

## **Appendix 6: Legal Opinion on Operations of an Office of Integrity Commissioner**

What follows are answers to questions of a general nature. Because local circumstances may vary, municipal councils, staff and persons interested in the actions of a particular council are encouraged to consult their own solicitor or seek locally appropriate interpretations and professional opinions.

### **Confidentiality**

Sections 223.5 to 223.8 of the *Municipal Act, 2001*, address the issue of confidentiality in relation to matters involving an Integrity Commissioner. The Commissioner and every person acting under the Commissioner's direction "shall preserve secrecy". These requirements are expressly stated to prevail over the *Municipal Freedom of Information and Protection of Privacy Act*. Where a Commissioner provides a periodic report he or she "may summarize advice he or she has given but shall not disclose confidential information that could identify a person concerned."

The only clear exception requires that otherwise confidential information must be disclosed "in a criminal proceeding as required by the law". In addition, where during the course of an inquiry a Commissioner becomes aware of reasonable grounds to indicate that the *Criminal Code* or another Act has been violated this must be reported to the appropriate authorities and the Commissioner's inquiry suspended until the other matter is resolved.

This generally suggests that information such as the name of a complainant and the name of a person complained of (or any other persons who might be involved in a matter), or information that would allow a person or matter to be identified, must be kept strictly confidential.

This strict prohibition on disclosure is tempered slightly by the discretion given to a Commissioner to disclose in a report "such matters as in the Commissioner's opinion are necessary for the purposes of the report." However, given the general thrust of the legislation, Commissioners would likely need to obtain fact-specific legal advice before deciding to release any identifying information in a report or otherwise.

### **Conflict of Interest**

The term "conflict of interest" is almost always used in the context of municipalities to refer to conflicts of a direct or indirect pecuniary nature that are dealt with under the *Municipal Conflict of Interest Act*. However, non-pecuniary or "ethical" conflicts can also arise and may form the basis of a matter an Integrity Commissioner is asked to consider. For example, a councillor who comments upon a request before Council for funding from an organization represented by his or her spouse may be compliant with *MCIA* while not refraining from participating in the debate (see *MCIA*, sections 3 and 4b) whereas, in the public's mind, such behaviour may be seen as a conflict.

It is necessary to clearly distinguish between the two types of conflicts, pecuniary and ethical. However, given the mandate and purpose behind having an Integrity Commissioner, it is important that she or he be prepared to address both. If the matter is pecuniary in nature, then it must be referred to others. If the matter is non-pecuniary then it can and ought to be addressed by the Commissioner.

### **Impose and Recommend Actions:**

In law, with Council's prior approval, is an Integrity Commissioner allowed to impose as well as recommend sanctions, and can Council overturn that decision/recommendation? [Under our legal system municipal councils are "creatures of statute"; that is, they have no inherent powers and can only exercise those powers granted to them either expressly or implicitly in statutes or regulations etc. At the same time, the Integrity Commissioner is also a creation of statute and](#)

can only exercise those powers granted, in this case in the *MA 2001*. The following provisions appear relevant:

**223.3 (5)** The municipality may impose either of the following penalties on a member of council or of a local board if the Commissioner reports to the municipality that, in his or her opinion, the member has contravened the code of conduct:

1. A reprimand.
2. 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.

**223.5 (6)** The local board may impose either of the penalties described in subsection (5) on its member if the Commissioner reports to the board that, in his or her opinion, the member has contravened the code of conduct, and if the municipality has not imposed a penalty on the member under subsection (5) in respect of the same contravention.

At the same time the *Municipal Act 2001* also provides:

**223.3 (2)** Subject to this Part, in carrying out the responsibilities described in subsection (1), the Commissioner may exercise such powers and shall perform such duties as may be assigned to him or her by the municipality.

Based on these provisions, it would appear that the power to reprimand or sanction a member is expressly given only to the council/local board and not to the Integrity Commissioner. Therefore, absent any express delegation of these powers by a council or local board to an IC, their decision will be the operative decision.

With specific intent, a Council may (a) expressly assign the power to an Integrity Commissioner to impose as well as recommend a penalty; (b) choose not to accept or act on a recommendation of the Integrity Commissioner; and (c) at its discretion, overturn any penalty or recommended sanction recommended or imposed by its Integrity Commissioner. These understandings can be varied at the explicit decision of a municipality.

