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MEMORANDUM

March 23, 2009

TO: Vancouver City Council
FROM: Dr. Penny Ballem, City Manager
SUBJECT: Vancouver Olympic Village Document Leak Review

In November 2008, Mr. Richard Peck, Q.C., was appointed by the City Manager to investigate the source of the leak of confidential information relating to the Athlete's Village in Southeast False Creek and report back to Council, in an open meeting, the results of the investigation.

Attached is Mr. Peck's report, dated March 11, 2009, for Council's information.

I have asked the City Clerk to report back to Council on the recommendations contained in this report.

* * * * *

Vancouver Olympic Village Document Leak Review

PHASE ONE:

Management of Confidential Documents:
A Review of Applicable Policies and Procedures

Richard C.C. Peck, Q.C.

March 11, 2009

EXECUTIVE SUMMARY

Integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful.

- Samuel Johnson

A. The Olympic Village Leak

On October 14, 2008, an *in camera* meeting was held to deal with problems arising with the financing of the Olympic Village project. After a very lengthy meeting, during which numbered copies of a confidential report prepared by project manager, Jody Andrews, were distributed and discussed, the City voted unanimously to extend “protective advances” to the project developer, Millenium, in order to assist in “balancing” its loan with the American lending company, Fortress. The Report was confidential and the numbered copies were to be collected at the conclusion of the meeting. One report went missing.

In the time following the City's vote to extend \$100 million dollars of assistance to Millenium, some or all of the information contained in the missing Report was leaked to the media. In the midst of an ongoing civic election, the “Olympic bail-out” became a significant election issue. Since the initial disclosure of the confidential information contained in the Report, other information of a confidential nature has made its way into the media.

At the end of November of 2008, the City appointed me as an Investigator pursuant to sections 176 and 177 of the *Vancouver Charter*. Section 176 of the *Vancouver Charter* states that I must “investigate and report” upon “any alleged misfeasance, breach of trust, or other misconduct” by “any member of Council” or “any employee of the city” in regard to the “duties or obligations” of that person “to the city.” As well, I can investigate and report upon “any matter connected with the good government of the city or the conduct of its business.”

Around the same time that I was appointed, then-Mayor Sam Sullivan asked the Vancouver Police Department (the “VPD”) to investigate the missing Report and consider whether the person responsible had violated the *Criminal Code of Canada*. That investigation is still ongoing, as of the date of this report.

In light of that ongoing investigation, I recommended that the investigative phase of my responsibilities be deferred until the VPD’s investigation had concluded. Ultimately, any such investigation on my part may be unnecessary.

I decided to explore my mandate in two phases: (1) the first phase of inquiry would focus on the adequacy of city policies and procedures relating to *in camera* meetings, the treatment of sensitive documents and the use of confidential information; and (2) the second phase of the inquiry would, if necessary, enter into a fact-finding process to determine to a reasonable degree of certainty how, and by whom, confidential information was disclosed outside an *in camera* council meeting. This report focuses on the first phase of that mandate.

B. The Phase One Inquiry

In early December, a number of interviews were conducted to gather information. I decided early on that, given the VPD investigation, I was not going to interview the City Manager or the City Councillors who were present during the October 14th *in camera* meeting during the first phase of the Inquiry. I met with the Director of Legal Services and with the Acting City Clerk during this time and began collecting the relevant statutes, policies and procedures in place to govern the management of confidential information in the City of Vancouver.

The next significant step in the Inquiry was to identify an appropriate benchmark by which to measure the policies and procedures in place in Vancouver. While some inquiry was made as to procedures in other levels of government in British Columbia and in the business sector, it was soon decided that another leading Canadian city would be the best comparator. The City of Toronto, rocked by City contract scandals and suffering from frequent leaks of confidential information to the media, had recently conducted its own review of municipal best practices and had

implemented significant reforms to increase the City's accountability and transparency. The Province of Ontario had also recently enacted the *City of Toronto Act, 2006* ("COTA"), with significant input from the City of Toronto, which provided clear statutory authority for several of the City's accountability initiatives. Accordingly, I chose the City of Toronto as the comparator by which to evaluate the sufficiency of Vancouver's practices and policies.

We had a telephone interview with David Mullan, former Integrity Commissioner for the City of Toronto, and with Ulli Watkiss, City Clerk for Toronto. Ms. Watkiss kindly provided us with a variety of helpful and informative materials, which set out some of the key policies and procedures that the City of Toronto has adopted in order to better manage confidential information and prevent leaks of such information to parties outside the City's confidence. In drafting my Report and making the recommendations set out in the following section, I relied on the information provided to me by the City of Vancouver staff, my interviews with current and former City staff from both Vancouver and Toronto and information publicly available on the websites of those respective cities.

There are many similarities in the applicable legislation and internal policies of the two cities. Both the *Vancouver Charter* and *COTA* require all City Council meetings to begin and end in public. Both Vancouver and Toronto have Codes of Conduct. In some ways, the legislative and municipal framework that exists in Vancouver seems to have broader application. The Vancouver Code of Conduct applies to Members of Council and City staff, while in Toronto the Member's Code of Conduct does not apply to City Staff. In Vancouver, the City has enacted a "whistleblowing" policy which creates a duty on City staff to report misconduct by other members of the staff and implements protections for doing so. This policy does not apply to alleged misconduct by Members of Council.

Upon closer inspection, however, the oversight and accountability provisions in the Vancouver Code are lacking. There is no statutory basis for the Code of Conduct in the *Vancouver Charter* and no prescribed penalties in the *Charter* for a contravention of the existing Code. The Code itself is fundamentally flawed in that there is no independence from the City built into the Code. Alleged contraventions of the Code are to be reported to the Mayor, regardless of the subject of the complaint.

Further, there is no provision in the Code for an alternative reporting regime if an individual wishes to make a complaint about the Mayor. This current regime is particularly problematic given the party-based governance model in place in the City of Vancouver.

As it stands now, there is no equivalent in Vancouver of the Toronto-based model of the now statutorily required Integrity Commissioner. Under that model, the Integrity Commissioner is an independent officer who can investigate alleged contraventions of the Member's Code of Conduct by elected City officials. The Commissioner has coercive powers, similar to a commissioner of inquiry. Of key importance is that the Commissioner can recommend the imposition of two statutory penalties, enacted by COTA. While the City of Vancouver can lay claim to having a Code of Conduct for its elected officials, without a statutory underpinning and an enforcement regime, it lacks authority.

C. The Recommendations

Confidential information, used to support the decision-making process, can be managed in a number of ways including:

- controlling the flow of information between City staff and the City Clerk's Office;
- limiting access, electronic or otherwise, to confidential information;
- secure copying of confidential information;
- limiting distribution of confidential information; and,
- ensuring the security of meeting locations for in private sessions.

Based on a review of the *Vancouver Charter*, the City's Code of Conduct, and the City's "whistleblowing policy," and a review of the corresponding legislation and procedures which operate in the City of Toronto and interviews of members of the respective Cities' staffs, I would make the following recommendations:

1. the City should create a central electronic repository for confidential information that cannot be accessed without a password.

2. the password should be person-specific and strictly controlled by the City Manager or the City Clerk and should be capable of being recorded on a log in/log-out basis.
3. the City Clerk, or their designate, should oversee the circulation and duplication of any confidential information.
4. The City Secretariat should adopt a policy which requires each individual staff member who purports to draft a confidential report to also draft a public report on the same issues. The focus of the report should be to inform the public as to the matters to be covered in the *in camera* meeting in as much detail as possible without revealing the identities of the parties involved or the precise nature of the issue to be discussed.
5. The City should endeavour to limit the amount of information that is declared to be confidential and the amount of time spent by Council *in camera*.
6. The City should amend the Code of Conduct to include a definition of "confidential information," an example of such is the one employed by the City of Toronto.
7. The City should work to keep accurate records regarding the amount of time spent *in camera* and the number of documents or meeting topics declared confidential.
8. Confidential information should be printed on paper with an identifiable colour scheme (i.e. purple paper).
9. Confidential information distributed to Council should be marked as "confidential."
10. Confidential information distributed to Council should be marked with a numerical or alphabetical identifier, which is recorded by the City Clerk.
11. Numbered confidential documents which are distributed at *in camera* Council meetings should be returned to the City Clerk

individually, and each Council member should be required to sign out once they have returned their assigned document.

