REPORT OF THE INTEGRITY COMMISSIONER: PROPOSING CHANGES TO THE *CODE OF CONDUCT FOR MEMBERS OF COUNCIL* AND TO THE *PROCEDURE BY-LAW* AND REPORTING ON WORK REGARDING GUIDANCE TO MEMBERS RELATED TO: FUNDRAISING, ELECTION ACTIVITY AND USE OF SOCIAL MEDIA

REPORT NO. 5 – SEPTEMBER 4, 2019

To: Members of Council for The City of Winnipeg

I. INTRODUCTION

On February 22, 2018, Council for the City of Winnipeg adopted a new *Code of Conduct for Members of Council* (the "*Code")* which establishes rules to govern Members' ethical obligations when they perform their duties of office and a complaint mechanism to assist in enforcing compliance with those rules.

The *Code,* together with the appointment in 2017 of an Integrity Commissioner forms part of a new ethics and accountability framework for the Members of Council.

As I stated in my Report to Council dated January 16, 2018, in which I recommended the adoption of the new *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]

Having worked with the *Code* for more than a year, providing advisory services to Members of Council and responding to complaints made about the Members' conduct, I am of the view that certain changes should be made to the wording of the *Code* in order to make it a more useful tool.

---

[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

This report also addresses proposed changes to the *Procedure By-law* as well as recommendations for further work to be done to clarify Members' ethical obligations relating to their election related activity and use of social media.

II. CHANGES TO THE *CODE*

Starting in April of this year, I met on a confidential basis with each Member of Council to discuss their experience with the *Code* and to hear whether they had any questions or concerns or suggestions for change.

In some cases, the Member with whom I met was part of the original Council which participated in drafting the *Code*. In other instances the Member, having been only recently elected, had less experience working with the *Code* but perhaps a different perspective on it.

The amendments which I am recommending in this report are based on the information I received from meeting with all 16 Members of Council and on my own experience working with the *Code*, to date.

In recommending these changes I was also guided by reviewing rules governing the ethical obligations of elected officials at the municipal, provincial and federal levels in other jurisdictions across the country and my discussions with municipal Integrity Commissioners and provincial Conflict of Interest Commissioners from those jurisdictions, including the Conflict of Interest Commissioner for Manitoba.

All of the proposed amendments are clearly set out on Attachment No. 1 to this report and I only highlight here, what I believe are the most significant of the changes I am proposing be made.

Some of the proposed changes are simply intended to make the *Code* more accessible and less legalistic. For example, with respect to Appendices A and B to the *Code* being the *Advice Protocol* and *Complaint Protocol* respectively, I am recommending that the word "protocol" be changed to "procedure".

Other proposed changes are intended to make the wording of the *Code* gender neutral, for example, changing "his or her" to "their".

With respect to the rules relating to the Members' ethical obligations, my intention in recommending the changes set out in Attachment No. 1 is not to change the Member's obligations under the *Code* but rather to clarify how those obligations should be interpreted and applied.

With respect to the changes which pertain to the complaint process, most of those changes are intended to provide more information to Members and the public about how the Integrity Commissioner performs its role as well as to clarify how Members may conduct themselves when they are the subject of an investigation.

How to read Attachment No. 1

Any wording which is new or changed is indicated in red.

Wording which has not changed but has been moved to a different location in the document is also indicated in read and is accompanied by a note which signals that the wording was relocated.

Existing wording which is to be removed has a black line struck through it.

Changes to the Definition Section

I am proposing a change to the definition of the term "duties of office" in order to better identify what those duties do or do not include.

This term is referenced in a number of rules including the rules relating to: conflict of interest; gifts; and use of influence.

