REPORT OF THE INTEGRITY COMMISSIONER: RECOMMENDING THE ADOPTION OF A PROPOSED CODE OF CONDUCT FOR MEMBERS OF COUNCIL FOR THE CITY OF WINNIPEG

REPORT NO. 1 – JANUARY 16, 2018

To: Members of Council for the City of Winnipeg

Background

On December 9, 2015, Council for The City of Winnipeg resolved to create the position of Integrity Commissioner and gave the position a mandate which included drafting a new Code of Conduct for Members of Council.

In drafting the new Code of Conduct ("the proposed Code") the Integrity Commissioner was to review the Code of Conduct which had been established by Council in 1994 and then undertake an analysis of codes of conduct in other jurisdictions to ensure that the proposed Code was consistent with best practices across the country.

The writer was appointed as The City of Winnipeg's Integrity Commissioner on February 22, 2017 with an official start date of April 1, 2017.

The recommendations which are set out in this Report relating to the adoption of a proposed Code of Conduct are made in response to the mandate Council has given me in this new role. They are listed in their entirety at the end of this Report.

Process to Prepare the Proposed Code

> "The process of code development is at least as important, if not more important, than the product in terms of realizing the potential benefits and avoiding unforeseen consequences of adopting a code".[1]

As instructed by Council, to prepare the proposed Code I reviewed the 1994 Code of Conduct for Council for The City of Winnipeg and conducted a cross-jurisdictional analysis of the ethics regimes and Codes of Conduct in place in other jurisdictions across Canada, and in the United States. As well, I reviewed the Codes of Conduct for Members of the House of Commons and Members of provincial legislatures across the country.

I also studied reports, books and articles relating to the field of municipal government ethics and consulted extensively with Integrity Commissioners from other jurisdictions and I consulted with

[1] *A Code of Ethics or Code of Conduct for Political Parties as a Potential Tool to Strengthen Electoral Democracy in Canada – A Discussion Paper on the Advantages and Disadvantages of a Code Prepared for Elections Canada* by Dr. Paul G. Thomas, December 2014, p.17

lawyers at the City's Legal Services, to ensure my recommendations would be consistent with the laws and policies which govern the City.

A list of the jurisdictions and authorities I reviewed, together with a chart which shows a representative sampling of the analysis I conducted, is attached to this report. (Attachment #1).

The proposed Code that I recommend Council approve (Attachment #2) is not a departure from but rather an enhancement of the 1994 Code of Conduct, building on the principles set out in that Code and on best practices across the country.

I provided the first draft of the proposed Code, to Members of Council for their review and comment on June 23, 2017 and met with many individual Members over the summer to discuss the proposed Code's provisions.

Starting in September, I held meetings with the Members of Council as a group, on five separate occasions – each meeting lasting over two hours – to discuss the provisions and interpretation of the proposed Code.

The proposed Code which is attached to this report, therefore, is the result of a process which has involved considerable frank discussion and a search for consensus.

Of particular importance is the fact that because the proposed Code is self-imposed and developed by the Members of Council themselves, it demonstrates the Members' awareness of the importance of ethical conduct.

Purpose of a Code of Conduct

The purpose of a code of conduct for public officials has been explained as follows:

> "Codes of ethics in the public sector are intended to promote integrity in public affairs and to provide guides to acceptable behaviour. They are intended to gain and retain public confidence and trust in public institutions. They are intended to help ensure decision making is fair; that information is appropriately shared and confidence is maintained; that public resources are properly used; and that office is properly attended, acquired and utilized. Codes are about promoting fairness at large, and avoiding corruption and corrupt influences. They are intended to promote a public service imbued with a sense of public purpose and propriety.
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> Such documents provide guides, and may be part of the professionalization of interpersonal relations in government. They help to instil understandings of fair play, and the need to curtail favouritism and abuse. They can buttress both the real and apparent independence and neutrality of civil services."[2]

[2] Gregory J Levine, *Municipal Ethics Regimes*, Municipal World Inc. 2009, p.7

A Code of Conduct is a set of rules which reflects the values and principles to which all Members of Council agree to adhere. As such it is a strong statement from Council - made with the intention of promoting public confidence in government.

When developing a Code of Conduct it is important to understand what ethical behaviour in government looks like and why it is important.