12. No member of Council shall be permitted to leave the Council chamber for any reason during an *in camera* unless they have returned their confidential documents to the City Clerk and signed out.
13. Training on Codes of Conduct should be mandatory for all City staff and City Councillors.
14. Political staff should be required to adhere to the same ethical guidelines that apply to Councillors and City staff. Councillors should have their staff execute an agreement to abide by the City's codes of conduct.
15. The Oath of Office should be amended to include some reference by prospective Councillors to respecting their "duty of confidentiality" and an oath to abide by the Code of Conduct.
16. Subject to collective bargaining restraints, all staff and councilors should be required to sign an annual declaration that they are aware of the codes of conduct, are versed in them, and will uphold them.
17. A full-time or part-time integrity or ethics commissioner should be hired.
18. The City should request the Provincial Government to amend the *Vancouver Charter* in the following ways:
 - (a) The *Charter* should require the City to enact a separate Code of Conduct for members of Council and advisory body members;
 - (b) The *Charter* should prescribe specific penalties for a contravention of the Code of Conduct;

- (c) The *Charter* should direct the establishment of an Office of the Integrity Commissioner, similar to that created by COTA;
- (d) The Integrity Commissioner should have duties and powers similar to those held by the Integrity Commissioner for Toronto, as set out in COTA;
- (e) The Integrity Commissioner should have the jurisdiction to investigate complaints against members of Council and City employees;
- (f) The Integrity Commissioner should be independent of City Council, while reporting to Council on matters investigated under its statutory mandate;

D. The Last Word

Finally, the obvious needs to be stated: the proper functioning of the City business ultimately depends on the personal integrity of those charged with the responsibility of carrying it out. In the end, internal protections can only go so far.

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PREFACE

WITH THIS REPORT, I have endeavored to take a constructive and prospective approach to the issues raised by the unauthorized disclosure to the media of the Confidential Report of October 14th, 2008. The business that the City undertakes on a daily basis is important and should be of interest to every Vancouverite. The provisions in place that set out when and why City Council should, or indeed must, discuss certain aspects of City business behind closed doors are based on solid policy rationales. Untimely or unauthorized disclosure of information, intended to be held by City Councillors and staff in confidence, can have significantly adverse consequences for both individuals and corporations employed by or involved in dealings with the City.

IN THE FIRST PHASE OF THIS INQUIRY, I have not attempted to discern the identity of the person or persons responsible for the breach of confidentiality occasioned by the disclosure of the City's intention to assist the developer in completing the Olympic Village project. As mentioned above, I have focused my analysis on what steps the City of Vancouver can take to ensure that a similar breach of ethics does not recur and to offer some recommendations as to procedures that might be implemented to censure those that would take their duty of confidentiality so lightly.

I WAS APPOINTED as an Investigator by City Council pursuant to sections 176 and 177 of the *Vancouver Charter* at the end of November, 2008. I was given no mandate – no “terms of reference.” Section 176 of the *Vancouver Charter* states that I must “investigate and report” upon “any alleged misfeasance, breach of trust, or other misconduct” by “any member of Council” or “any employee of the city” in regard to the “duties or obligations” of that person “to the city.” Alternatively, I can investigate and report upon “any matter connected with the good government of the city or the

conduct of its business." Needless to say, the mandate set out in the *Charter* is remarkably broad.

IN RELATION TO THE TIMING OF THE CITY'S INVESTIGATION, I am cognizant of the ongoing criminal investigation being conducted by the Vancouver Police Department (the "VPD"). It is well-established that investigations conducted for the purposes of establishing criminal liability are within the purview of the police. I do not intend to intrude upon the VPD's bailiwick in that regard. In light of their ongoing investigation, I recommended that the investigative phase of my responsibilities be deferred until the VPD's investigation had concluded. Ultimately, any such investigation on my part may be unnecessary.

I HAVE DECIDED TO EXPLORE MY MANDATE IN TWO PHASES: (1) the first phase of inquiry focuses on the adequacy of City policies and procedures relating to *in camera* meetings, the treatment of sensitive documents and the use of confidential information; and (2) the second phase of the inquiry will, if necessary, enter into a fact-finding process to determine to a reasonable degree of certainty how, and by whom, confidential information was disclosed outside an *in camera* council meeting. This Report focuses on the first phase of that mandate. Again, the second phase may not be necessary depending on the result of the VPD investigation.

IN THIS REPORT I HAVE NOT conducted an expansive survey of municipal "best practices" in the management of confidential information. In my opinion, if the City of Vancouver wishes to adopt some, or all, of the recommendations in this Report then the City's financial resources are better spent conducting such research internally. I have simply tried to identify certain areas, in both City practice and its enabling legislation, where positive change may be affected. In doing so, I have kept the current financial climate in mind. My work on this Report has unfolded against the backdrop of the Country's continuing descent into a financially depressed economy and the City's decision to assume financial responsibility for the Olympic

Village project. As such, I have endeavored to discharge my responsibilities under s. 176 of the *Charter* in a manner that minimizes the financial impact on the City and, thus by extension, its citizens. It is my sincere hope that, ultimately, it is the citizens of Vancouver who will benefit from the recommendations contained in this Report.

I. THE OLYMPIC VILLAGE WAS IN TROUBLE

On October 14, 2008, a regular meeting of City Counsel convened at 3:36 p.m. and dealt with several motions. The regular meeting was then recessed at 3:45 p.m. An *in camera* meeting was deemed necessary to deal with problems arising from the financing of the Olympic Village project.

At 4:20 p.m., Council reconvened with all members present for an *in camera* meeting, wherein agenda item 6 – “Verbal Briefing of Real Estate Negotiations” – was discussed and a confidential report was circulated. Jody Andrews, Deputy City Manager, Ken Bayne, General Manager, Business Planning and Services, and Michael Flanagan, Director, Real Estate Services, provided an overview of the Administrative Report, “Southeast False Creek and Olympic Village Financing Considerations,” dated October 14, 2008 (hereinafter the “Report”).¹

A. Millennium Needed Cash Flow

The rationale behind considering the Report *in camera* was inscribed on the face of the document.² Jody Andrews, the Project Manager, thought that, amongst other things, disclosure of the information in the Report could harm the business interests of a third party and endanger the security of the property of the city.

According to the Report, the recent economic downturn in world-wide credit, equity and real estate markets, following on a period of high construction activity and escalating construction costs, had created a difficult environment with regard to funding the work required to complete the

¹ City of Vancouver, Regular Council (In Camera) Meeting Minutes, dated October 14, 2008, at p. 4-5 [hereinafter the Meeting Minutes”].

² The Report cited s-s. 165.2(1)(d), (e), (g), (i), (j) and (k) of the *Vancouver Charter*, SBC 1953, c. 55 [hereinafter the “Charter”].

Olympic Village phase of the City's Southeast False Creek development. Due to recent global and local market conditions, it had become increasingly difficult for the developer, Millennium, to keep its loan with the financier, Fortress Credit Corp. (hereinafter "Fortress"), an American lender.

Two months earlier, Millennium had injected an additional 25 million dollars in equity into the project in order to "balance the loan". The Report was tabled with Council in October, of 2008, Millennium advised that it would not be able to meet the next construction draw, estimated to be approximately 30 million dollars, and would likely be unable to meet the following construction draw 30 days thereafter.

B. Fortress Demanded Guarantees

The project had secured financing of \$750 million from Fortress. As the project progressed, the budget came under pressure. An update of the budget in Spring 2008, indicated that a "balancing" payment of \$25 million was required, which Millennium funded by an equity infusion. At that time, it was acknowledged that additional financing would be required and an in depth review of project status set this amount at \$60 million to \$100 million. It was the view of the City's consultants that the likely amount of funding required to bring the project to completion was in the range of \$100 million.

Millennium was unable to raise a new credit facility and again found its loan "out of balance." The City was advised by Fortress that if it did nothing to alleviate the situation it would refuse to fund the next progress draw on October 15, 2008. Millennium indicated that it was unable to cover the approximately \$26.6 million construction progress draw. If left unpaid, the general contractors would issue default notices, which would begin a process, the likely result of which would be that the City would have to effectively take control of the project.

C. The City Adopted A Plan

In the Report, the City was presented with three options to deal with the October financing crisis: (1) do nothing; (2) refinance; or (3) provide “protective advances.” The Report stated, as explained above, that if the City chose to do nothing it would likely find itself taking control of the project anyway and also having to decide additional questions, such as whether Millennium should remain involved in the project; how the project would be completed for VANOC; and how to finance the remainder of the project.

The Report also took a dim view of the refinancing option, due to the concessions sought by Fortress in return for providing an additional \$100 million in financing; the first among many being an increase in the City guarantee from \$190 million to \$440 million.³ Further, there was concern on the part of Millennium and the City that the Fortress proposal would not provide sufficient financing to complete the project.

