

## MEMORANDUM

May 5, 2023

TO: Mayor and Council

CC: Paul Mochrie, City Manager  
Rosemary Hagiwara, Acting City Clerk

FROM: Jason Twa  
Assistant Director, Civil Litigation

SUBJECT: Annual Report of the Office of the Integrity Commissioner and Review of the Code of Conduct By-law

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We write to provide responses to questions raised by Council with respect to the above noted matter at the April 26, 2023, meeting of the Standing Committee on Policy and Strategic Priorities.

### **Background**

On April 26, 2023, staff appeared before Council to speak to the above noted report, with the following recommendations:

- A. THAT Council, pursuant to section 145.93 of the Vancouver Charter, resolve to review the Code of Conduct By-law No. 12886 (the "Code of Conduct") and for that purpose receive for information the Annual report of the Office of the Integrity Commissioner for the period of January 1, 2022 to October 31, 2022 (the "Annual Report") attached as Appendix "A" to this report.
- B. THAT Council endorse the recommendations drawn from the Annual Report and attached as Appendix "B" to this report in order to improve the text or operation of the Code of Conduct By-law.
- C. THAT Council instruct staff to bring forward proposed amendments to the Code of Conduct and Mayor and Councillor Expenses By-Law No. 11529 (the "Expenses Bylaw") to reflect the recommendations endorsed.

Council approved recommendation A and referred recommendations B and C to the next scheduled Council meeting on May 9, 2023.

Below are the recommendations made by the Integrity Commissioner in her Annual Report, along with questions posed by Council and staff's responses to those questions. Staff have also consulted the Integrity Commissioner to seek further clarity on the recommendations in light of the questions raised by Council.

## **Recommendations**

### **1. Make Integrity Commissioner educational presentations mandatory with absences to be reported in the Integrity Commissioner's annual report;**

- *What is the rationale for reporting absences vs simply making educational presentations mandatory? Does this not have an element of shaming by publishing?*

Education sessions are one of the core components of the City's ethics regime and an area of responsibility of the Integrity Commissioner. The more comprehensive an understanding Council and Advisory Board members have of the Code of Conduct By-law and its requirements, the greater the likelihood that members will be able to identify potential ethical issues and conflicts, act accordingly and avoid complaints.

With this recommendation, the Integrity Commissioner is attempting to highlight the importance of the education sessions with a view to increasing the uptake on the education sessions. Hence the desire to make them mandatory. However, simply labelling an education session as "mandatory" without there being any consequence for a failure to attend an education session arguably does little to encourage attendance at such sessions. "Mandatory" by its very nature would seem to contemplate some consequence for not attending.

In terms of the consequences proposed in this recommendation, being the publication in the Annual Report, it is about accountability and transparency, two principles that are found throughout the Code. The Integrity Commissioner's powers, in respect of addressing Councillor's conduct in areas such as attending education sessions, is extremely limited. The publication of names would be a relatively "soft" measure to encourage attendance at education sessions.

In addition, a relevant consideration in response to a complaint under the Code of Conduct By-law and/or the *Vancouver Charter* may be whether the breach was made inadvertently or mistakenly. Creating a transparent record of council members who have attended training on core areas of the Code (such as conflict of interest) may be evidence of good faith and due diligence taken by a council member in the exercise of their obligations.

Education sessions are developed in part based on the feedback of Council themselves. Education is a tool the Integrity Commissioner can use to informally address an issue or concern and proactively mitigate the need for formal complaints to be brought and investigated. In the event that council members do not attend the sessions, this proactive approach is fettered.

- *Has consideration been given to adding language to ensure these sessions are scheduled well in advance and consideration given to avoiding conflict with other statutory duties or offering more than one session time to enable all Councillors to attend?*

It is reasonable that adequate notice be provided to council members of the scheduled meetings and that absences be permitted for reasonable excuses. The report simply brings forward the recommendations of the Integrity Commissioner. If those recommendations are accepted by Council, staff will go away, draft the amendments and then bring forward those amendments at a later date for Council's approval. The concerns noted are considerations that can be addressed by staff when drafting the amendments.

In addition, the Integrity Commissioner has expressed that she is more than willing to hold additional or repeated sessions if a Council member is unable to attend, or, alternatively, develop web-based content that can be viewed at the convenience of Council in order to facilitate that the content is accessible to Council.

**2. Require Advisory Board Members to complete a minimum of 4 hours of compulsory education on key topics of conflicts of interest, Code of Conduct and communications each year, with failure to complete to be reported in the Integrity Commissioner's annual report;**

- *As above, what is the rationale for reporting absences vs simply making education compulsory? Does this not have an element of shaming by publishing?*

The Integrity Commissioner has indicated that the Annual Report will not cite the individual names of Advisory Board Members that do not attend training, rather, it will report the number of members that received training and the number of members that did not receive training.

- *How will this compulsory education be funded assuming it is external education that Councillors are seeking out on their own?*

This recommendation does not relate to additional education requirements for Council members, rather, it relates to education sessions for Advisory Board Members.

