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Submission to the Standing Committee on Regulations and Private Bills:

Bill 123, the *Transparency in Public Matters Act, 2004*

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Introduction

The principle of open government is a linchpin of democracy because it allows citizens to scrutinize the activities of elected officials and public servants to ensure that they are acting in the public interest.

One pillar that supports open government is freedom of information legislation, which gives people the right to access government-held information. A second pillar is open meetings legislation, which ensures that public bodies conduct their meetings in public, except in limited and specific circumstances.

In Ontario, the first pillar of open government has solid foundations. The *Freedom of Information and Protection of Privacy Act*, and the *Municipal Freedom of Information and Protection of Privacy Act* empower citizens to access records held by government, and the affected institutions have demonstrated their willingness to meet the requirements of the legislation.

However, the second pillar that supports open government – requiring public bodies to conduct open meetings – is only partly built in Ontario. There is no comprehensive open meetings law in Ontario. Instead, rules governing meetings tend to be subsumed in various pieces of legislation governing a limited group of public bodies, such as municipal councils, police services boards and school boards.

The Office of the Information and Privacy Commissioner of Ontario believes that Bill 123, *Transparency in Public Matters Act, 2004,* captures the principles that are essential to an effective and meaningful open meetings law.

These submissions will address:

- Why a comprehensive open meetings law is needed in Ontario; and
- How Bill 123 satisfies key requirements of an effective open meetings law.

Why an Open Meetings Law is Needed in Ontario

Although some public bodies such as municipal councils, police services boards and school boards are required to hold meetings that are open to the public, with some exceptions, these open meetings provisions do not go far enough in protecting the public interest.

For example, under the *Municipal Act, 2001* (the *Municipal Act*), the definition of "meeting" is unclear and imprecise; there is no clear statutory obligation to provide the public with advance notice that sets out the date, time, location and specific subject matter of all meetings, and the statute does not provide the public with a formal right to specifically complain about a violation of the open meetings rules. Similar omissions exist in the *Education Act* and the *Police Services Act* public meeting requirements.

In addition, there is no stand-alone open meetings law that governs public bodies at the provincial level in Ontario. Although it is widely recognized that provincial agencies, boards, commissions and Crown corporations must be accountable to taxpayers, few if any of these public bodies are statutorily required to open their meetings to the public.

As a result, Ontario needs a comprehensive open meetings law that uniformly and consistently applies to both municipal and provincial levels of government.

In order for an open meetings law to be effective, it must:

- provide a clear, precise and practical definition of a meeting;
- require public bodies to give the public proper and adequate advance notice of each meeting, including a clear and concise agenda;
- prohibit public bodies from considering business not included on a published agenda;
- give the public a legal right to complain if it feels that open meetings rules have not been followed;
- establish an efficient and accessible oversight system, with a body responsible for investigating complaints and resolving disputes; and
- provide remedies and penalties if the law has been breached.

These open meetings requirements are not extraordinary. In fact, they are common in the United States where the federal government and all state governments have enacted comprehensive open meetings laws that guarantee, with limited exceptions, that the public can attend meetings of public bodies. Such laws usually require public bodies to give the public proper and adequate advance notice of each meeting, including a clear and concise agenda; provide citizens with the legal right to complain if open meetings rules have not been followed; and provide for remedies and penalties to redress violations.

How Bill 123 Satisfies Key Requirements of an Effective Open Meetings Law

Definition of a Meeting

Section 3 of Bill 123 provides that a meeting occurs if certain conditions are met. For example, a "meeting" within the definition of the bill occurs when a public body deliberates on or does any thing within its jurisdiction or terms of reference. The number of members in attendance must constitute a quorum, or a majority, in the absence of a quorum requirement. These elements are commonly found in U.S. open meetings laws.[1]

An example of the lack of clarity that currently exists can be seen in the *Municipal Act*, where a "meeting" is simply defined as any regular, special, committee or other meeting of a council or local board.[2] This definition provides little help in resolving ongoing debates about whether informal gatherings of municipal councilors or board members constitute meetings that should be held in public. The courts in Ontario have also stepped in on occasion to provide direction on what constitutes a "meeting".[3]

We believe that Bill 123 provides a clear and practical definition of a meeting that can be applied at the municipal and provincial level. In our view, this definition will alleviate uncertainty stemming from the existing open meetings provisions in Ontario. Bill 123 provides additional clarity by expressly including electronic gatherings within the definition of a meeting.

Notice Requirements

A meeting is not truly open to the public unless citizens are given advance notice that the meeting is going to take place.

Section 4 of Bill 123 clearly requires public bodies to give reasonable public notice of its meetings by posting the date, time and location of the meeting as well as a clear, comprehensive agenda of items to be discussed.