The third and final option presented in the Report was for the City to provide “protective advances” to Millennium to cover the progress draw. Under the existing loan documents the City could effectively inject equity into the project thus ensuring that the contractors would be paid and work would continue. The Report’s authors also noted that, as the payment would be made to Millennium, the contractors might not realize that there had been a change in the financing source. If the City could provide funds to cover three progress draws, the loan would essentially be back in balance and Fortress would be required to resume draw payments under the existing \$750 million facility.

The Report recommended that the City not move to replace Millennium and the developer and make the “protective advances” to protect its interests in the project and to meet its commitments to VANOC to have the permanent facilities

³ Report, *supra*, at p. 9.

for the Olympic Village ready by the Fall of 2009. Ultimately, City council voted unanimously to pay the cash balancing payments to Millennium's development in Southeast False Creek Area 2A, up to an aggregate amount of \$100 million dollars.

1. The *In Camera* Meeting

All of the discussions relating to the financing crisis took place *in camera*. As per the normal course the meeting took place in the Mayor's office. All council members were present. In addition to the council members, several members of the City staff were present as well, including Judy Rogers, City Manager, Marg Coulson, Acting City Clerk, and Francie Connell, Director, Legal Services.⁴

Information regarding the most current state of affairs was being provided to the Report's authors almost up to the moment the council meeting was began. The authors of the Report were scrambling to generate the most up-to-date version of the Report. It is unknown at this point how many people had access to drafts of this Report in the hours and days leading up to the Council meeting.⁵

At the *in camera* meeting the Report was distributed to the council members by Marg Coulson and/or Jody Andrews. The copies of the Report had been marked in the upper right hand corner with a number. The numbered Reports had been assigned to specific Councillors, beginning with the Mayor. The Reports were printed on white paper and included the words "in camera" in the upper right hand corner.

⁴ All of the individuals present are listed in the Meeting Minutes, *supra*, at p. 1.

⁵ It would almost certainly have included the following people: Judy Rogers, Jody Andrews, Ken Bayne, Michael Flanagan, Francie Connell, Marg Coulson or someone from the City Clerk's office; and Bill Aujula, a solicitor from legal services.

The Councillors were permitted 20-30 minutes to review the 12-page Report. Afterwards the matter was up for discussion. The Report's authors provided an overview of the Report and questions were responded to by same, in addition to Judy Rogers, Francie Connell, Bill Aujula and Ross MacDonald, outside counsel from Stikeman Elliot LLP. The matter was discussed for several hours, an unusually long time for an *in camera* meeting. Council did not adjourn the *in camera* meeting until 7:38 p.m.

After the meeting had adjourned, Jody Andrews asked the Councillors to return their copies of the Report. Some of those present remember that a number of the councillors deposited their reports in the middle of the table and that either Mr. Andrews or Ms. Rogers collected a couple of Reports personally from two councillors. No one kept track of who returned their Reports. No sign-off or check-out system was used to confirm that all of the Reports had been turned in before the participants left the room.

After the meeting, Ms. Connell and other members of the City Staff retired to the City Manager's office to discuss how the meeting had gone. Very shortly thereafter, Jody Andrews entered the room and advised them that one of the Reports was missing. Upon discovering this, he identified the missing report as belonging to Councillor Ladner. Mr. Andrews approached Councillor Ladner and asked for his report. Councillor Ladner indicated that he did not have the report and that he had left it in the middle of the table in the Council Room. Mr. Andrews explained that they could not locate the report and asked Councillor Ladner if he had his copy with him. Councillor Ladner then proceeded to show Mr. Andrews his documents and possessions and, according to Ms. Connell, Mr. Andrews was satisfied that Councillor Ladner did not have the Report on his person. Ms. Connell advised that Mr. Andrews approached Councillor Ladner within 10 minutes of the *in camera* session. Ms. Connell explained that two other council members, B.C. Lee and Kim Capri were also in the area after the meeting had adjourned. Both of those councillors were questioned and

explained that they did not have a copy of the Report on their person.

Ms. Connell immediately sent out a memo to Council and staff who had been present at the *in camera* meeting informing them that one of the Reports had gone missing. Two days later, the missing Report was located on the desk of Councillor Lee. Councillor Lee did not know how the Report ended up on his desk.

D. Someone Breached Their Duty of Confidentiality

In the time following the *in camera* meeting of October 14, 2008, Gary Mason, a reporter with the *Globe and Mail* wrote an article about the financing crisis which appeared to include confidential information that had been contained in the missing Report.⁶ It appeared that someone who had access to the confidential information had either disclosed the Report itself to the media or had orally reported on its contents.

II. THE GOVERNING POLICY IN VANCOUVER

A. The Vancouver Charter

The *Vancouver Enabling Act, 1949*, came into effect as the *Vancouver Charter* on July 2, 1953. It replaced the *Vancouver Interpretation Act, 1921*. The *Charter* was consolidated on December 31, 1996, by the British Columbia Office of the Legislative Counsel.

⁶ A review of the online articles by Gary Mason on the *Globe and Mail* website reveals that on November 6, 2008, Mr. Mason wrote an article entitled, "Athletes village to get \$100-million loan." In the article, Mr. Mason quoted from sections 6-B and 6-C of the October 14, 2008, Council Meeting minutes, which were marked "confidential." It should be noted however that the same quotations cited by Mr. Mason were also included in the Report as recommendations. Accordingly, it is not clear whether the quoted information was drawn from the Report itself or from the Meeting minutes.

The *Charter* sets out, *inter alia*, the procedures which govern civic elections (Part I), the general powers of city council (Part III), and the duties of the mayor and various other city employees (Part IV). Part XVII of the *Charter* sets out the penalties for a violation of the *Charter* or a city by-law.

1. In Camera Meetings

Part III of the *Charter* provides for the make up of Council and its general powers. Section 165 provides that Council may make by-laws governing the conduct of Council members at meetings of Council and its committees, the notice requirements for such meetings, the minutes of the business transacted by the Council and its committees and provides for the destruction of documents and the conditions under which they may be destroyed.

As a general rule, s. 165.1(1) of the *Charter* requires that meetings of City Council must be open to the public. There are exceptions to the rule and they are set out in s. 165.2, as follows:

165.2 (1) A part of a Council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:

- (a) personal information about an identifiable individual who holds or is being considered for a position as an officer, employee or agent of the city or another position appointed by the city;
- (b) personal information about an identifiable individual who is being considered for an award or honour, or who has offered to provide a gift to the city on condition of anonymity;
- (c) labour relations or other employee relations;
- (d) the security of the property of the city;
- (e) the acquisition, disposition or expropriation of land or improvements, if the Council considers that disclosure could reasonably be expected to harm the interests of the city;

(f) law enforcement, if the Council considers that disclosure could reasonably be expected to harm the conduct of an investigation under or enforcement of an enactment;

(g) litigation or potential litigation affecting the city;

(h) an administrative tribunal hearing or potential administrative tribunal hearing affecting the city, other than a hearing to be conducted by the Council or a delegate of Council;

(i) the receipt of advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(j) information that is prohibited, or information that if it were presented in a document would be prohibited, from disclosure under section 21 [*disclosure harmful to business interests of a third party*] of the *Freedom of Information and Protection of Privacy Act*;

(k) negotiations and related discussions respecting the proposed provision of an activity, work or facility that are at their preliminary stages and that, in the view of the Council, could reasonably be expected to harm the interests of the city if they were held in public;

(l) a matter that, under another enactment, is such that the public may be excluded from the meeting;

(m) the consideration of whether a Council meeting should be closed under a provision of this subsection or subsection (2);

(n) the consideration of whether the authority under section 165.21 [*other persons attending closed meetings*] should be exercised in relation to a Council meeting.

(2) A part of a Council meeting must be closed to the public if the subject matter being considered relates to one or more of the following:

(a) a request under the *Freedom of Information and Protection of Privacy Act*, if the Council is designated as head of the local public body for the purposes of that Act in relation to the matter;

(b) the consideration of information received and held in confidence relating to negotiations between the city and a provincial government or the federal government or both, or between a provincial government or the federal government or both and a third party;

(c) a matter that is being investigated under the *Ombudsman Act*, of which the city has been notified under section 14 [*ombudsman to notify authority*] of that Act;

(d) a matter that, under another enactment, is such that the public must be excluded from the meeting.

(3) If the only subject matter being considered at a Council meeting is one or more matters referred to in subsection (1) or (2), the applicable subsection applies to the entire meeting.

The only restriction on the business which can be transacted in a closed meeting is that the Council must not vote on the reading, or adoption, of a by-law when its meeting is closed to the public.⁷

Section 165.3(1) stipulates that before a meeting, or part of a meeting, is held *in camera*, Council must pass a resolution, in the public part of the meeting, which states the fact that the meeting is to be closed to the public and the statutory basis upon which Council relies to close that part of the meeting. Accordingly, all meetings of City Council must begin as public meetings, before all or a portion of the meeting is held *in camera*.

