

STAFF REPORT: Administration



REPORT TO: Finance and Administration
MEETING DATE: June 24, 2009
REPORT NO.: A.09.07
SUBJECT: Closed Session Meeting Policy
PREPARED BY: Stephen Keast, Clerk

A. Recommendations

THAT Council receive Staff Report A.09.07, "Closed Session Meeting Policy" and enact a By-law to adopt Corporate Policy POL.COR.09.08, Closed Session Meetings.

B. Background

Recent revisions to the *Municipal Act, 2001* (the Act), require a municipal government to try to ensure that it is accountable to the public for its actions and that its actions, including decisions, are transparent to the public. As part of the emphasis on accountability and transparency, higher levels of scrutiny have been placed on the holding of closed session meetings or portions of meetings, where the public is not able to view and hear proceedings.

Minutes of closed session meetings are now required to be produced where in the past it was sufficient to be able to produce minutes if required for some reason to do so. Further, a municipality must appoint a closed meeting investigator to respond to any request for investigation into whether a municipality was in compliance with the Act in conducting any closed session meeting or a portion of meeting. If an investigator is not appointed, the role would fall to the Ontario Ombudsman by default.

Council appointed Amberley Gavel Ltd. as closed meeting investigators for The Blue Mountains, principals being Fred Dean and Nigel Bellchamber. Amberley Gavel Ltd. recently circulated a closed session meeting update which is attached to this Report as background. Town Staff recently became aware of a Grey County Policy on conducting In-camera (in a chamber, closed session) meetings, the Act referring only to the term closed session.

Regarding accountability, transparency and clarity for Council, Staff and the public, Staff are recommending Council consider a Corporate Policy addressing the administration and operations of closed session meetings to be used for all Town Council, Local Board and Committee meetings. The attached Policy is based on the Grey County Policy with some modifications to comply with Town practices and Procedural By-law.

C. The Blue Mountains' Strategic Plan

Providing a strong, well-managed municipal government.

D. Environmental Impacts

None

E. Budget Impact

None

F. Attached

1. Amberley Gavel Ltd. Closed Meeting Investigator Program Update.
2. Draft Corporate Policy POL.COR.09.08, Closed Session Meetings
3. Generic closed session motion

Respectfully submitted,

For more information, please contact:
Stephen Keast, Clerk
skeast@thebluemountains.ca
519 599 3131, ext 237

**Update by Amberley Gavel Ltd.
To
Clients of
Local Authority Services'
Closed Meeting Investigator Program**

Conventional Wisdom Does Not Apply!

Background

It has been fifteen months since the Municipal Act's closed meeting investigator provisions came into effect. This update is prepared by Amberley Gavel Ltd for clients of the LAS Closed Meeting Investigator Program. The following comments are intended to assist both members of council and of staff, particularly the municipal Clerk, in meeting the closed meeting requirements of sections 238 and 239 of the Municipal Act.

Reasons for holding a closed meeting

The current list of subject matters for which a council, local board or committee may hold a closed meeting, with two additions, has been in place since the mid 1990s. Even with this history, we still regularly hear through the media, the public, some members of council, and occasionally municipal staff that conventional wisdom is that there are three reasons for which a closed meeting may be held: legal, property and personnel matters. This is simply incorrect, and the courts have said so. The list of exceptions to the open meeting rule is found in Section 239 of the Act.

Note however, that convenience and political comfort are not on the list of reasons to hold a closed meeting!

It is recommended that the clerk provide a copy of the list of reasons for which a closed meeting may be held to each member of council, and to each member of all local boards and committees covered by section 239 of the Municipal Act .

The investigations completed to date by Amberley Gavel for the LAS program are available on the website www.agavel.com. The Reports to councils as a result of the investigations have revealed that generally municipal councils are moving into closed meetings for reasons authorized by section 239.

Notice

One key element of transparency is that for every meeting of council, of every local board, or a committee of either of them that is subject to the Section 238 provisions, notice shall be given. This is the case whether the meeting is open or closed to the public. The details of the notice must be provided for in the procedure by-law. This requirement was added in the 2006 amendments to the Municipal Act, 2001 and came into force January 1, 2008.

One frequent observation is that municipalities are including public notice provisions in the procedure by-law for regular meetings but not for special meetings. A number of municipalities did not pick up on this requirement when amendments to their procedure by-laws were enacted after Bill 130 was passed. Still other municipalities have not amended their procedure by-laws since 2006.

The notice for special meetings often refers to notice to members but does not include any provision for notice to the public for special meetings. This requirement has frequently been overlooked and the result can be that the notice to the public required for a special meeting by virtue of the regular meeting notice policy could be several weeks, hence putting at risk the validity of the special meeting.

It is recommended that council review and pass any necessary amendments to the procedure by-law consistent with the requirements of the Municipal Act, as amended by Bill 130.