The *Municipal Act*, for example, does not set out specific notice requirements. Rather, it states that municipalities and local boards shall pass a procedure by-law for governing the calling of meetings[4], which could result in varied practices. In addition, while some public bodies may

[1] *I'm Sorry, this Meeting is Closed to the Public: Why We Need Comprehensive Open Meetings Legislation in Canada*, Information and Privacy Commissoner/Ontario, December 2004, pp. 9and 10. Available at: www. ipc.on.ca
[2] S.O. 2001, c.25, s.238(1)
[3] See, for example, *Southam Inc. v. Hamilton-Wentworth (Regional Municipality) Economic Development Committee (1988)* 66 O.R. (2d), p.213
[4] Supra., note 2, s. 238(2)

already provide notice, the print media in Ontario have cited instances where some have allegedly failed to provide the public with proper notice of meetings.[5]

Statutory notice requirements such as those provided by the bill will help to ensure that all public bodies uniformly and consistently provide reasonable notice to the public that a meeting will take place.

Enforcement of Open Meetings Laws

From an open government perspective, the most significant part of Bill 123 is that it includes enforcement mechanisms. These protections may be found in sections 10 to 22 of the bill.

Bill 123 provides members of the public with a legal right to complain if they believe that open meetings rules have not been followed. It would also establish an oversight body responsible for investigating complaints and resolving disputes. A person who believes a designated public body has contravened or was about to contravene the bill could make a complaint to the Information and Privacy Commissioner of Ontario (Commissioner).

Under Bill 123, the Commissioner would be empowered to mediate a complaint. Failing that, the Commissioner would have the power to review a complaint, and to undertake a review on her own initiative. The Commissioner could also exercise various powers when reviewing a suspected contravention, including the power to enter and inspect premises, to demand production of materials relevant to the review, and to require a person to appear before the Commissioner to give evidence.

With respect to remedies, the Commissioner would have the authority to make certain orders after a review. For example, she would have the authority to order that a public body change or cease a practice relating to open meetings requirements. The Commissioner would also have authority to issue an order that voids a decision made by a public body at a meeting that did not conform to the requirements of the law.

Bill 123 would also create certain offences that could lead to the imposition of a monetary penalty. It would be an offence to willfully obstruct or attempt to mislead the Commissioner when she is performing function authorized under the bill, or to willfully fail to comply with an order.

Benefits of Enforcement Provisions

Critics of Bill 123 have suggested that these oversight powers are too broad and would result in another layer of bureaucracy.

[5] See Zev Singer, "Library board debates lessons in democracy" *Ottawa Citizen*, May 15, 2003, p. C1 and Karen Best, "Debate continues over closed door council meetings" *Dunnville Chronicle*, April 16, 2003, p. 3

In response to this criticism, it should be noted that existing laws governing public meetings at the municipal level do not explicitly provide the public with a formal right to complain about a violation of open meetings rules, nor are there remedies or penalties that would specifically apply to such violations. Any possible remedy under the *Municipal Act*, for example, would require a member of the public to go to court to either quash a municipal bylaw for illegality or to "restrain" a municipality from violating a procedure bylaw. This is a cumbersome, costly and time consuming process for addressing open meetings law violations.[6]

The Commissioner's office is an experienced, adjudicative tribunal with expertise in a broad range of access issues, including procedural matters. The office is accessible to the public and more efficient as an enforcement mechanism than the courts, particularly since mediation is also offered as an effective alternative dispute resolution mechanism.

Moreover, the Commissioner's order-making powers in Bill 123 are entirely consistent with existing oversight authority. The Commissioner is currently empowered to issue binding orders under the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act* as well as the *Personal Health Information Protection Act, 2004* and has the authority to require the production of records, enter and inspect premises and require a person to appear to give evidence. Offences and penalties for obstructing the Commissioner in the performance of her duties are also found in these statutes. [7]

It is important to note that Bill 123 would not empower the Commissioner to overrule duly elected officials by substituting her own views. Although one of the Commissioner's order-making powers under the bill would be the ability to void a decision made by a public body at a meeting that did not conform to the open meeting requirements, such an order would be based **only** on a procedural violation of open meetings rules, not on the substance of the meeting itself. The public body would retain the authority to start over and make the same decision again, but this time in compliance with the law.