### **Inquiry/Investigation**

Is inquiry in legislation the same as investigation? In law, must an inquiry/investigation be terminated if it is referred to another authority? What is the interplay/relation between an IC's role in the matter of turning investigations over to another authority under part v.1 of the *Municipal Act* and the application of *MCIA*?

The role of the IC under the *Municipal Act 2001* as it interacts with the *MCIA* and all other legislation is most directly governed by the following provision of the *Municipal Act 2001*:

**223.8** If the Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of any other Act or of the Criminal Code (Canada), the Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to council.

The use of the terms inquiry and investigation, while perhaps appearing to mean the same, in law are generally seen to be different. An **inquiry** in the context of this legislation would likely be viewed as steps being taken in the routine administration of the IC provisions in the *MA 2001*. However, once it appears that there are sufficient facts to form reasonable grounds to say any Act has been contravened the matter then becomes an **investigation**. This normally triggers certain responsibilities on the part of the investigator such as the need to indicate that an investigation is taking place. It also normally triggers certain protections for the person being investigated such as Charter protections against search and seizure, the right to counsel, and the right to remain silent. This area of the law is complex and legal advice should generally be sought on a case-by-case basis. At the same time, the *MA 2001* appears to address most of this issue by requiring an IC to suspend her/his inquiry until any investigation is complete.

Given that the *MCIA* would qualify under the heading of “any other Act” if the IC determines that there are reasonable grounds to believe that the *MCIA* has been violated then the inquiry/ investigation must be terminated and referred to the appropriate authority. In these circumstances, since there is no body specifically created to address *MCIA* issues, the appropriate authority might well be the municipal solicitor(s) who could then provide direction.

In order to pursue a violation by a Councillor of provisions of the *MCIA*, someone has to make a complaint and file it with the courts within a short time line. Should the IC learn of such a complaint against a member of Council or a Local Board alleging an *MCIA* violation, his or her duty is to cease an inquiry or investigation. Even if a formal complaint has not been filed, should the IC become aware of facts that might give rise to a complaint it would be prudent to report same to the municipal solicitor and seek guidance on what to do.

### **Subpoena and Evidentiary Powers:**

Can the IC compel staff to participate in an investigation which he or she has initiated? What investigation, subpoena and/or evidentiary powers does the IC have?

The *MA 2001* gives an IC the following powers:

#### **Inquiry by Commissioner**

**223.4** (1) This section applies if the Commissioner conducts an inquiry under this Part,

- (a) in respect of a request made by council, a member of council or a member of the public about whether a member of council or of a local board has contravened the code of conduct applicable to the member; or
- (b) in respect of a request made by a local board or a member of a local board about whether a member of the local board has contravened the code of conduct applicable to the member.

#### **Powers on inquiry**

(2) The Commissioner may elect to exercise the powers of a commission under Parts I and II of the *Public Inquiries Act*, in which case those Parts apply to the inquiry as if it were an inquiry under that Act.

#### **Information**

(3) The municipality and its local boards shall give the Commissioner such information as the Commissioner believes to be necessary for an inquiry.

#### **Same**

(4) The Commissioner is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by the municipality or a local board that the Commissioner believes to be necessary for an inquiry.

The *Public Inquiries Act* provides:

#### **Power to summon witnesses, papers, etc.**

**7.** (1) A commission may require any person by summons,

- (a) to give evidence on oath or affirmation at an inquiry; or
- (b) to produce in evidence at an inquiry such documents and things as the commission may specify, relevant to the subject-matter of the inquiry and not inadmissible in evidence at the inquiry under section 11.

## Privilege

11. Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

As can be seen, subject to any issues of privilege, under the *Public Inquiries Act*, an IC does have the power to subpoena witnesses and require them to produce evidence. Some of these types of powers are also more expressly granted in sections 223.4((3) and (4) of the *MA 2001* set out above and these powers would obviate the need to obtain a subpoena to access these types of records. The IC could also compel staff to participate in an inquiry if the staff person had documents etc. identified in the foregoing provisions and/or through the use of the subpoena powers etc. granted pursuant to the *Public Inquiries Act*.

If the IC chooses to exercise these considerable powers, they would apply to anyone—a member of municipal staff or any other third party. The *PIA* draws the line at “privileges”, that is, litigation materials or evidentiary items involving client-solicitor privilege.

**Source:** *Integrity Commissioner Resource Report*; professional opinion by Eric Gillespie.

**Application:** Because local circumstances may vary, municipal councils, staff and persons interested in the actions of a particular council are encouraged to consult their own solicitor or seek locally appropriate interpretations and professional opinions.