One of the duties and responsibilities of the Integrity Commissioner is to deliver education programs regarding the ethical obligations and responsibilities of members under the Code of Conduct (per s. 5.7 of the By-law). The Integrity Commissioner's Office has an overall budget which includes the delivery of education programming. The Integrity Commissioner's Office will be putting on the education sessions for Advisory Board Members. Accordingly, no additional funding is required.

At the time of making this recommendation, the Integrity Commissioner understood that Advisory Board Members had not received education on the Code and their obligations thereunder. Currently, City staff have planned approximately two hours of education sessions for Advisory Board Members. The Integrity Commissioner has indicated that this training would be considered as part of the compulsory training she has recommended.

The remaining training will be provided by the Integrity Commissioner through web-based and/or zoom training given the large number of Advisory Board Members.

**3. Allow Council Members, including the Mayor, to incur eligible expenses of up to \$5,000 per year for obtaining independent legal advice as to their duties and obligations under the Code of Conduct By-law, *Financial Disclosure Act* and conflict of interest provisions in the *Vancouver Charter* (sections 145.2-145.91);**

- *Was a recommendation to increase Councillor's discretionary budget for this purpose contemplated either individually or as a pooled resource as is done with Councillor travel expenses for recognized conferences like FCM, UBCM, etc.?*

The Integrity Commissioner's recommendation is that up to \$5,000 of a Councillor's expenditures on these specific nature of legal expenses should be considered to be eligible expenses under the Mayor and Councillors Expenses By-law. This recommendation was made based on the understanding that, currently, Council members cannot use their annual discretionary budget for any legal expenses related to their duties. The intention was not to increase the discretionary budget. Rather, the recommendation was made to allow some flexibility for Council members to obtain privileged independent legal advice related to the exercise of their duties. This recommendation was made as another means to proactively mitigate against breaches, or complaints, by providing Council with access to independent legal advice. There is also an equity consideration to this recommendation, to allow access to legal advice for Council members who do not have the economic means to pay for such advice personally.

- *Can you confirm whether this could be used to seek legal advice generally by a Councillor about their duties and obligations, as well as for the purposes of retaining legal services to respond to any complaint that might be filed against them?*

The intention is not that the discretionary budget to be used to indemnify legal expenses incurred in responding to a complaint. The expenditure of up to \$5,000 would only be for the purposes of obtaining independent legal advice as to a member's duties and obligations under the Code of Conduct By-law, the *Financial Disclosure Act*, and specific provisions of the *Vancouver Charter* (i.e. conflict of interest; influence; gifts; disclosure of contracts; and use of insider information). It could not be used for the purposes of retaining a lawyer to respond to a Code of Conduct complaint or any other legal proceeding that might be filed against a member as such indemnification for legal proceedings must be sought in accordance with the procedure provided for in s. 180 of the *Vancouver Charter* (i.e. 2/3 vote of Council members).

- *Wasn't it intended that the Integrity Commissioner would be a resource to provide general legal advice about conflict and their duties?*

While the Integrity Commissioner is available to provide advice and guidance to members, there is no solicitor client relationship between a member and the Integrity Commissioner. As such, there is no protection from disclosure, for example, in a subsequent complaint. This recommendation recognizes that there may be circumstances in which a member wishes to obtain independent and privileged legal advice, which is protected from disclosure.

- *Why was the amount set at \$5,000 given how costly legal services can be (and if these funds can be used to respond to a complaint, the amount is likely insufficient)?*

The amount of \$5,000 was recommended by the Integrity Commissioner who is a practicing lawyer (and hence aware of the costs of legal services). The purpose of the recommendation is to provide one off legal advice on a discrete issue, not for a detailed, complex and ongoing legal retainer. That being said, it is open to Council to increase the maximum amount of discretionary expenses that can be applied toward this nature of legal expense.

**4. Expressly allow the Integrity Commissioner to provide their opinion or make recommendations regarding indemnification of legal fees of a Council Member;**

- *Is the intent to judge whether to indemnify based on whether a Councillor is viewed to be on or off side with the Code of Conduct with respect to a complaint? Why would this not be a defined standard that removes discretion and could be consistently applied?*

When a Councillor incurs legal expenses with respect to a Code of Conduct complaint, they can seek indemnification pursuant to section 180 of the *Vancouver Charter*. Approval of indemnification requires a 2/3 approval of Council.

The intent of this recommendation is to expressly allow the independent Integrity Commissioner to make a non-binding recommendation based on the circumstances of a particular case. The Integrity Commissioner can only make a recommendation, as Council must make the final determination. The thought is that it may be of some assistance to Council to have the Integrity Commissioner, as an independent official who adjudicated the complaint, to provide a recommendation based on the circumstances of the case.

A recommendation would not solely be dependent on whether a Council member was determined to be “off-side” or not. There may be circumstances where, even when a breach has been found, the legal principles have broad application and the legal precedent developed has general utility for Council. An example of this is would be with respect to the conflict of interest obligations.