As the eminent scholar on government ethics, Robert Wechsler, wrote:

> "Government ethics is not about *being* 'good' or 'a person of integrity'. It's not something officials learn at home, at school, or in their house of worship. In fact, conduct that is praiseworthy outside of government, such as helping a family member get a job or returning a favour one has been given, is considered wrong in a government context.
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> Government ethics is about *acting* responsibly and professionally, as a government official or employee, under certain circumstances and following certain rules and procedures. It is about preserving *institutional* rather than *personal* integrity. Government ethics decision-making should be just another professional routine.
>
> For the purpose of government ethics, 'ethics' does not mean the field of study concerned with being or doing good (the word's usual meaning). The word 'ethics' means the area of decision-making involving conflicts between, on the one hand, the obligations government officials and employees have toward the public and, on the other hand, their obligations to themselves and their family, their business associates and others with whom they have a special relationship (what are known as 'conflicts of interest' or, simply, 'conflicts').
>
> Government ethics involves not only the reality of these obligations, and of the underlying relationships, but also the appearance of these obligations and relationships."[3]

Having a Code of Conduct provides greater certainty and guidance for the Members of Council on how to reconcile their private interests with their public duties and functions.

Elements of the Proposed Code

Preamble

The proposed Code contains a Preamble which identifies that Members of Council for The City of Winnipeg:

> "recognize that they hold office for the benefit of the public and that their conduct must adhere to the highest ethical standards, exceeding the minimum obligations required by law."

[3] Robert Wechsler: *Local Government Ethics Programs In a Nutshell,* City Ethics, Inc., 2013 pg. 4-5

The idea that codes of conduct for public officials should go beyond the minimum standards of behaviour and set out the highest ideals and values toward which all public servants should be working, was a recommendation of The Honourable Madam Justice Denise E. Bellamy in her report from the *Toronto Computer Leasing Inquiry* ("Bellamy Report").[4] This report was one of the first reports in Canada to establish best practices for decision-making and administration in municipal governments.

Accordingly, the proposed Code contains a number of provisions which require Members to exceed the minimum standards of behaviour required by law. For example, *The Municipal Council Conflict of Interest Act*, C.C.S.M. c.M255 only requires Members of Council to avoid voting on or influencing matters where they have a pecuniary or financial interest. The proposed Code, however, makes it unethical for Members of Council to attempt to influence decisions *whenever* they have a private interest - whether pecuniary or otherwise.

Similarly, under *The Municipal Council Conflict of Interest Act* Members of Council are only required to make public disclosure of gifts whose value exceeds $250. Under the proposed Code, however, Members commit to providing greater transparency by disclosing all gifts worth $50 or more. The proposed Code also sets out clear rules regarding the circumstances under which it is appropriate for a Member of Council even to accept a gift or benefit in the first place.

Key Principles

The Key Principles set out in the proposed Code reflect an acknowledgement by the Members of Council that they must perform their duties of office honestly and with integrity, impartiality and transparency, putting the public interest before private and self-interest and in a manner that promotes public confidence and trust in the political process. While the Key Principles, like the Preamble, do not support stand-alone contraventions of the proposed Code, they provide a context for interpreting the rules of behaviour that are contained in the Code.

Rules

The 10 Rules set out in the proposed Code are rules of behaviour which provide clear guidance to the Members of Council regarding the handling of such matters as: confidential information; conflicts of interest; gifts and benefits; improper use of influence; use of City staff, resources and property; election related activity; and respectful conduct towards City staff, members of the public and each other.

Sanctions for Misconduct

One of the important features of the proposed Code is that it contains a range of sanctions for a failure to comply with its Rules.

Justice Bellamy, in her report, recommended for the City of Toronto that it:

[4] The Honourable Madam Justice Denise E. Bellamy: *Toronto Computer Leasing Inquiry (The City of Toronto, 2005)*

> "…should give the integrity commissioner the power to recommend to Council an appropriate range of sanctions for ethical misdeeds by councillors. Sanctions should include 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 declaration of a vacancy in the councillor's seat."[5]

She also recommended that while the decision whether or not to impose sanctions belongs to council, council should consider the integrity commissioner's recommendations very seriously and depart from them only where they are manifestly unfit."[6]

Justice Bellamy further commented that council should not go behind the commissioner's investigations into the conduct in question by undertaking its own investigation because to do so would undermine the authority of the integrity commissioner's role by replacing an independent professional investigation, with a political one.

The proposed Code contains a number of sanctions which mirror those recommended by Justice Bellamy. Unlike Ontario, however, where municipal councils are authorized by legislation to suspend a member's salary for up to three months, no such authority exists in Manitoba.

Having consulted with Legal Services on this matter, I am of the view that if Council wants to be able to enforce similar pecuniary sanctions, it will have to request that the Province legislate changes to *The City of Winnipeg Charter*.

Application of the proposed Code

Although the proposed Code applies to Members of Council only, it is important that the staff who work with Members of Council, namely Councillors' Executive Assistants and the staff who work in the Mayor's Office, also be required to comply with the provisions of the proposed Code.