The only statutory stipulation governing the minutes to be taken during a closed door meeting provides that the minutes must record the names of all persons in attendance.⁸

2. Ethical Obligations in the Charter

The two main areas of ethical obligations covered in the *Charter* are conflicts of interest and the acceptance of gifts and benefits. These provisions are set out in ss. 145.2 to 145.91 of the *Charter*. Sections 141 to 142.3 describe the circumstances under which a member may be disqualified from holding office and the process for obtaining a court ordered declaration of same.

⁷ Section 165.1(2) of the *Charter*.

⁸ Section 165.3(2) of the *Charter*.

Council members are required to disclose whether they have any direct or indirect pecuniary interest in a matter before Council or any other “interest in the matter that constitutes a conflict of interest.”⁹ The *Charter* sets out several situations amounting to a conflict of interest that may result in disqualification from Council pursuant to s. 141(2).¹⁰ It should be noted that inadvertence or a good faith error are deemed to be excuses to the contravention under each of the enumerated situations.

There are no provisions in the *Vancouver Charter* which expressly restrict or prohibit the disclosure of confidential information by members of council.

3. Compliance and Consequences

There are very few provisions in the *Vancouver Charter* which operate to ensure compliance by members of Council with its provisions or provide meaningful consequences to members of Council who violate them. There is no reference in the *Charter* to a Code of Conduct for members of Council. While there is an internal Code of Conduct,¹¹ which has been developed by the City as a corporate policy, there are no specific penalties set out in the *Charter* for a contravention of the Code of Conduct.

Section 165.5 of the *Charter* provides that the person presiding over a Council meeting may expel another person from the meeting if that person is “acting improperly.” That expulsion order is also enforceable, at law, with the same force as a court order. No further definition is given of “improper” conduct, nor is it clear from the section if the phrase “another person” includes a member of Council.

⁹ Section 145.2 of the *Charter*.

¹⁰ The impugned behaviours are set out in the following sections: section 145.3 [restrictions on participation if in conflict]; section 145.4 [restrictions on inside influence]; section 145.5 [restrictions on outside influence]; section 145.7 [restrictions on accepting gifts]; section 145.8 [disclosure of gifts]; section 145.9 [disclosure of contracts]; section 145.91 [disclosure on use of insider information].

¹¹ The Vancouver Code of Conduct will be discussed later in this Report.

Section 176 authorizes the City to appoint a barrister to investigate any “alleged misfeasance, breach of trust, or other misconduct” by any member of Council or any City employee in regard to their duties and obligations to the City. The Investigator may order persons to appear before him or her and answer questions under oath. Further, the Investigator may order a person to produce a record or thing in the person’s possession or control. The Investigator may apply to court for an order enforcing the summons or production orders issued by the Investigator. A report cannot be made against a person who is subject to any charge in the investigation unless and until they have been given notice of the charge and an opportunity to be heard in person or by counsel. A person who fails to attend and answer questions or produce requested documents is liable, on application to the court, to be found in contempt, as if in breach of a court order.¹²

Section 208 of the *Charter* requires the Mayor to vigilantly cause the law for the government of the City to be enforced and obeyed. It also requires the Mayor to oversee the conduct of all City employees and cause “all negligence or misconduct” to be punished. This section also authorizes the suspension of a City employee by the Mayor, if it is deemed necessary, until the Council either reinstates the employee or dismisses the employee. On its face, this provision does not apply to members of Council.

Part XVII of the *Vancouver Charter* governs the ability of the City to enforce City by-laws. Under section 353 the City may, through by-law, impose fines, imprisonment or both for an offence under any by-law.¹³ City Council may deal with a contravention of a by-law by means of, amongst other

¹² Section 177.1 of the *Charter*.

¹³ It is unclear from a plain reading of s. 333(1) whether the City has authority through by-law to specify that a contravention of the by-law is an offence. For example, section 366 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, provides as follows: “The City may pass by-laws providing that a person who contravenes a by-law of the City passed under this Act is guilty of an offence.”

remedies, an *Offence Act* prosecution.¹⁴ If a person is convicted of contravening a City by-law under the *Offence Act*, the court may, in addition to the penalties set out under s. 333 of the *Charter*, prohibit the person from further harmful activity or may direct the person to take any action necessary to remedy the harm occasioned by the offence.

B. The City of Vancouver's Code of Conduct

In May of 2008, the City of Vancouver implemented, as corporate policy AE-028-01, a Code of Conduct. This policy was developed on an initiative of Council. Before that time, the City had no Code of Conduct in place. During that time, advice on matters relating to fiduciary duties, ethical obligations, and statutory obligations under the *Charter* was given to Council, as required, by the City Manager, the Director of Legal Services, or the City Clerk.

1. Application

The Code of Conduct applies by definition to all City staff, Council officials and advisory body members. The definition of "council officials" includes the Mayor and Council members. An "advisory body member" means a person sitting on an advisory committee, task force, commission, board, or other Council-established body and includes persons contracted to support any of these bodies.

2. Key Principles

Part 1 of the Code of Conduct enumerates the six key principles underlying the provisions of the Code: (1) Integrity; (2) Accountability; (3) Responsibility; (4) Leadership; (5) Respect; and (6) Openness. Each of the key principles is briefly expanded upon in this Part of the Code. One of the limitations, however, is that the principles of "Integrity" and "Responsibility" are expressly tied to respecting the dictates of the *Charter* and the Code of Conduct.

¹⁴ Section 333B (1) of the *Charter*.

This problem is repeated in articles 2.1 to 2.3 of the General Conduct section of the Code. There is also an unnecessary amount of repetition present in the Code.¹⁵

3. Handling of Information

Part 3 of the Code deals with how Council officials, staff and advisory body members manage information. Article 3.1 reads, in its entirety, as follows:

Council Officials, staff and advisory body members must:

- Protect information that is specifically marked confidential and other material understood to be confidential in nature;
- Refrain from discussing / disclosing any confidential information with/to other staff, or with persons outside the organization except as authorized;
- Take reasonable care to prevent the examination of confidential material by unauthorized individuals;
- Not use confidential information with the intention to cause harm or detriment to Council or any other person or body;
- Only access information needed for council business;
- Only use confidential information for the purpose it is intended to be used;
- Only release information in accordance with established City policies and procedures and in compliance with the *Freedom of Information and Protection of Privacy Act*; and
- Not disclose any information discussed during an *in camera* session of Council.

The phrase “confidential information” is not defined or described in Part 3 of the Code.

4. Compliance and Consequences

Part 8 of the Code of Conduct sets out the process for the handling of breach allegations and the imposition of disciplinary action. Article 8.3 requires that alleged breaches

¹⁵ See the Code, arts. 2.1, 2.2, and 2.5; see also arts. 8.2 and 8.5.

of the Code by members of Council be reported in writing to the Mayor.¹⁶ Article 8.2 requires the Mayor to “consider” any alleged breaches, conduct any necessary inquiries and recommend appropriate disciplinary action to Council.

Where a Council member has contravened the Code of Conduct, article 8.6 of the Code authorizes Council to, by resolution, impose one of the following penalties:

- censure the individual for misbehaviour;
- require the individual to apologize to any person adversely affected by the breach;
- counsel the individual; or
- in the case of an advisory body member, terminate their appointment.

Articles 8.7 – 8.9 of the Code set out that breaches of the Code of Conduct by staff will result in disciplinary action pursuant to collective agreements, labour legislation and contractual terms.

C. Other Applicable Policies and Procedures

1. The City’s Whistleblowing Policy

In a corporate policy (AE-028-02) dated May 15, 2008, the City Council approved a policy entitled, “Whistleblowing – Reporting, Investigation and Protection.”¹⁷ The purpose of the policy is described as follows:

This policy sets out guidelines for the reporting and investigation of serious misconduct where there are no procedures in place for doing so, and provides protection from retaliation to those who

¹⁶ The Code does not provide any mechanism for reporting an alleged breach of the Code of Conduct by the Mayor, or for any investigation of same. It is the Mayor who receives the complaints, who inquires into the complaint and recommends any proposed penalty to the Council. This reporting regime effectively puts the Mayor beyond the reach of the law as it were.

¹⁷ “Whistleblowing – Reporting, Investigation and Protection,” policy no. AE-028-02 [hereinafter the “Policy”].

report serious misconduct in good faith. Reporting serious misconduct in good faith is also referred to as whistleblowing.

The policy is stated to apply to all City and Parks and Recreation staff. It does not appear to apply to members of Council.