It is also important to note that enforcement of open meetings laws by an oversight body is not unusual in the United States. Several U.S. states have an ombudsman who oversees enforcement and interpretation of their open meetings laws.[8] The courts typically show some level of deference to the ombudsman's interpretations of the law.[9] For example, in Connecticut, the Freedom of Information Commission[10] is responsible for reviewing alleged violations of the state's open meetings law and has the power to issue orders. In general, complainants must

[6] Supra., note 1, pp. 13, 14

[7] Power to issue orders: *Freedom of Information and Protection of Privacy Act (FIPPA), s. 54; Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, s. 43; *Personal Health Information Protection Act, 2004 (PHIPA),* s. 61.
Power to order production of records, enter and inspect premises: *FIPPA*, s. 52(4); *MFIPPA*, s. 41(4) and *PHIPA*, s.60.
Power to require a person to give evidence: *FIPPA*, s. 52(8); *MFIPPA*, s. 41(8) and *PHIPA*, s. 60(12).
Offences and penalties for obstruction: *FIPPA*, s. 61, *MFIPPA*, s. 48 and *PHIPA*, s.72.

[8] Ann Taylor Schwing, *Open Meeting Laws*, 2nd ed. (Anchorage: Fathom Publishing Company, 2000), p. 46

[9] Ibid.

[10] <www.state.ct.us/foi/>

first seek relief from the Commission but may appeal to the courts if they are dissatisfied with the Commission's decision.[11]

Oregon's Government Standards and Practices Commission[12] has the power to review and investigate complaints that public officials have violated the state's open meetings law. The Commission may interview witnesses, review minutes and other records *in camera*, and obtain other information about executive sessions (i.e., closed sessions) to determine if a violation of the open meetings law has occurred. It may also impose civil penalties in certain cases.[13]

It is our position that Bill 123 establishes an efficient and accessible oversight system with appropriate enforcement mechanisms that are essential for an effective open meetings law in Ontario.

Scope of Bill 123

The designated public bodies and types of designated public bodies that are included in the current schedule to the bill are fairly narrow. In addition, we understand that Ms. Caroline Di Cocco may be proposing amendments which could further limit the application of the bill to municipal councils, public hospital boards and district school boards or school authorities.

It is our position that a comprehensive open meetings law should eventually extend to the broader municipal sector and include public bodies such as police services boards, local school boards and library boards, to name a few. Moreover, we are of the view that this law should also extend to provincial agencies, boards and commissions as well as the broader public sector with the exception of adjudicative bodies, such as the courts and administrative tribunals.[14] These provincial bodies, not currently listed in the schedule to the bill, include organizations that deliberate and make decisions affecting citizens on a host of different issues, including the environment, the arts and economic development.

Nevertheless, even with the amendment proposed by Ms. Di Cocco, we are of the view that Bill 123 provides a solid starting point for the application of an open meetings law. Although some have challenged the bill's initial application to municipalities, we are of the view that municipal councils are important to include at the initial stages of an open meetings law. These public bodies deal with a wide range of matters that affect the day-to-day lives of citizens and the communities in which they live. Moreover, these public meetings are held locally and are convenient for citizens to attend.

[11] Conn. Gen. Stat. Ann. § 1-206(b), (c) (West 1999 Cum.PP), as cited in Schwing, supra note 8, footnote 229 on p. 47.

[12] <www.gspc.state.or.us/>

[13] Ore. Rev. Stat. § 192.685(1),(2), 244.260(1) (1998 Supp.), as cited in Schwing, supra note 8, footnotes 236 and 237 on p. 47.

[14] It is interesting to note that under the *Audit Statute Law Amendment Act, 2004,* the Auditor's value-for-money audit mandate was expanded to include organizations in the broader public sector that receive government grants, such as hospitals, colleges, universities as well as Crown-controlled corporations, such as the new Hydro corporations.

We encourage the future expansion of this open meetings law to encompass the broader public sector, and recognize that work will be required in the future to analyze the many provincial and municipal bodies that are publicly funded to identify those that would be subject to the open meetings requirement. However, we are satisfied with the scope of Bill 123 as a foundation on which to build.

Last Minute Agenda Items

One omission from the current version of Bill 123 is a provision that would prevent public bodies from slipping last-minute items onto an agenda without notifying the public. Such a prohibition has been included in similar legislation in several U.S. states.[15]

Although we strongly maintain that there should be such a provision, we realize that there may be a need for limited exceptions so as not to unduly hinder the functioning of public bodies in special circumstances, for example, emergencies.

Accordingly, we recommend that Bill 123 should be amended to include a rule that would prohibit a public body, with limited exceptions, from considering business not included on a published agenda.

We understand that Ms. Di Cocco may be proposing an amendment to address this omission from the bill, and we would support such an amendment.

Conclusion

If passed, Bill 123 will provide Ontario with a solid second pillar of open government – a strong open meetings law. We also believe that this bill has the potential to enhance Ontario's position as one of the leading jurisdictions in North America when it comes to open, transparent and accountable government. We endorse the passage of Bill 123.

[15] Supra, note 8, pp.204-205.