In its current version, the *Code* defines "duties of office" as follows:

> ***'Duties of Office'*** *include those activities that are reasonably related to a Member's office, taking into consideration the different interests and the diverse profiles of their constituents as well as the Members' different roles on committees, agencies, boards and commissions.*

The change to the definition I am proposing reads as follows:

> ***'Duties of Office'*** *are the duties and activities that relate to the position of the Member, namely participation in activities relating to the proceedings and work of Council and activities undertaken in representing the City or the Member's ward or constituents but do not include:*
>
> - *activities related to the private interests of the Member;*
> - *activities related to a Member's campaign for re-election; and*
> - *activities including fundraising activities designed, in the context of a federal, provincial or municipal election, or any other local election, to support or oppose a political party or an individual candidate.*

These changes are in line with the description of the duties of office of Members of the House of Commons and in my view provide more guidance in understanding how the term applies to Members' ethical obligations under the *Code*.

I have also moved the definition of the terms "Private Interest" and "Dependant" which were set out in rule 2 – Conflict of Interest and rule 3 – Gifts, respectively, into the Definition section of the *Code*, for the sake of consistency and ease of identification.

Changes to the Rules Themselves

Addition of a New Rule Addressing Fundraising Activity

When Council adopted the *Code* in February 2018 it also instructed me to draft a fundraising policy for its review and approval.

Accordingly, I prepared a draft policy which I reviewed with the Members of Council at the individual meetings I held with them, in the spring.

In addressing the topic of fundraising activity my focus was on determining the best way to provide guidance to facilitate the Members' compliance with the *Code* if and when they wanted to engage in such activity.

In addition to the existing rules which may be engaged if a Member solicits funds from a person or organization, namely: rule 2 – Conflict of Interest and rule 4 – Use of Influence; I am proposing two changes to the *Code* which would provide further guidance as to the type of fundraising activity which is or is not permitted.

The first of those changes is as set out above in the proposed change to the definition of "Duties of Office" which would specifically exclude fundraising activities which are designed to support or oppose a political party or an individual candidate in the context of a federal, provincial or municipal election, from being considered to be part of a Member's duties of office.

The second change is by adding a new rule which would read as follows:

> *3. Fundraising*
>
> *Members must not solicit funds from any person or organization if doing so would constitute an improper use of the influence of their office.*

This rule reinforces and reminds Members that engaging in fundraising activity has the potential to constitute a misuse of the influence of their office and they should exercise caution when undertaking this activity.

For example, a targeted donor may perceive a fundraising request from a Member as a way to gain advantage in exchange for making the donation, if the donor has a matter pending before Council. In that case, the Member's fundraising activity, even if intended to benefit a good cause, would constitute an improper use of the influence of their office.

Similarly, if a Member were to use their office or title to ask someone to donate to a personal cause, their private charitable foundation, for example, that would be an improper use of their influence because supporting such a cause is not part of their duties of office.

Changes to the *Advice Protocol*– Appendix A and the *Complaint Protocol* – Appendix B regarding Members' ability to speak publicly

One question I am frequently asked by Members of Council is for advice about whether they are permitted to make certain information public, whether the information relates to advice they have received from me or information about a complaint which has been made against them.

Members of Council necessarily perform their work in a public forum and the ability to communicate publicly about matters relating to their work, including their conduct in the performance of their duties, is important to them. They have consistently told me, however, that they want to comply with any confidentiality requirements which are imposed on them by the *Code.*

Accordingly, I have proposed changes to the *Advice Protocol* and the *Complaint Protocol* to assist the Members in knowing how to comply with these obligations.

Those changes are:

1. an amendment to the *Advice Protocol* which says that although communication between the Integrity Commissioner and a Member is confidential:

    b. A Member is entitled to make public, advice the Member receives from the Integrity Commissioner; and

2. a new section in the *Complaint Protocol* which confirms:

> *28. If a complaint becomes a matter of public record at any time whether before, during or after the Integrity Commissioner has undertaken an investigation, the Member about whom the complaint is made is permitted to speak publicly about the complaint.*

Other Changes to the *Complaint Protocol* – Appendix B – regarding the Integrity Commission's work