The public Resolution authorizing the closed meeting

Before a closed meeting may be held, a council, local board or committee must pass a resolution, at a public meeting, indicating the fact of holding a closed meeting and the general nature of the matter(s) to be dealt with. It is not sufficient to merely check one or more items off the list in section 239. The resolution should give as much detail as is reasonable without disclosing information that would be detrimental to the municipality or the interests of others discussed at the closed meeting. A properly worded resolution is the condition precedent for the holding of the closed meeting.

The resolution must include all of the subjects to be dealt with at the closed meeting. This is an issue of transparency. Closed meetings are the exception to holding all meetings in public and the reasons in the resolution must be clear and all inclusive.

It is recommended that municipalities review their practices and the resolutions they pass to exclude the public from a meeting.

Voting at a closed meeting

There continues to be considerable confusion around what, if any, votes may be taken at a closed meeting. Votes may be taken for procedural matters. Votes may also be taken for giving directions or instructions to officers, employees or agents or persons retained by or under a contract.

Experience to date has shown that greater care must be taken in preparing motions for consideration by the council, committee or local boards in a closed meeting. The legislation intends that municipal bodies make decisions in public and not at a closed meeting. Make certain that motions are prepared directing actions.

It is recommended that motions presented for deliberation at closed meetings include the words, "That (appropriate person or office) is hereby directed to..."

The legislation does not authorize "straw votes". With care, motions providing direction can achieve the body's goals, leaving the final decision to be exercised by the body at a meeting open to the public.

It is also important to use written motions. Do not rely on verbal motions. This will make it easier for the clerk or recording secretary to prepare the minutes of the closed meeting accurately.

What Committees must comply with sections 238 & 239?

Has your municipality done an assessment to determine which committees are subject to the closed meeting rules? "Committee" is defined in section 238 to mean, "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".

Thus, for example, a committee of 3 members all of whom are members of council is a committee for the purposes of the closed meeting requirements. On the other hand, if the 3 person committee has one member of council and two members of the public, it is not a committee for the purposes of sections 238 and 239.

But it could be covered if the municipal procedure by-law provides otherwise. It is important to check your procedure by-law to determine if all committees established by council or a local board, not only committees as defined by section 238, are required to comply with section 239.

How you define committee in your procedure by-law could expand (but not reduce) the scope of the section 238 definition. This could result in those committees being subject to a closed meeting investigation.

What Local Boards must comply with sections 238 & 239?

The closed meeting provisions apply to all local boards unless the Act excludes them by name. Council should ensure that these boards and their committees are educated by the municipal clerk as to the section 239 requirements. Note the scope of the list which is found in Section 1 of the Municipal Act. For example, both Boards of Health and Committees of Adjustment fall within the definition of local board

Minutes of a Closed Meeting

As with public meetings, minutes are required of all meetings of council, local boards and committees of both. These minutes cannot be taken by a member of the council. The Act requires that minutes of meetings, open and closed, be taken by the clerk, or designate, in the case of a meeting of council and by the appropriate staff person in the case of a local board or committee, presumably trained by the clerk.

It is recommended that the Clerk establish a manual to be used by designates to ensure consistency between the Clerk and designates over time.

Final Observations...

People are making requests for investigations usually because of the decision being made and not solely to encourage greater transparency. The issue is often one of perception.

As a general observation, there appears to be a frequently observed lack of attention to process and detail by both staff and members. Greater education of both staff and members is recommended.

Some LAS program members have used the information on the Amberley Gavel website to educate staff and the public. The more the public is made aware of the reasons for holding closed meetings and the more the municipality makes the process transparent, the less likely a request for investigation will be received.

Both members of council and staff need to be asking regularly whether a closed meeting is necessary. The closed meeting is the exception; the public meeting is the rule.

April 2009

THE CORPORATION OF THE TOWN OF THE BLUE MOUNTAINS

POLICY & PROCEDURES

Subject Title: Closed Session Meetings

Corporate Policy (Approved by Council)

Policy Ref. No.: POL.COR.09.08

Administrative Policy (Approved by CAO)

By-law No.: N/A

Department Policy: (Approved by Mgr.)

Name of Dept.:

Date Approved:

Staff Report:

Policy Statement

The Corporation of the Town of The Blue Mountains supports the principles of open and accountable governance. The purpose of this Policy is to provide clarity on when closed meetings are to be held and the processes to be followed.

Purpose

Section 239 of the *Municipal Act, 2001* (the Act) as amended, establishes the parameters under which a municipality, board or committee meeting may be closed to the Public. The Act also requires that minutes be recorded during Closed Session Meetings.

A meeting or part of a meeting may be closed to the public if the subject matter being considered is:

- 239(a). the security of the property of the municipality or local board;
- (b). personal matters about an identifiable individual, including Town 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;

239(3). 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.

239(3.1). the educating or training of Council and at the meeting, members will not discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the Council, Committee or Local Board.

Application

This policy applies to Council, Local Boards and all Committees including *ad-hoc* committees and Staff so as to increase the accountability and transparency of the municipal decision making process.

