municipal councils are generally not divided into governments and oppositions. There is a clear temptation within some councils to carry out some business behind closed doors in a way not authorized by provincial laws relating to municipal government. This is why we need procedures to insure that meetings are held in public unless there is express legislative authority for meeting behind closed doors. But this does not mean that informal groups of municipal councillors should be prohibited from discussing municipal business in private.

If such groups are intent on meeting, they will be able to meet privately whatever the law might say. How can we possibly stop councillors meeting with each other in private places, such as their homes? How can anyone police the subject matter of their conversations?

Conscientious, law-abiding municipal councillors would presumably attempt to obey the law.

But why should they be under tougher constraints than federal or provincial politicians? No one – certainly not the Ontario ombudsman – has attempted an answer to such a question. In any event, it is the relatively few municipal councillors who might *not* be so conscientious and law-abiding that we need to be worried about – and we could never know about their actions whatever the law might say.

Occasionally informal meetings of municipal councillors are reported – and no one even raises the issue of open meetings. For example, on 26 April 2012, *The Globe and Mail*'s Kelly Grant wrote a story which began: "The nine councillors who hold the balance of power at Toronto City Hall emerged from their first formal [!] get-together Thursday with a single promise: We'll meet again." They met to discuss municipal business. The news in this story was *not* that it was an illegal meeting; it was that the "mighty middle" was getting organized. They were doing what we expect politicians to do.

ENDNOTES

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- ¹ Quoted in Jason Reynar, "Transparent Municipal Governance: When Must a Meeting be Open?" *Municipal & Planning Law Reports*, Fourth Series, 88 (2011): 68-99
- ² Kenneth Mackenzie, *The English Parliament*, revised edn. (London: Penguin, 1968), p.60
- ³ *Ibid*, p.63
- ⁴ <http://www.parl.gc.ca/procedure-book-livre/document.aspx?sbdid=27cd73e5-b779-447b-9dec-f682a7a31f6f&sbpidx=5>
- ⁵ *Ibid*
- ⁶ Ian MacF. Rogers, *The Law of Canadian Municipal Corporations*, 2nd edn. (Toronto: Carswell, 1971), p.10
- ⁷ David Siegel, "City Hall Doesn't Need Parties", *Policy Options* 8-5 (June 1987), 26-7 and James Lightbody, "Finding the Trolls under your Bridge: The New Case for Overt Partisanship in Canadian City Politics", *Journal of Canadian Studies* 39 (Spring 1999), 172-83.
- ⁸ Stanley M. Makuch, "Freedom of Information in Local Government in Ontario", Research Publication 7 prepared for the Commission on Freedom of Information and Individual Privacy, May 1979, p.111.
- ⁹ M. Rick O'Connor, *Open Local Government 2*, (St. Thomas ON, Municipal Word, 2004), p.29. For a not very helpful government paper issued prior to the legislation, see Ontario, Ministry of Municipal Affairs, *Open Local Government* (Toronto: Queen's Printer, 1992), especially pp.31-4.
- ¹⁰ <http://www.ombudsman.on.ca/Investigations/Municipal-Meetings/Cases.aspx> . For decisions made by the most prominent organization acting as closed meeting investigators for Ontario municipalities, see: http://www.agavel.com/?page_id=28
- ¹¹ Ombudsman of Ontario, "Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal" 25 April 2008, p.4.
- ¹² O'Connor, *Open Local Government*, pp. 28-9.
- ¹³ Ombudsman, "Don't Let the Sun", Para. 57, p.16
- ¹⁴ *London (City) v. RSJ Holdings Inc.*, [2007] 2 SCR 588, Para.23.
- ¹⁵ Ombudsman, "Don't Let the Sun", Para.59, p.17.
- ¹⁶ *Ibid.*, Para 68, p.19
- ¹⁷ *Ibid.*, Para 32, p.7
- ¹⁸ Darren MacDonald, "A recipe for dysfunctional local government," *Sudbury Northern Life*, 16 September 2013.
- ¹⁹ Ontario Information and Privacy Commissioner "Making Municipal Government More Accountable: The Need for an Open Meetings Law in Ontario", 2003, p.5.
- ²⁰ *Ibid.*, pp.5-6
- ²¹ Ombudsman, "Don't Let the Sun". Para.55, p.15.
- ²² Quoted in *Ibid.*, Para.55, pp.15-16.
- ²³ This statement is based on the work of David Ennett, a Western MPA student who in 2014 reviewed the Ontario legislature's Hansard on this subject, especially debates on Bill 130, the *Municipal Statute Law Amendment Act, 2006*. This is the law that provided for "closed meeting investigators" and for the default role of the Ontario ombudsman if a municipality chose not to appoint a closed meeting investigator.
- ²⁴ http://www.ontla.on.ca/committee-proceedings/transcripts/files_html/2005-09-29_T017.htm
- ²⁵ *Ibid.*
- ²⁶ For a comprehensive treatment of the background prior to 1961 in the US, see "Open Meeting Statutes: The Press Fights for the 'Right to Know'", *Harvard Law Review* 75 (1961-62): 1199-1221. For a more recent and critical survey, see Steven J. Milroy, "Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech And Hamper Effective Democracy", *Tennessee Law Review* 78 (Winter 2011): 309-76.
- ²⁷ Scott Houston, "Texas Open Meetings Act: Constitutional?", *Texas Tech Administrative Law Journal* 13 (Fall 2011): 79-100.
- ²⁸ *Asgeirsson v. Abbott*, United States Court of Appeal for the Fifth Circuit, 25 September 2012.
- ²⁹ <http://foiacouncil.dls.virginia.gov/ref/meetingshandout2013.pdf>

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- ³⁰ Ann Tyler Schwing, *Open Meeting Laws*, 3rd edn. (Anchorage, Alaska: Fathom Publishing: 2011), p.218
- ³¹ Ombudsman of Ontario, "In the Back Room" October 2013, Para.24, p.10.
- ³² *Ibid.*, Para.33, p.12.
- ³³ *Ibid.*, Para.88, p.29
- ³⁴ *Ibid.*, Appendix, Letter from Aird and Berlis LLP to the Ombudsman of Ontario dated 27 September 2013.
- ³⁵ *Ibid.*, p.9 of the letter from Aird and Berlis.
- ³⁶ <http://www.ombudsman.on.ca/Resources/Articles-by-the-Ombudsman/2013/Punish-rogue-politicians.aspx>
- ³⁷ <http://www.law.cornell.edu/uscode/text/5/552b>
- ³⁸ British Columbia, Office of the Ombudsperson, *Open Meetings: Best Practices Guide for Local Governments*, Special Report 34 to the Legislative Assembly of British Columbia, September 2012,