



**REQUIRED BY-LAW AND POLICY AMENDMENTS – ETHICS ADVISOR AND INTEGRITY
COMMISSIONER TERMS OF REFERENCE AND PROCEDURE PROTOCOL**

EXECUTIVE SUMMARY

On 2016 July 4 City Council directed the Integrity and Ethics Office, City Solicitor and City Auditor to report back to Council no later than 2016 September 26 with bylaw and policy amendments necessitated by Council's adoption of Terms of Reference for the Ethics Advisor and Integrity Commissioner, and the Procedure Protocol for the Integrity Commissioner. Council subsequently deferred that report to 2016 December 19.

This Report sets out recommendations necessary for the implementation of the Procedure Protocol and, specifically, shifting the review of conduct of Members of Council from the City Auditor to the Integrity Commissioner. This includes making the Procedure Protocol a matter of Council Policy, which is necessary to permit the Integrity Commissioner to discharge the functions formerly performed by the City Auditor pursuant to the Whistle-Blower Policy (CC026, Effective 2007 May 28).

It also seeks direction from Council for the Ethics Advisor, in consultation with Members of Council, to undertake a comprehensive review and rewriting of the policies governing ethical conduct by Members of Council. Currently, Members of Council are subject to several policies. That means that there is no single document for Members to consult with respect to ethical conduct. This distinguishes Calgary from other municipalities, such as the City of Toronto, where ethical policies are incorporated into a single Code of Conduct. In addition, while it does address most of the important ethical issues applicable to Members of Council, the general Ethical Conduct Policy for Members of Council does not provide sufficiently clear guidance. The Integrity and Ethics Office believes that Members of Council, particularly new Members of Council, would benefit from review, consolidation and rewriting of those policies.

RECOMMENDATIONS OF THE INTEGRITY AND ETHICS OFFICE

That the Legislative Governance Task Force recommend that Council:

1. Direct the Ethics Advisor, in consultation with Members of Council, to prepare a revised Code of Conduct governing Members of Council;
2. Adopt the Integrity Commissioner Complaints Policy, in Attachment 1 (revised);
3. Adopt the proposed amendments to the Disclosure Policy for Members of Council, CC044 in Attachment 2;
4. Adopt the proposed amendments to the Ethical Conduct Policy for Members of Council, CC042, in Attachment 2;
5. Adopt the proposed amendments to the Gifts and Benefits Policy for Members of Council, CC043, in Attachment 2;
6. Consider whether to adopt the proposed amendments to the Accepted use of Technology Resources – Members of Council Policy, PAC009, and to the Members of Council and Election Campaigns Policy, CC041, in Attachment 3; and
7. Receive Report LGT2016-0951 as an item of Urgent Business at the 2016 December 19 Regular Meeting of Council.

**RECOMMENDATION OF THE LEGISLATIVE GOVERNANCE TASK FORCE, DATED
2016 DECEMBER 13:**

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That Council:

1. Direct the Ethics Advisor, **the City Solicitor and City Clerk**, in consultation with Members of Council, to prepare a revised Code of Conduct governing Members of Council;
2. Adopt the Integrity Commissioner Complaints Policy, in Attachment 1 **(Revised)**;
3. Adopt the proposed amendments to the Disclosure Policy for Members of Council, CC044 in Attachment 2;
4. Adopt the proposed amendments to the Ethical Conduct Policy for Members of Council, CC042, in Attachment 2;
5. Adopt the proposed amendments to the Gifts and Benefits Policy for Members of Council, CC043, in Attachment 2; and
6. **Adopt** the proposed amendments to the Accepted use of Technology Resources – Members of Council Policy, PAC009, and to the Members of Council and Election Campaigns Policy, CC041, in Attachment 3.

Opposition to Recommendations:

Recommendations 2 and 4
Opposed: A. Chabot

PREVIOUS COUNCIL DIRECTION / POLICY

A number of Council policies address matters of appropriate and ethical conduct for Members of Council.