Article 1.3 of the Policy stipulates the following:

Staff have a responsibility to report instances of serious misconduct. Examples of serious misconduct that should be reported pursuant to this policy include but are not limited to:

- serious violations of City policies;
- Manipulation of City resources for any illegal, improper or unethical purpose including fraud, theft, embezzling funds, or accepting kickbacks or bribes;
- Misappropriating funds, misdirecting or misuse of funds, assets or corporate information;
- Manipulating City accounting or audit records or destroying any accounting or audit-related records except as otherwise permitted by the City's corporate Records and Information Management Policy;
- Actions likely to cause serious harm to persons, public safety, property or the environment;
- Actions resulting in the City being exposed to liability or financial loss;
- Failure to take reasonable steps to report and/or rectify actions that may impact negatively on the City's reputation resulting in the public losing confidence in the organization's ability to deliver services;
- Deliberately concealing information relating to any of the above;
- It should be noted that the above are examples only and are not an exhaustive list of what amounts to serious misconduct.

The reporting regime established under the Policy is set out in articles 3.1 – 3.3 of same. Staff who become aware of serious misconduct are required to report it to their supervisor, manager, General Manager or directly to the Designate. Article 2.1 requires the City Manager, who is responsible for overseeing the Policy, to appoint the General Manager, Human Resources, as the Designate responsible for the day-

to-day administration of the Policy. If the alleged misconduct involves the Designate, staff are required to report the misconduct to the City Manager. If the misconduct emanates from the City Manager, staff are required to report the misconduct to the Director of Legal Services. All reports are to be made in writing.

The policy mandates that every reasonable effort will be made to keep the report confidential and protect the identity of the person making the report.¹⁸ The Policy also makes retaliation against the whistleblower a separate ground of serious misconduct, which in itself is reportable.

The task of investigating any allegations of serious misconduct is assigned to the Designate. The investigation may be carried out by the Designate directly, it may be assigned to management in the area affected, or it may be assigned to an independent third-party.

Article 9 of the Policy stipulates that matters covered by the Policy are confidential in nature and that breaches of that confidentiality, including disclosing information to the media, will be dealt with in accordance with the Policy. Ostensibly, disclosure of such an investigation to the media would itself amount to serious misconduct which staff would be required to report to the Designate.

Article 6.5 directs that individuals accused of serious misconduct will be given an opportunity to know and respond to the allegations, except in exceptional circumstances. Article 6.6 directs that employees found "guilty of serious misconduct" may be subject to discipline up to and including dismissal.

Under the policy, the Designate is required to document the results of each investigation in a confidential report. A

¹⁸ Articles 4.1- 4.4 of the Policy.

summary of reports under the Policy is to be submitted to the City Manager and to City Council.¹⁹

2. The Oath of Office

Section 140 of the *Charter* sets out that a person elected or appointed to office on Council must take a prescribed oath of office (by oath or solemn affirmation) within a prescribed time limit. The oath must be sworn before a judicial officer or the City Clerk and the oath-taker must obtain a copy of the completed oath, or certificate of it, from the person administering the oath.

A person taking office on Council must also take an “oath of allegiance.” The Lieutenant Governor may, by regulation, establish alternative oaths of office for the purposes of s. 140 and may create different oaths for different office-holders.

The current form of the oath of office for a City of Vancouver Council member is as follows:

I,[*name of person elected or appointed*]....., do solemnly affirm that:

- I am qualified to hold the office of Councillor for the City of Vancouver to which I have been elected;
- I have not, by myself or any other person, knowingly contravened the *Vancouver Charter* respecting vote buying or intimidation in relation to my election to the office;
- I will faithfully perform the duties of my office, and will not allow any private interest to influence my conduct in public matters;
- as required by the *Vancouver Charter*, I will disclose any direct or indirect pecuniary interest I have in a matter and will not participate in the discussion of the matter and will not vote in respect of the matter.

[am. B.C. Reg. 365/2003.]

¹⁹ Article 7 of the Policy.

As is evident, the focus of this statement of fidelity is linked to disclosing conflicts of interest involving a direct or indirect pecuniary interest. There is no mention of a duty of confidentiality in the oath.

According to s. 140(6) of the *Charter*, once a member of Council has sworn the oath of office and has indeed taken office (see s. 140(4)), the member is entitled to hold that office through its term until and unless that member resigns or is disqualified.

Section 141 sets out the circumstances in which a member will be disqualified from holding office, including a failure to take the oath of office and repeated consecutive absences from Council meetings. Section 141 also referentially incorporates several other sections which set out other circumstances which may lead to disqualification of a member.

Two of the included sections which could potentially be raised as relating to the leaked Report are ss. 145.9 [disclosure of contracts]²⁰ and 145.91 [restrictions on use of insider information].²¹ A person disqualified under s. 141(1) is prohibited from holding office until the next general local election.

²⁰ While at first blush this section might appear to have some application in the present circumstances, it is clear that the section is simply aimed at having members disclose conflicts of interest based on the potential for direct or indirect financial gain based on the contract being entered into by the City.

²¹ Again, this section is simply aimed at prohibiting a member or former member from using information or a record obtained during the performance of their duties to advance their financial interests.

III. THE SELECTED COMPARATOR: THE CITY OF TORONTO

A. The City of Toronto Act, 2006

The City of Toronto Act, 2006, S.O. 2006, c. 11 (hereinafter "COTA" or the "Act"), was given Royal Assent on June 12, 2006.

1. In Camera Meetings

Generally, the City and its local boards are required by law to give notice and hold all meetings in public.²² Sometimes, however, it is necessary to close a meeting to the public so Council or a committee can consider confidential information as permitted by law.

According to its public website, the City of Toronto takes a number of steps to ensure the highest degree of openness and transparency for meetings of Council and committees. They are set out as follows:

- We give notice of all meetings of City Council and its committees.
- We post agendas, reports, and correspondence to the web before meetings and we post decisions and minutes as soon as possible after meetings.
- We only close meetings when legally permitted or required to do so, and confine the debate in those sessions to the confidential information contained in reports.
- We minimize the amount of confidential information in reports and documents before committee and Council.²³

²² Section 190(1) of COTA.

²³ It is this particular initiative which is cited by the current City Clerk, Ulli Watkiss, as the single-most important step in reducing the number of leaks of confidential information.

- We establish a date for release of confidential information in agenda documents, if it can be released, at the time it is considered.²⁴

Under the Act, a meeting can only be closed if the subject of debate falls under one of several exceptions to the open meeting rules. The exceptions are set out in ss. 190(2) and (3) of COTA.

The City must close a meeting to consider an access to information request.²⁵ The City may close a meeting to consider any of the following:

- Receiving advice that is subject to solicitor-client privilege;²⁶
- Security of the property of the municipality (or local board);²⁷
- Acquisition or disposal of land;²⁸
- Considering personal information about an identifiable individual;²⁹
- Labour relations or employee negotiations;³⁰
- Litigation or pending litigation, including matters before administrative tribunals;³¹
- Education or training of the members, so long as no decision-making is advanced;³² and
- Any other matter permitted or required by statute.³³

No votes can be taken in closed session, except for votes on procedure and votes to give confidential instructions to staff, local boards or agents.³⁴

²⁴ <http://www.toronto.ca/committees/open-closed-meetings/index.htm>

²⁵ Section 190(3) of COTA.

²⁶ Section 190(2)(f) of COTA.

²⁷ Section 190(2)(a) of COTA.

²⁸ Section 190(2)(c) of COTA.

²⁹ Section 190(2)(b) of COTA.

³⁰ Section 190(2)(d) of COTA.

³¹ Section 190(2)(e) of COTA.

³² Section 190(3.1) of COTA.

³³ Section 190(2)(g) of COTA.

³⁴ Section 190(5) of COTA.

Under the City's procedures, even if a closed session is required to consider a matter, the meeting must begin and end in public.³⁵ Before closing a meeting, the committee or Council will adopt a motion to close the meeting setting out the nature of the subject to be discussed and the statutory reason for closing the session.³⁶ When Council considers a matter in a closed meeting, it does so in a committee of the whole.³⁷

The City is also required to record, without note or comment, "all resolutions, decisions and other proceedings at a meeting of the body," even if the session is closed to the public.³⁸

2. The Investigator

The City, its local boards, and committees of both, are required to follow the open and closed meeting provisions of COTA, as well as the closed meeting rules set out in the Council Procedures.

If a member of the public believes that a meeting of City Council, a local board to which the Act applies, or a committee of either, has been improperly closed, that person can request that the City review the circumstances by appointing an independent investigator.³⁹ The investigator is not required to be a city employee.⁴⁰

³⁵ Municipal Code, Chapter 27, Council Procedures, Article V, § 27-38 B [hereinafter "Council Procedures"]. These procedures can be searched online at http://www.toronto.ca/legdocs/municode/1184_027.pdf.

³⁶ Section 190(4) of COTA.