The Integrity Commissioner's work, when conducting an investigation and preparing a report, whether or not the complaint has been substantiated, can be a time consuming and expensive process. This is why complaint procedures, including the procedure established in the *Code*, typically establish criteria for a preliminary review of complaints to allow an ethics professional an opportunity to exercise their discretion in determining whether a specific complaint merits the utilization of their publicly funded resources.[2]

In its current version, the *Code* provides that:

> *7. If the Integrity Commissioner is of the opinion that:*
>
> *a. the conduct described in the complaint is not within the Integrity Commissioner's jurisdiction to investigate; or*
>
> *b. the complaint is frivolous, vexatious or not made in good faith; or*
>
> *c. there are no grounds or insufficient grounds for an investigation, or that it is unlikely that the complaint will succeed;*
>
> *the Integrity Commissioner shall not conduct an investigation and, where this becomes apparent in the course of an investigation, shall terminate the investigation.*

The change I am proposing would be to add the following ground to this section:

> *d. an investigation would serve no useful purpose."*

[2] Robert Wechsler, Director of Research, City Ethics Inc.: *Local Government Ethics Programs: A Resource for Ethics Commission Members, Local Officials, Attorneys, Journalists and Students, and a Manual for Ethics Reform*, City Ethics Inc., 2013, p.88

A primary example of a situation captured by this ground would be where the Integrity Commissioner is of the view that the allegations set out in the complaint even if proven, involve only a *de minimus* violation of the *Code*. In such a case, utilizing public funds to conduct an investigation and prepare a report may not be worthwhile. The remedial aspect of the complaint process which is its most important function, would still be served by the Integrity Commission bringing the matter to the Member's attention.

In this regard, I am also proposing to articulate in the *Complaint Protocol* the following provision:

> *11. Where the Integrity Commissioner has declined to conduct an investigation, the Integrity Commissioner will provide the Member who is the subject of the complaint with both an anonymized copy of the complaint and the Integrity Commissioner's response to the Complainant*

The purpose of providing a Member of Council who is the subject of a complaint with an anonymized (in the sense of having redacted the complainant's identity) copy of the complaint and the Integrity Commissioner's response to the complainant, when the Integrity Commissioner has determined they will not be conducting an investigation is two-fold:

1. to inform the Member of the concern that was raised about their conduct; and

2. for education purposes to show how the *Code* was interpreted and applied.

As I have indicated on many occasions, the advisory and educational aspects of the Integrity Commissioner's office are the most effective aspects of the role when it comes to shaping the conduct of elected officials.

This view was expressed by the Honourable Madam Justice Denise E. Bellamy in her report from the *Toronto Computer Leasing Inquiry* (*"Bellamy Report")* – one of the first reports in Canada to establish best practices for decision-making and administration in municipal governments.[3] She

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

said that the City should regard sanctions for ethical breaches as a last resort in an effort to preserve and enhance ethics in government and that "First and foremost should be the cultivation of ethical behaviour in a supportive and educational way."[4]

This process is also consistent with the process which is followed by regulators in other contexts such as, for example, the Law Society of Manitoba, which provides its members with a copy of any complaint (not anonymized) it receives about the member along with its response to that complaint, when it decides for whatever reason not to conduct an investigation.

III. CHANGES TO THE *PROCEDURE BY-LAW*

When the *Code* was enacted, certain amendments were also made to the *Procedure By-law*.[5]

One of those amendments was to give the Member who is the subject of an Integrity Commissioner's investigation report to Council, the ability to appear in delegation at the meeting at which Council considers that report.

The *Procedure By-law* is silent however, with respect to whether anyone else can appear in delegation to speak to the report.

In my view, the *Procedure By-law* should be amended to articulate that at the meeting at which Council considers an investigation report, delegations should be limited to the Member who is the subject of the report and the Integrity Commissioner.

I am supported in making this recommendation by the writings of the ethics scholar Robert Wechsler who makes it clear that an individual complainant is not a party to an ethics proceeding.