The Ethical Conduct Policy for Members of Council (CC042, Effective 2013 July 01) provides general information on standards for Council Member conduct. After reviewing the legislative responsibilities of Council Members, it sets out guidelines and restrictions regarding: pecuniary interests, preferential treatment, personal conduct and integrity, and management of the workplace and City resources. It also sets out a mechanism for enforcement of the policy. It currently provides that enforcement of the policy will occur through the Whistle-Blower Policy, and through reporting to Council by the City Auditor.

Specifically, the Ethical Conduct Policy provides, under the heading "Procedures", and the sub-heading "Policy Breaches":

3. Members of Council may report alleged violations of this policy in a Personnel Item report to be brought to an In Camera Meeting of Council.

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4. A decision to apply one or more of the actions detailed in (a-e) above requires a Council resolution.

5. A Member of Council who believes a Member is in violation of this policy may report their concerns in accordance with The City's Whistle-Blower Policy. Investigations of violations and investigation outcomes will be administered in accordance with The City's Whistle-Blower Policy and Program. The Whistle-Blower Program ensures all reports received are appropriately reviewed. See: The Whistle-Blower Policy for further information.

6. All substantiated violations and reports made through the Whistle-Blower Program shall be reported by The City Auditor to Council in an In-Camera Meeting of Council.

7. The City Manager shall be consulted in all matters concerning alleged violations of this policy between Members of Council and City employees.

8. All discussions surrounding alleged and substantiated violations of this policy shall be conducted in an In Camera Meeting of Council and the discussion shall remain confidential under the appropriate sections of the Freedom of Information and Protection of Privacy (FOIP) Act.

Other policies addressing the ethical obligations of Members of Council include:

- Disclosure Policy for Members of Council (CC044, Effective 2014 November 4)
- Acceptable Use of City Technology Resources – Members of Council (PAC0009, Effective 2003 June 3)
- Gifts and Benefits Policy for Members of Council (CC043, Effective 2015 July 01)
- Members of Council and Election Campaigns (CC041, Effective 2013 January 28)

Each of these policies addresses specific issues with Council conduct, as indicated by the name of the Policy. They have different approaches to enforcement. The Gifts and Benefits Policy for Members of Council provides:

17.2 Anyone who believes a Member of Council is in violation of this council policy may report their concerns in accordance with the City's *Whistle-Blower Policy*...

17.3 Members of Council may also report alleged violations of this policy in a Personnel Item report to be brought to an In-Camera Meeting of the Priorities and Finance Committee of Council.

17.6 All substantiated violations and reports made through the Whistle-Blower Program shall be reported by the City Auditor to council....

The Disclosure Policy for Members of council provides:

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10.2 Members of Council may report alleged violations of this policy in a Personnel Item Report to be brought to an In Camera Meeting of Council

10.3 A Member of Council, or any individual, who believes a member of Council is in violation of the policy may report their concerns in accordance with The City of Calgary *Whistle-Blower Policy*...

10.4 All substantiated violations and reports made through the Whistle-Blower program shall be reported by the City Auditor to Council...

10.5 All discussions surrounding alleged and substantiated violations of this policy shall be conducted in an In Camera Meeting of Council and the discussion shall remain confidential under the appropriate sections of the *Freedom of Information and Protection of Privacy (FOIP) Act*.

The Members of Council and Election Campaigns Policy provides under the heading Procedure:

Compliance with this policy shall be monitored for Councillors by the Manager of the Office of the Councillors who shall report all reported or observed breaches to the Councillors Office Co-Ordinating Committee and for the Mayor by the City Auditor.

Potential breaches of this policy should be reported to the appropriate individual for resolution and rectification.

The Acceptable Use of City Technology Resources directs enforcement to occur through the Mayor or the Chairman of the CCCO (presumably, the Councillors Office Co-Ordinating Committee, although the abbreviations do not appear to be defined in the Policy).