³⁷ Municipal Code, Chapter 27, Council Procedures, Article XIII, § 27-105 to 27-110.

³⁸ Section 190(8) of COTA.

³⁹ Section 190.1(1) of COTA. The investigation will be undertaken by an investigator appointed pursuant to s. 190.2(1) of COTA or by the Ombudsman if no investigator has yet been appointed. The City is to assign powers and duties to the investigator that are commensurate with the importance of the investigator's independence and impartiality, confidentiality with respect to the investigator's activities; and the credibility of the investigator's investigative process: s-s. 190.1(2)-(5).

⁴⁰ In fact, the current Investigator for the City of Toronto is Professor Lorne Sossin from the University of Toronto law school.

3. Ethical Obligations under the Act

There are no provisions in COTA dealing expressly with conflicts of interest,⁴¹ the acceptance of gifts or benefits, or the management of confidential information. Between elections members of Council may become disqualified and lose their seat if convicted of an offence under the *Criminal Code of Canada* or for failing to declare a conflict of personal interest under the *Municipal Conflict of Interest Act*.⁴²

Part V of COTA provides for the establishment of mechanisms and offices relating to the accountability of City Council and its members.

Section 157 requires the City to establish Codes of Conduct for members of City Council and members of certain local boards.

Section 158 requires the City to appoint an Integrity Commissioner who reports to city council. The responsibilities, powers and duties of the Commissioner are described in section 159. If the Commissioner reports to City Council that, in his or her opinion, a member of council has contravened the Code of Conduct, the Council may impose specific penalties on the member under subsection 160(5) of COTA.

4. The Integrity Commissioner

At its meeting on March 1, 2 and 3, 2004, City Council adopted a Report from the Policy and Finance Committee authorizing the recruitment and appointment of a City Integrity Commissioner.⁴³ In July of that year, City Council

⁴¹ This aspect of the conduct of members of council was governed by the *Municipal Conflict of Interest Act*.

⁴² The reach of the Municipal Conflict of Interest Act is confined to pecuniary interests.

⁴³ 2005 Annual Report, Integrity Commissioner's Office, dated May 8, 2006 [hereinafter "2005 Annual Report"].

appointed David Mullan as the City's first Integrity Commissioner (the "Commissioner"). The Commissioner assumed his responsibilities on September 1, 2004. The duties of the Integrity Commissioner are described on the City's official website.⁴⁴

Prior to the enactment of COTA, the mandate of the office of Integrity Commissioner was spelled out in the motion authorizing the appointment:

...to provide independent and consistent complaint prevention and resolution, advice, opinion and education respecting the application of the Code of Conduct for members of Council ("Code of Conduct") and other by-laws/policies governing the ethical behaviour of members, including general interpretation of the *Municipal Conflict of Interest Act*.⁴⁵

The mandate of the Commissioner is confined to the Code of Conduct governing the activities of Councillors. The Commissioner has no jurisdiction over complaints about other City Officials or staff generally.

Two events occurred in the past several years which had a significant impact on the nature and workings of the Integrity Commissioner's Office: (i) the release in September 2005 of the Report of the Commission of Inquiry into the Leasing of Computers at the City of Toronto ("the Bellamy Commission Report");⁴⁶ and (ii) the enactment of COTA in 2006.

⁴⁴ A description of the duties of the Integrity Commissioner can be found at <http://www.toronto.ca/integrity/integrity-duties.htm>.

⁴⁵ 2005 Annual Report, *supra*, at p. 2.

⁴⁶ *Ibid.*, at p.3. The events examined in the Bellamy Commission of Inquiry were six large IT transactions between the City of Toronto and outside suppliers before, during, and after amalgamation and Y2K. Serious questions arose about all of these transactions and as such two judicial inquiries were called: the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry. The recommendations in the Bellamy Report greatly influenced the City of Toronto and its efforts to lobby for specific changes in COTA. Much of the overall thrust of the Bellamy Commission Report, as well as a slew of its detailed recommendations, underscore the centrality of ethical behaviour and integrity in the functioning of the municipality. In its endorsement of the office of Integrity Commissioner and its calls for the enhancement of the powers of that office, as well as the setting of higher standards for the conduct of

COTA provided the office of Integrity Commissioner with a statutory basis⁴⁷ and conferred on City Council much, if not all of the legal capacity it required to establish a permanent office along the lines of that of the provincial Integrity Commissioner. It also made specific provision for sanctions against Members of Council for Code of Conduct violations.

Section 160 of the Act conferred coercive powers, consistent with that of a commission of inquiry, upon the Integrity Commissioner that enables (at least in some contexts) the Integrity Commissioner to subpoena witnesses and require production of documents. Prior to the enactment of these provisions the Commissioner had no power to compel persons to appear, answer questions, or produce documents.

Section 161(1) of the Act requires the Commissioner to preserve secrecy with respect to all matters that come to his knowledge in the course of his duties. Section 162(1) of COTA directs the Integrity Commissioner, in reporting to Council on advice provided, not to disclose confidential information that could identify the person concerned.

5. Compliance and Consequences

Section 160(5) of COTA stipulates that City Council may impose one of two penalties on a member of Council if the Integrity Commissioner reports to Council that the member has contravened the Code of Conduct. The two penalties set out in COTA are:

- a reprimand; or
- suspension of the remuneration paid to the member in respect of his or her services as a member of Council or of the local board, as the case may be, for a period of up to 90 days.

Members of Council, it called on the City to re-examine the foundations of the Office and what it does.

⁴⁷ Section 158 of COTA.

Part XV of the Act governs the authority of the City to enforce city by-laws. Section 366 provides authority for a city by-law to specify that a contravention of the by-law is an offence. Under s. 370, the City may establish a system of fines for offences under City by-laws, with certain restrictions. The remainder of this Part sets out the City's powers of entry, inspection and other general enforcement powers. The Act explicitly withholds from the City the power to enact a by-law making violation of the Code of Conduct an offence.⁴⁸

B. The City of Toronto's Code of Conduct

During its first term as a unified city, the City of Toronto, as one of several initiatives, adopted a Code of Conduct for Members of Council (the "Member's Code"). Further, subsection 157(1) of COTA now specifically mandates the City to establish or maintain a code of conduct for members of Council. In response to this requirement, the City revised and updated the original *Code of Conduct*.

1. Application

The Member's Code is intended to provide members of Council and other City board appointees with guidelines for appropriate behaviour and conduct. The Code is not aimed at the conduct of City staff. There is a separate and distinct Code of Conduct for Local Board Members.

According to the *Member's Code of Conduct Complaint Protocol* ("Complaint Protocol"),⁴⁹ there are procedures that allow for both formal complaints and informal complaints. Formal complaints against members of Council must be made in writing and must be signed by an identifiable individual. The complaint must set out reasonable and probable grounds for the allegation that the member has

⁴⁸ Subsection 157(3) of COTA. 2005 Annual Report, *infra*, at p. 15.

⁴⁹ The *Member's Code of Conduct Complaint Protocol* can be accessed online at <http://www.toronto.ca/integrity/pdf/complaint-protocol.pdf>.

contravened the Member's Code of Conduct and include a supporting affidavit that describes the evidence in support of the complaint.

Article 6.1 of the Complaint Protocol directs that the Integrity Commissioner must report to the complainant and the member within 90 days of the complaint being made. Where the complaint is sustained, in whole or in part, the Commissioner is required to report to Council and outline the findings, the terms of any settlement, or recommended corrective action.

After receiving the report of the Commissioner, it is the duty of City Council to respond to the report within 90 days of its receipt. The Complaint Protocol also allows for City Council to vary the recommendation to impose a penalty under s. 160(5) of COTA.

2. The Preamble

The key principles of the Member's Code are set out as follows:

- Members of Council shall serve and be seen to serve their constituents in a conscientious and diligent manner;
- Members of Council should be committed to performing their functions with integrity and to avoiding the improper use of the influence of their office, and conflicts of interest, both apparent and real;
- Members of Council are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and will bear close public scrutiny; and
- Members of Council shall seek to serve the public interest by upholding both the letter and the spirit of the laws of the Federal Parliament and Ontario Legislature, and the laws and policies adopted by City Council.⁵⁰

⁵⁰ Member's Code, *supra*, at p. 2-3.

The Member's Code then goes on to consider the behaviour of Council members in relation to the acceptance of gifts and benefits, the handling of confidential information, the use of city property, the improper use of influence and conduct at Council meetings.