As Justice Bellamy said in her report:

> "No one at the City should feel that anyone else at the City is held to either a stricter or more lenient standard of behaviour."[7]

Members of Council are responsible for the actions of their staff and must ensure that their staff understand the provisions of the proposed Code including how their actions may cause a Member of Council to run afoul of the Code.

The Councillors' Ward Allowance Fund Policy currently requires that Councillors' Executive Assistants comply with the provisions of the 1994 Code of Conduct.

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[5] Bellamy report, p.49
[6] Bellamy Report, p.50
[7] Bellamy Report, p.32

I recommend that that policy be amended to require that Councillors' Executive Assistants comply with the provisions of the proposed Code and that their employment contracts reflect that requirement.

I also recommend that the Mayor take whatever steps are necessary to ensure that anyone working in the Mayor's office be required to comply with the provisions of the proposed Code.

Complaint Protocol

An essential component of the proposed Code is the Complaint Protocol which is found at Appendix B to the Code. The Complaint Protocol provides a transparent method for receiving and addressing complaints relating to alleged breaches of that Code.

An important consideration in drafting the Complaint Protocol was that the process be as accessible as possible for potential complainants and balance the requirement to afford procedural fairness to Members who are the subject of formal complaints.[8]

The Complaint Protocol which forms part of the proposed Code reflects best practices across the country and is consistent with the requirements of administrative law principles of fairness and natural justice. It allows for complaints to be filed by City staff, members of the public or Members of Council.

Where the Integrity Commissioner finds that a complaint has been sustained either in whole or in part, the Integrity Commissioner shall publicly report to Council outlining his or her findings and any recommended corrective action or sanctions.

When the Integrity Commissioner delivers an investigative report, that report should proceed to Council as quickly and directly as possible. To that end, I recommend that the City's Organizational By-law be amended to allow the Integrity Commissioner to provide investigative reports to Council, directly.

The Complaint Protocol requires that Council consider and act on investigative reports forthwith upon receiving them.

It also provides that the Member of Council who is the subject of the investigative report shall be entitled to to make a presentation to Council on the matter but shall not participate in the deliberations of Council or in any vote of Council on the matter. I recommend that the Procedure By-law be amended to allow for this process.

It should be noted that the complaint process will be suspended during the campaign period in an election year. The reason for suspending the complaint process before an election is to prevent undue influence and interference in the electoral process and to prevent the complaint process from being used as a political or campaign tool.

[8] This requirement was acknowledged by The City of Toronto's first Integrity Commissioner, David Mullan, in his *City of Toronto Integrity Commissioner End of Term Report* prepared in 2008

Advice Protocol

Finally, the proposed Code provides that Members of Council may seek advice from the Integrity Commissioner in accordance with the Advice Protocol which is attached to and forms part of the proposed Code as Appendix A.

The advisory function is the most important aspect of an Integrity Commissioner's role and Members of Council are encouraged to consult with the Integrity Commissioner as often as necessary.

As a further encouragement to seeking and acting upon the advice of the Integrity Commissioner, the proposed Code says that where a Member relies upon the Integrity Commissioner's advice, that advice will bind the Integrity Commissioner in any subsequent consideration of the Member's conduct, for example, when considering a complaint about that conduct. This is a common feature of codes of conduct, across the country.

Code of Conduct with Commentary

The Preamble to the proposed Code says that in order to assist Members of Council and the public in understanding and interpreting the Code, the Code of Conduct for Members of Council shall be made available in a version which includes commentary. The commentary does not form part of the Code of Conduct itself. It will be updated by the Integrity Commissioner on a regular basis to respond to changes in legislation or policies, and decisions and advice provided by the Integrity Commissioner.

A copy of the version of the proposed Code of Conduct for Members of Council with Commentary is attached to this report for Council to receive, for information only (Attachment #3).

Other Matters

Policy Relating to Fundraising

The proposed Code at "Rule 4", provides that Members must not use the influence of their office for purposes other than the proper exercise of their duties of office. The circumstances to which this Rule applies include situations where Members of Council carry out fundraising activities.

The concern that arises from using one's influence for fundraising, even for a good cause, is that such requests may be perceived as a way for a donor to gain advantage in return for making a donation or alternatively that the potential donor may feel uncomfortable if they decline to make a donation.

Whether the fundraising activity is appropriate for the Member to participate in depends on the specifics of the Member's participation, the nature of the recipient organization, and its relationship to the City, the Member's relationship with that organization and the donor's relationship to the Member and the City.