In addition, as Council has to make the ultimate decision on indemnification, setting out defined standards that would determine when someone is entitled to indemnification or not would be in breach of section 180, which requires Council to make the decision in each case to grant indemnification. Setting out standards that pre-determine the issue of indemnification would be an unlawful fettering of Council’s discretion.

**5. Amend the definition of “leadership in the public interest”, to take into account the principle of collaboration as set out in the Regulation;**

- *Collaboration appears to be challenging construct to fully define and judge and a difficult one in a political environment where Councillors are inherently expected by the*

*electorate to put forward different points of view. Can you provide more detail on what collaboration means in the course of a Councillor's duty and how it is defined explicitly?*

Collaboration is a foundational principle that the Province requires Council to consider in reviewing its Code of Conduct. The Regulation does not define "collaboration". In its normal sense, "collaboration" means to work with someone to produce or create something.

The Integrity Commissioner in her annual report states the following on this issue:

"...The Code of Conduct By-law includes a number of obligations that support a collaborative environment, such as the obligation to engage in respectful communications. To further highlight the importance of collaboration in the Code of Conduct By-law, we recommend that the definition of "leadership in the public interest" be amended to add the italicized language: "A Member must act *personally, and jointly with other Members*, in the best interests of the city as a whole, and without regard to the Member's personal interests."

The proposed amendment is the same language that is currently included as part of the Park Board's Code of Conduct Policy.

Collaboration is not necessarily incompatible with the political environment. Elected officials can disagree on particular issues or policy positions, but still be committed to work together in the best interests of the City. It should be noted that the Code of Conduct recognizes that Council members are entitled to hold a position on an issue and respectfully express their opinions. It also recognizes that free and open debate is guaranteed by the *Charter of Rights and Freedoms*. Accordingly, having as a value in the Code of Conduct that members act jointly in the best interests of the City does not diminish a member's right to hold a different opinion on an issue from their colleagues.

- *Will others be able weaponize this to make complaints alleging a Councillor has not collaborated?*

Part 2 of the Code of Conduct By-law sets out various standards and values that members are to uphold. Those values represent overarching principles to guide and inform the conduct of members. Staff cannot speak to particular scenarios and opine whether specific conduct would or would not amount to be a breach of the Code of Conduct, as that is the purview of the Integrity Commissioner.

The Code provides for a vetting process where the Integrity Commissioner can reject frivolous or vexatious complaints at the very first stage of a complaint. The existence of an independent Integrity Commissioner reviewing complaints should provide some comfort that frivolous complaints will not proceed.

- 6. Minimize the overlap between the Code of Conduct and City employment policies by clarifying the extent to which the Code of Conduct applies to complaints made by employees and mandating certain disclosure to the City Manager when a complaint under the Code of Conduct may be subject to City employment policies or applicable employment related legislation;**

While no specific questions were raised in respect of the above recommendation, the recommendation is intended to prevent the overlap of two investigations taking place involving the same subject matter. For example, a complaint might be made under the Code of Conduct By-law as well as a second complaint made to WorksafeBC, both relating to the same event. This amendment would allow the City to coordinate the investigations so that only one investigation would take place by the Integrity Commissioner with her report satisfying the requirements of both processes.

**7. Expressly permit the Integrity Commissioner to pause the timeline for formal investigations where mediation may be an option for resolution;**

While no specific questions were raised in respect of the above recommendation, the purpose of this recommendation is to allow mediation to take place at any stage of the formal investigation process. As currently drafted, the Code of Conduct only provides for mediation at the beginning of the complaint process and does not provide an option for pausing the investigation to consider mediation at any stage during the investigation.

**8. That the Integrity Commissioner's annual report be made public by no later than December 1 each year for planning, budgetary and transitional reasons;**

While no specific questions were raised in respect of the above recommendation, the purpose of this recommendation is to time the Integrity Commissioner's Annual Report with the City's other processes. It would allow the Integrity Commissioner's budget to be more properly considered in the City's budget process. As well, where an Integrity Commissioner's term coincides with the end of the calendar year, as is currently the case, this amendment would allow for the Annual Report to be submitted before the end of the Integrity Commissioner's term.

**9. Adding transitional provisions to the Code of Conduct.**

While no specific questions were raised in respect of the above recommendation, the purpose of this recommendation is to address the transition of the Integrity Commissioner's Office at the end of the Integrity Commissioner's term. The Code of Conduct is currently silent on how matters are to be transitioned between an outgoing and a new Integrity Commissioner, or what is to occur if no new Integrity Commissioner has not yet been appointed at the end of the outgoing Commissioner's term. This recommendation will address such issues as to who is to complete an ongoing investigation and consider the issue of interim coverage between Integrity Commissioners.

Staff will be pleased to address any further questions that Council may have with respect to the Integrity Commissioner's recommendations at the Council meeting.