3. Confidential Information

Part V of the Member's Code focuses on the handling of confidential information by council members. The Code makes some effort to define and describe what type of information is to be considered confidential:

Confidential information includes information in the possession of, or received in confidence by the City that the City is either prohibited from disclosing, or is required to refuse to disclose, under the *Municipal Freedom of Information and Protection of Privacy Act* (often referred to as "MFIPPA"), or other legislation. Generally, the *Municipal Freedom of Information and Protection of Privacy Act* restricts or prohibits disclosure of information received in confidence from third parties of a corporate, commercial, scientific or technical nature, information that is personal, and information that is subject to solicitor-client privilege.

The *City of Toronto Act, 2006* allows information that concerns personnel, labour relations, litigation, property acquisitions, the security of the property of the City or a local board, and matters authorized in other legislation, to remain confidential. For the purposes of the *Code of Conduct*, "confidential information" also includes this type of information.

The express prohibition on the use of confidential information by Council members is expressed in the Code in the following manner:

No member shall disclose or release by any means to any member of the public, any confidential information acquired by virtue of their office, in either oral or written form, except when required by law or authorized by Council to do so.⁵¹

⁵¹ Ibid., at p. 6.

The use of confidential information by Council members for personal or private gain is also strictly prohibited by the Member's Code.

The Member's Code specifically notes that any matter discussed at an *in camera* meeting is deemed confidential, and unauthorized disclosure of same is prohibited:

Under the Procedures By-law (passed under section 189 of the *City of Toronto Act, 2006*), a matter that has been discussed at an *in-camera* (closed) meeting remains confidential. No member shall disclose the content of any such matter, or the substance of deliberations, of the *in-camera* meeting until the Council or committee discusses the information at a meeting that is open to the public or releases the information to the public.⁵²

The Code provides several examples of the types of information that a member of Council must keep confidential:

- items under litigation, negotiation, or personnel matters;
- information that infringes on the rights of others (e.g., sources of complaints where the identity of a complainant is given in confidence);
- price schedules in contract tender or Request For Proposal submissions if so specified;
- information deemed to be “personal information” under the *Municipal Conflict of Interest Act*; and
- statistical data required by law not to be released (e.g. certain census or assessment data).⁵³

The Code also makes it explicit that members of Council should not access, or attempt to gain access to, confidential information in the custody of the City unless it is necessary for the performance of their duties and not prohibited by Council policy.

⁵² Ibid.

⁵³ Ibid.

4. Compliance and Consequences

Part XVIII of the Member's Code sets out the penalties which are available to City Council if they wish to sanction a member of Council for a contravention of the Code of Conduct. The Code repeats the sanctions available under s. 160(5) of COTA: a reprimand; or a suspension of pay up to 90 days.

The Code also provides for other penalties to supplement the statutory consequences in COTA. The Integrity Commissioner may also recommend that Council take the following actions:

1. removal from membership of a Committee or local board;
2. removal as Chair of a Committee or local board;
3. repayment or reimbursement of moneys received;
4. return of property or reimbursement of its value;
5. a request for an apology to Council, the complainant, or both.

The list of sanctions ultimately included in the Member's Code is somewhat more restrictive than some had hoped. The Bellamy Commission in fact recommended (Recommendation 46) a considerably wider range of sanctions than those contained in subsection 160(5) of the *City of Toronto Act, 2006*:

...public reprimands, public apologies, expulsion from one or more committee meetings, removal from committee posts or committee chair positions, expulsion from one or more Council meetings, or at the high end of the spectrum, a fine or a declaration of vacancy in the councillor's seat.⁵⁴

⁵⁴ Bellamy Commission Report, recommendation 46, at p. 421.

C. Other Applicable Policies and Procedures

1. City of Toronto Procedures related to Confidential Information

At its September 28-30, 2005 meeting, Toronto City Council adopted motion J(36) which requested the City Clerk, in consultation with the Integrity Commissioner, to report to the Policy and Finance Committee on measures that may be undertaken to protect the confidentiality of documents. The motion was in response to recent media reports disclosing confidential information discussed by Council and highlighted that such breaches compromise Council's privilege and pose serious financial and legal implications for the City and can cause harm to individuals.

A review of the staff report generated in response to motion J(36) [hereinafter the "2005 Staff Report"], reveals the steps that are taken by the City Clerk's Office before, during and after meetings to protect confidential information to support decision-making.

2. Access to Confidential Information

In Toronto, confidential information and staff reports received by the Secretariat from City staff are generally placed in sealed envelopes and electronic versions are password protected. The sharing of any confidential information amongst Secretariat staff for transmittal between committees or with Council is done on a restricted basis. According to the 2005 Staff Report, the City of Toronto was exploring ways to strengthen internal controls for submitting, securing and sharing confidential information between City staff and the Secretariat.

3. Management and Distribution

Confidential information and staff reports are included with meeting agendas or distributed during meetings on distinct purple paper with each page marked "CONFIDENTIAL."

High speed copying of confidential documents is handled by the City's copy centres under secure conditions. Secretariat staff submit documents and discuss copy parameters with the Lead Hands located at the copy centres. The Lead Hand oversees all copying of confidential information and ensures all copies made are placed in a secure area. Secretariat staff is contacted when the documents are ready to be assembled with the agenda.

4. Collection and Destruction

Confidential agenda materials are distributed to Members and staff in sealed envelopes. For committees, the distribution of confidential information to staff varies depending on the subject matter and staff supporting a particular meeting. The number of copies distributed to Members and staff depends on the particular committee. For City Council meetings, the confidential information package includes:

- a cover sheet requesting all recipients to place this material in a specific secure red recycling bin after use, if it is not being retained by the recipient;
- a *Municipal Freedom of Information and Protection of Privacy Act* statement advising that the enclosed materials are subject to the Act and must be kept confidential;
- a confidential agenda, summarizing the confidential items in agenda order; and
- the individual confidential items.

When Council meetings are in session, any additional confidential information received for the meeting (e.g., staff reports) is copied on confidential paper directly by Secretariat staff and distributed at the meeting to Members and selected staff. All confidential information received during a meeting is locked up in the Secretariat's work space in the chamber. When meetings are in private session, corporate security staff secures the room for authorized persons only.

Once City Council meetings have ended, and Members and staff have removed their materials, Secretariat staff sort through all remaining paper and documents left in the chamber and place any confidential information (copied on purple paper) in the secure red recycling bins.

5. Best Practices

In preparing its 2005 Staff Report, the City Clerk's office surveyed a number of municipalities across Canada to review their processes to manage confidential information for Council decision-making. While many of the procedures reviewed were similar, there were several initiatives identified by the City of Toronto as being worthy of further study. Those processes are as follows:

- use of electronic-only documents for confidential information with log-in/check-out protection to monitor who accesses what confidential information;
- dealing with confidential information in meetings primarily through staff presentations;
- use of a separate report template for communicating confidential information, with a specific requirement to state the reasons for the information being considered confidential;
- requirement for Members to return to the City Clerk any confidential information received, if a conflict of interest is declared;
- a requirement for all confidential information to include a "reporting out" statement to indicate if or when and what confidential information can be made public; and
- after Council's consideration of confidential information, the City Clerk retains only the original version and all other paper or electronic copies are shredded or deleted.

The 2005 Staff Report also noted that the City Clerk's office had acquired "a software application to customize the copying of confidential information by individual recipient."⁵⁵ This technology enables the City Clerk's Office to better

⁵⁵ 2005 Staff Report, "Safeguarding Confidential Information for Committee and Council Meetings," dated November 8, 2005.

identify who receives confidential documents. It can also be used to identify individuals who engage in the unauthorized sharing or re-distributing of confidential documents.

On a more long-term basis, the City decided that the amount of information deemed to be confidential and included in confidential reports had to be reduced. The 2005 Staff Report articulated this approach in the following way:

A fundamental shift is required in the City regarding the preparation and treatment of confidential information. The starting point for all information and staff reports should be a public one. Confidential information should be restricted to only that which is truly confidential as provided for under the *Municipal Act*. The current practice of staff starting from the premise of drafting a full staff report that will be confidential in its entirety needs to change since some of the information contained in those reports is public information. All staff reports should start as being a public report first. Any confidential information should be attached as a confidential attachment with the necessary information or presented verbally in private session, as appropriate.

In discussing the progress that the City of Toronto has made on the topic of confidential information, City Clerk Ulli Watkiss, opined that the single biggest factor in the reduction of "leaked" confidential information was the City's effort to reduce the total amount of information that was made confidential in the first place. She noted that over the last two years, City Council has spent 1,299 hours in City Council meetings. Of those, 29 hours have been held in camera, or 2.2% of the total time spent in meetings. Over that same time, of the 9,069 documents reviewed by Council, only 347, or 3.8% of the total documents viewed, have been categorized as "confidential." Ms. Watkiss stated that these numbers are very low and expressed some satisfaction with their efforts in this regard.