Definitions

Agenda

Agendas shall include a section entitled “Closed Session” where deemed to be required for a particular meeting. This will enable Council, a Local Board or Committee the opportunity to go into Closed Session to discuss all Closed Session items that are before the Council, Local Board or Committee at that particular meeting. Notice of meetings and Agendas is to be given in accordance with the provisions of the Town Procedural By-law. This does not necessarily preclude a councillor or member from requesting the opportunity to go into Closed Session during the discussion of specific reports and recommendations, however, in the interest of accountability and transparency and meeting notice requirements, such requests should be kept to an absolute minimum.

Staff Reports

Staff who are considering labelling a report “Confidential”, and is therefore to be considered in Closed Session, should seek advice from the CAO or the Clerk to ensure that the subject matter meets the criteria for a closed meeting discussion.

Resolution to go into Closed Session

A resolution to go into Closed Session should voluntarily disclose as much information in the resolution as possible. The reason must meet the criteria as set out in the Act. If Council or a committee is going into Closed Session, the resolution must also include the general nature of its subject matter and the fact that the meeting is being closed under this specific subsection.

An example follows of the level of detail expected:

1. In the situation that a lawsuit has already been commenced the resolution would read:

THAT Council do now go into closed session to discuss an item which relates to advice subject to solicitor-client privilege with respect to the lawsuit between The Corporation of the Town of the Blue Mountains and John and Jane Doe.

In the event that the subject is a matter of a potential lawsuit the resolution would read:

THAT Council do now go into a closed session to discuss an item which relates to advice subject to solicitor-client privilege with respect to a potential lawsuit;

AND THAT the legal advice relating to the potential lawsuit is the issue to be discussed and the particulars of the exact litigation matter are not included in the resolution because to do so might undermine the confidential nature of the advice to be discussed.

2. An example related to personnel is as follows:

THAT Council do now go into a closed session to discuss personal matters about an identifiable individual, including municipal or local board employees and advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

AND THAT the specifics of the matter to be discussed are not being referred to because the release of information related to the individual's name and position would undermine the confidentiality that requires the matter to be dealt with Closed Session.

It is recommended that if staff is aware of an upcoming Closed Session item that they seek advice on the wording of the appropriate resolution from the Clerk or Deputy Clerk.

Discussion and Voting

Voting during Closed Session meetings is restricted to procedural matters or for giving directions or instructions to officers, employees or agents of the municipality or committee of either of them or persons retained by or under a contract with the municipality. Where authorization to proceed on a matter is sought by Staff, any Recommendation to be considered by Council during the closed session shall begin with the phrase "THAT Council directs" or "THAT Council instructs".

The Mayor / Chair shall prohibit discussion of any matter that was not disclosed in the resolution authorizing the closed meeting.

Minutes

Closed Session minutes are taken by the Clerk. In the event the Clerk is excused from the Closed Session portion of the meeting, the CAO will document the proceedings. The CAO has had the authority for the responsibility of minutes delegated to him by the Clerk.

The minutes of the open meeting and Closed Session meeting shall reflect the time the Closed Session commenced and the time the Closed Session was completed, as well as who was in attendance. Once back in the open meeting, the Chair shall confirm the topics discussed in Closed Session and this shall be recorded in the minutes.

Approval of Closed Session Minutes

Approval of Closed Session minutes shall be at the next Closed Session meeting of Council or the appropriate committee meeting and shall be voted on in closed session.

Access to Minutes and Background Reports

Closed Session minutes and background reports shall be circulated to the members during the appropriate meeting on orange coloured paper. The minutes and reports shall be collected prior to returning to open session.

All Closed Session minutes and background reports shall be held by the Clerk in a secure location. In the event that Councillors wish to view the contents of confidential background reports they may do so by requesting access from the Clerk.

Exclusions

This Policy would apply to all actions and decisions of the municipality without exclusion or exception, unless otherwise provided for by statute.

References and Related Policies

Municipal Act, 2001 as amended

POL.COR.07.01 – Accountability and Transparency of Town Actions to the Public
By-law 2007 – 29, Being a By-law for governing the calling, place and proceedings of meetings of the Municipal Council for the Town of The Blue Mountains

Consequences of Non-Compliance

Non-compliance with the *Municipal Act, 2001* is subject to the remedies prescribed therein.

Review Cycle

This policy will be reviewed annually by the C.A.O., Senior Management Team and Council in open session.

TOWN OF THE BLUE MOUNTAINS COUNCIL

_____ 2009 NO. _____

MOVED BY _____ SECONDED BY _____

THAT with regard to subsection 239 of the *Municipal Act, 2001*, this Council do now move into closed session in order to address matters pertaining to

_____ the security of the property of the municipality or local board;

_____ personal matters about an identifiable individual, including Town 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, including matters before administrative tribunals affecting the municipality or local board;

_____ the receiving of advice that is subject to solicitor/client privilege, including communications necessary for that purpose;

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

_____ 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.

_____ the educating or training of Council and at the meeting, members will not discuss or otherwise deal with any matter in a way that materially advances the business or decision-making of the Council, Committee or Local Board.

AND WITH REGARD TO

Council moved into closed session at _____ p.m.

Council rose from closed to public session at _____ p.m.

K/Clerk09/Closed Session