---

[4] *Bellamy Report, supra,* p.50
[5] By-law No. 19/2018, s.6

While the individual's actions may begin an investigation, at that point the ethics program itself takes over, followed by possible consideration of the matter by Council.[6]

Even in situations where the complainant alleges having experienced harassment by a Member, the complainant's interests will have been addressed by the Integrity Commissioner's investigation and any recommendations made to Council.

Nor, typically will it be necessary for the Integrity Commissioner to appear in delegation. The investigation report must speak for itself and the Integrity Commissioner's findings should not become the subject of discussion and debate between Council and the Integrity Commissioner.

As Justice Bellamy stated in her report:

> Council should not go behind the commissioner's investigations into the conduct in question and undertake its own investigation. This would undermine the authority of the commissioner's office by replacing an independent professional investigation with a political one.

She went on to say that:

> Council should consider the integrity commissioner's recommendations very seriously and depart from them only where they are manifestly unfit.[7]

There may be occasions, however, where Council requires clarification about the process that was followed in a specific investigation or about the complaint process generally. The Integrity Commissioner should be able to appear in delegation to address those matters.

IV. FUNDRAISING ACTIVITY

As set out earlier in this report, in February 2018 when Council adopted the *Code* it also instructed me to draft a fundraising policy for its review and approval.

---

[6] Wechsler, *supra*, pp.683-684
[7] Bellamy, *supra*, Vol.2 – *Good Government*, p.50

From reviewing fundraising policies and practices in municipalities across the country, it appears that the regulation of fundraising activity ranges from detailed, prescriptive policies to no specific guidance at all.

The individual meetings which I recently held with the Members of Council provided an excellent opportunity for me to discuss with them the ethical issues that may arise when elected officials become involved in fundraising activity and to hear from them about the type of fundraising in which they might typically engage in the course of performing their duties of office.

As a result of my cross-jurisdictional review and my meetings with Members, I believe that it would not be helpful for Members to pass a formal fundraising policy.

Given the variety of circumstances in which fundraising activity may be carried out, much of this activity cannot be readily defined except in relation to particular circumstances. I am satisfied that the Members will be better guided by the changes which I am proposing to the *Code* as set out in Attachment No. 1 to this Report, together with the reminder to them, as always, of the benefit of seeking advice on a pro-active basis from the Integrity Commissioner.

V. Social Media and Election Related Activity

In the Annual Report for the period ending December 31, 2018, I recommended that Council authorize me to prepare policies for its review and ultimate approval on the following topics:

1. The use of social media – generally and in the context of elections; and

2. Election related activity.

I discussed both of these topics with the Members in the individual meetings I held with them in April of this year. In those discussions, the Members confirmed to me that they would like more guidance on these topics.

From my recent review of municipal ethics regimes in other provinces, I have noted that such guidance can be provided in a variety of ways including through: interpretation bulletins; specific policies; or through more detailed rules embedded in the *Code of Conduct* itself.

I recommend Council confirm its authorization for me to proceed with work to determine the best way to provide guidance to the Members in order to ensure that their election related activity and use of social media are conducted in compliance with the *Code.*

VI. Summary of Recommendations

1. That Council adopt the proposed changes to the *Code* which are shown on Attachment No. 1 to this report.

2. That Council amend the *Procedure By-law* to restrict delegation on investigation reports received by Council from the Integrity Commissioner, to the Member who is the subject of the report and to the Integrity Commissioner, the latter only for the limited purpose of speaking about the process undertaken to prepare the report or about complaint procedures generally.

3. That Council accept the Integrity Commissioner's recommendation to regulate Members' fundraising activity through the proposed changes to the *Code* which are shown on Attachment No. 1 to this Report and by availing themselves of their ability to seek the Integrity Commissioner's advice on a pro-active basis, rather than through adopting a formal policy.

4. That Council authorize the Integrity Commissioner to prepare a report and recommendations for Council's consideration on the most appropriate way to provide guidance to Members of Council regarding election related activity and the use of social media.

Sherri Walsh

September 4, 2019