IV. CITY OF VANCOUVER: WHAT NEEDS TO CHANGE?

A. Vancouver's Current Practices

During our interview, Ms. Connell explained that the agenda meetings for Vancouver City Council are prepared through extensive consultation with the various department heads and the City Managers. The staff would then bring the proposed agenda to the Mayor for his consultation. While it was possible for the Mayor to overrule agenda items or add agenda items, it was unusual for him to do so. The agenda was generally given the Mayor's blessing and proceeded with at the subsequent Council meeting. The legal department would, from time to time, advise the Council that it should go *in camera* in relation to various issues. Ms. Connell was very clear however that the legal department took its job very seriously in terms of ensuring that in only the most necessary cases would matters go *in camera*.

When one compares the Vancouver Charter with COTA, in relation to their respective open meeting exceptions, there are several more exceptions available in the Vancouver legislation.⁵⁶

1. Access to Confidential Information

Ms. Connell indicated that the normal practice within the City was to circulate Council meeting packages to the various Councillors one to two weeks before the scheduled meeting. Ideally, the City Councillors would receive their packages two weeks before a scheduled meeting. If written reports were provided, those reports would be included in the package. If some of the reports related to potentially

⁵⁶ There are 14 discretionary exceptions to the open meeting presumption in s. 165.2(1) of the *Charter*. There are four additional mandatory exemptions in subsection 165.2(2) of the *Charter*. Under COTA, subsection 190(2), there are seven discretionary exceptions to the open meeting requirement. Two additional exceptions are set out in s-s. 190(3) and 190(3.1).

sensitive topics which would require going *in camera* to discuss, they would be sent to the Councillors in a sealed package.

Confidential information is transmitted from City Departments to the City Clerk's Office via unencrypted e-mail. Emails containing confidential Council related information are sent to a limited e-mail distribution group, the "CC Council Group" or the "CC Meeting Coordinators". The CC Council Group is made up of the Acting City Clerk, the Deputy City Clerk, and three meeting coordinators (staff members from the City Clerk's office).

Confidential electronic information as it relates to *in camera* meetings is accessible to all Meeting Coordinators in the City Clerk's Office. It is kept in a subdirectory of a shared directory on the server to which only limited staff has access. Security is applied to the subdirectory, not to individual files.

The City employs a Report Tracking System (RTS), which flags material related to *in camera* Council meetings and renders the files inaccessible and invisible to staff without appropriate access privileges. Other City IT Security policies make it clear that all information stored or recorded on City computing devices belong to the City. The City's corporate classification scheme⁵⁷ specifies that confidential information must be retained until the end of the calendar year, and then immediately archived.

Further, photocopying of confidential information is performed on a designated Xerox machine on the third floor of City Hall.⁵⁸ According to City protocol, photocopying of such information is performed by "designated staff."⁵⁹

⁵⁷ The VanRIMS (Vancouver Records and Information Management Standard) specifies the appropriate disposition methods for *in-camera* materials.

⁵⁸ The third floor of City Hall has a limited staff access area.

⁵⁹ It is not known how many persons within the City Clerk's office are "designated" to perform confidential photocopying. It is not known if photocopying is supervised or performed in pairs.

2. Management and Distribution

Ms. Connell explained that there were varying levels of security or confidentiality related to *in camera* meetings. Sometimes the Councillors would receive *in camera* materials in a sealed package in advance of a council meeting. Sometimes a written report would be simply handed out at the meeting for discussion and then the Councillors would be able to take the *in camera* reports away with them for their review. Lastly, written reports might not be generated at all but rather a verbal report would be given at the meeting *in camera* for discussion and potential resolution.

3. Collection and Destruction

There were several aspects of the October 14, 2008 *in camera* meeting which were unusual. The written report was only completed a very short time prior to the beginning of the *in camera* meeting. The *in camera* meeting lasted 4 ½ hours itself, and Ms. Connell noted that this was an unusually long time for an *in camera* meeting. She also noted that the numbering of the reports was a procedure that had never been used before by the City. Ms. Connell described the procedure as extraordinary. Further, the measure adopted to collect the reports at the end of the meeting and not allow the Councillors to take the material away with them was also not the usual practice. In fact, the City does not have any policies to govern the collection and destruction of confidential information after an *in camera* meeting.

Members of Council who receive confidential information in the *in camera* package prior to a meeting, or receive it during the course of a meeting, are responsible for their own documents. It is the City's common practice to allow Council members to take the contents of the *in camera* package with them after departing the meeting. Council members are responsible for shredding their own documents. It is apparently not uncommon for Members to leave their

materials in the Mayor's office (where *in camera* meetings are held), which are then collected by the responsible meeting coordinator at the end of the meeting and shredded. Meeting coordinators are not required to keep track of which Council members take confidential information with them as they leave the *in camera* meeting room.

B. Recommendations

Confidential information to support the decision-making process can be managed in a number of ways including:

- controlling the flow of information between City staff and the City Clerk's Office;
- secure copying of confidential information;
- limited distribution of confidential information; and,
- the security of meeting locations for in private sessions.

Based on my review of the *Vancouver Charter* and the Code of Conduct, the corresponding legislation and procedures which operate in the City of Toronto, and our interviews of various members of the City staff, I would make the following recommendations:

1. the City should create a central electronic repository for confidential information that cannot be accessed without a password.
2. the password should be person-specific and should be capable of being recorded on a log in/log-out basis.
3. the City Clerk, or their designate, should oversee the circulation and duplication of any confidential information.

4. The City Secretariat should adopt a policy which requires each individual staff member who purports to draft a confidential report to also draft a public report on the same issues. The focus of the report should be to inform the public as to the matters to be covered in the *in camera* meeting in as much detail as possible without revealing the identities of the parties involved or the precise nature of the issue to be discussed.
5. The City should endeavour to limit the amount of information that is declared to be confidential and the amount of time spent by Council *in camera*.
6. The City should amend the Code of Conduct to include a definition of "confidential information," an example of such is the one employed by the City of Toronto.
7. The City should work to keep accurate records regarding the amount of time spent *in camera* and the number of documents or meeting topics declared confidential.
8. Confidential information should be printed on paper with an identifiable colour scheme (i.e. purple paper).
9. Confidential information distributed to Council should be marked as "confidential."
10. Confidential information distributed to Council should be marked with a numerical or alphabetical identifier, which is recorded by the City Clerk.
11. Numbered confidential documents which are distributed at *in camera* Council meetings should be returned to the City Clerk individually, and each Council member should be required to sign out once they have returned their assigned document.

12. No member of Council shall be permitted to leave the Council chamber for any reason unless they have returned their confidential documents to the City Clerk and have signed out.
13. Training on codes of conduct should be mandatory for all City staff and councillors.
14. Political staff should be required to adhere to the same ethical guidelines that apply to councillors and City staff. Councillors should have their staff execute an agreement to abide by the City's codes of conduct.
15. The Oath of Office should be amended to include some reference by prospective Councillors to respecting their "duty of confidentiality" and an oath to abide by the Code of Conduct.
16. Subject to collective bargaining restraints, all staff and councilors should be required to sign an annual declaration that they are aware of the codes of conduct, are versed in them, and will uphold them.
17. A full-time or part-time integrity or ethics commissioner should be hired.
18. The City should request that the Provincial Government amend the *Vancouver Charter* in the following ways:
 - (a) The *Charter* should require the City to enact a separate Code of Conduct for members of Council and advisory body members;
 - (b) The *Charter* should prescribe specific penalties for a contravention of the Code of Conduct;

- (c) The *Charter* should direct the establishment of an Office of the Integrity Commissioner, similar to that created by COTA;
- (d) The Integrity Commissioner should have duties and powers similar to those held by the Integrity Commissioner for Toronto, as set out in COTA;
- (e) The Integrity Commissioner should have the jurisdiction to investigate complaints against members of Council and City employees;
- (f) The Integrity Commissioner should be independent of City Council, while reporting to Council on matters investigated under its statutory mandate;

B. Conclusion

Any actions taken by City Council, or the City Clerk's Office, will only go so far to maximize the security of confidential information and limit its access as part of the City's decision-making process. Confidential information obtained before, during or after meetings, regardless of the medium used to access it, can only be truly safeguarded through the collective recognition by all who participate in the decision-making process that some information is legitimately confidential for statutorily required purposes and that confidentiality must be respected by the institution and those participating in decision-making.

In addition, there must be meaningful consequences for those who choose to forsake their duty of confidentiality and violate the Code of Conduct. Absent legislative amendments to the *Vancouver Charter*, the City is impaired in its ability to hold accountable its Council members.

Finally, the obvious needs to be stated. The proper functioning of City business ultimately depends on the personal integrity of those charged with the responsibility of carrying it out. In the end, internal protections can only go so far.