Many jurisdictions have specific policies which govern how fundraising activities should be carried out. For example, Ottawa has a Community Fundraising and Special Events Policy which states in part:

> "When considering whether to support a third party by organizing a fundraiser or benevolent event Members of Council shall disclose all material facts to the Integrity Commissioner and obtain a written opinion from the Integrity Commissioner approving the activity, which concludes that the Member does not have a conflict between his/her private interest and public duty." (Part III Support for Benevolent Activities and Events)

As instructed by Members of Council during the course of our consultations on the proposed Code, I will be providing a policy on fundraising for Council's approval, in the coming months.

In the interim, I recommend that Members of Council consult with and receive approval from the Integrity Commissioner before undertaking any fundraising activity whether that activity relates to member-organized community events or supporting other benevolent activities and events including those sponsored by various charities, service clubs and other non-profit community based organizations.

Legal Fees

A number of municipalities I reviewed allow a Member of Council who is the subject of a complaint alleging they have breached the Code of Conduct, to receive a set amount of money for consulting a lawyer and reimbursement of legal fees where the Member is found not to have contravened the Code. The amount of reimbursement varies from jurisdiction to jurisdiction.

Allowing reimbursement of legal fees for Members of Council who are found not to have breached the Code of Conduct, seems appropriate where they are found to have acted in good faith. I recommend that Council authorize the Integrity Commissioner, in consultation with the Clerk's Office, to develop a policy for Council's consideration that would allow some form of compensation in this regard.

Request for Legislative Changes

In the course of preparing the proposed Code, I identified a number of areas which would benefit from having amendments made to *The City of Winnipeg Charter*. These include giving the Integrity Commissioner more authoritative investigative powers and granting Council the ability to impose financial sanctions for breaching the proposed Code.

I recommend that Council authorize the Integrity Commissioner to work with the City's Legal Services to bring forward a report to Council recommending legislative amendments which should be requested of the Province of Manitoba to enhance The City of Winnipeg's ethical and accountability framework.

Conclusion

The process to prepare the proposed Code for Council's approval has been lengthy and comprehensive. I could not have accomplished the task so effectively without the assistance of the City Clerk, Richard Kachur, whose patient assistance in guiding me through my first months in this role has been invaluable.

> "The adoption of a code is something that should be done with seriousness and prudence. It is not a quick fix, nor are its contents and application obvious.[9]

The proposed Code is indeed the result of a process which has been undertaken with seriousness and prudence. I therefore make the following recommendations.

Recommendations

1. That Council adopt the proposed Code of Conduct for Members of Council (Attachment #2 to this Report) and enact a By-law to enforce the Code.

2. That the "Code of Conduct of the Council of The City of Winnipeg" adopted by resolution of Council on September 21, 1994 be revoked on the enactment of the By-law which enforces the proposed Code of Conduct.

3. That Council amend *The Councillors' Ward Allowance Fund Policy* within 90 days, to require that Councillors' Executive Assistants comply with the provisions of the Code of Conduct for Members of Council (Attachment #2 to this Report) and that the employment contracts for Executive Assistants require such compliance;

4. That the Mayor take the necessary steps within 90 days to ensure that the staff who work in the Mayor's office be required to comply with the provisions of the Code of Conduct for Members of Council (Attachment #2 to this Report);

5. That pending the adoption by Council of a Fundraising Policy, Members of Council must consult with and seek approval of the Integrity Commissioner before undertaking any fundraising activity whether relating to member-organized community events or supporting other benevolent activities and events including those sponsored by various charities, service clubs and other non-profit community based organizations; and

6. That Council authorize the Integrity Commissioner, in consultation with the City Clerk, to develop a policy for Council's consideration which would allow compensation for legal fees in certain circumstances where Members are the subject of complaints under the Code of Conduct for Members of Council (Attachment #2 to this Report);

7. That Council authorize the Integrity Commissioner to work with the City's Legal Services to bring forward a report to Council recommending legislative amendments which should be requested of the Province of Manitoba to amend *The City of Winnipeg Charter* to enhance

[9] Gregory J Levine, *Municipal Ethics Regimes*, Municipal World Inc. 2009, p.6

the Integrity Commissioner's role and to give Council the authority to order sanctions of a pecuniary nature when the Code of Conduct for Members of Council (Attachment #2 to this Report) is found to have been breached;

8. That Council amend the Organization By-law to require that all reports prepared by the Integrity Commissioner following an investigation which has been carried out pursuant to the Complaint Protocol, Appendix B to the proposed Code of Conduct for Members of Council (Attachment #2 to this Report) be provided directly to Council;

9. That Council amend the Procedure By-law to allow a Member who is the subject of an investigative report to make a presentation to Council, in accordance with the provisions of the Complaint Protocol, Appendix B to the proposed Code of Conduct for Members of Council (Attachment #2 to this Report);

10. That the proper officers of the City do all things necessary to implement the intent of the foregoing.

Sherri Walsh, Integrity Commissioner
January 16, 2018