The Whistle-blower Policy (CC026, Effective 2007 May 28) provides the general mechanism for enforcement of city policies; i.e., to "ensure consistent, systematic, corporate-wide processes are in place for the prevention, detection, reporting and investigation of any suspected act of waste and/or wrongdoing". The policy addresses protection of reporters, the scope of disciplinary action, the role of the City Auditor, the role of the City Manager, expectations for reporting misconduct, and the procedures for reporting, investigating and adjudicating waste and wrongdoing.

The City Auditor has proposed revisions to the Whistle-blower Policy, also being presented to Council for this Meeting, which would exclude Members of Council from its application, on the understanding that the Integrity Commissioner will address reports of alleged misconduct by Members of Council.

Finally the Integrity Commissioner's Procedure Protocol (M2016-056, approved 2016 July 4) sets out the procedure for considering complaints by the Integrity Commissioner. It sets out how reports may be made as well as the process for investigating, adjudicating and addressing allegations of misconduct by Members of Council. It covers a number of matters that, in relation

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to the City Auditor, are dealt with in the Whistle-Blower Policy, although the procedure protocol does not address issues of reporter protection. Further, the Procedure Protocol has not been adopted as Council Policy.

INVESTIGATION: ALTERNATIVES AND ANALYSIS

Required Revisions

The creation of the office of the Integrity Commissioner, and granting to the Integrity Commissioner powers that were formerly exercised by the City Auditor, mandates certain revisions to the City Policies. It means that certain revisions must occur in order to allow the Integrity Commissioner to address complaints of misconduct by Members of Council generally and pursuant to specific City policies.. Specifically:

1. A policy must be written for the Integrity Commissioner that serves the same function and purpose as the Whistle-Blower Policy does for the City Auditor. That proposed policy – the Integrity Commissioner Complaints Policy – is set out in Attachment 1. The Integrity Commissioner Complaints Policy incorporates some of the language and approach of the proposed revised Whistle-blower Policy, in particular with respect to protection of employee reporters. It also incorporates the terms of the Procedure Protocol.
2. That Ethical Conduct Policy, Clauses 3-8, under the Heading “Procedures” and the sub-heading “Policy Breaches” should be repealed and replaced with the following:
 3. A Member of Council, or any individual, who believes a member of Council is in violation of the policy may report their concerns in accordance with the Integrity Commissioner Complaints Policy.
 4. All substantiated violations and reports shall be addressed by the Integrity Commissioner in accordance with the Integrity Commissioner Complaints Policy.
3. Clauses 10.2-10.5 of the Disclosure Policy should be repealed and replaced with the following:
 - 10.2 A Member of Council, or any individual, who believes a member of Council is in violation of the policy may report their concerns in accordance with the Integrity Commissioner Complaints Policy.
 - 10.3 All substantiated violations and reports shall be addressed by the Integrity Commissioner in accordance with the Integrity Commissioner Complaints Policy.
4. Clauses 17.2-17.3 and 17.6 of the Gifts and Benefits Policy should be repealed, Clause 17.4 should be renumbered 17.3, 17.5 should be renumbered 17.4, and the following new clauses should be added:

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17.2 A Member of Council, or any individual, who believes a member of Council is in violation of the policy may report their concerns in accordance with the Integrity Commissioner Complaints Policy.

17.5 All substantiated violations and reports shall be addressed by the Integrity Commissioner in accordance with the Integrity Commissioner Complaints Policy.

Revisions for consideration

For consistency, Council may also wish to revise the enforcement process for the Members of Council and Election Campaigns Policy, and for the Acceptable Use of City Technology Resources – Members of Council Policy, so that enforcement of those policies is also a matter for the Integrity Commissioner. While to some extent matters of technology may seem not to be matters of ethics, the focus of the policy on issues such as transmitting abusive or offensive messages, committing crimes, accessing pornography or improperly accessing another person's technology, do seem squarely to address questions of ethics and integrity.

If Council wishes to shift enforcement of those policies to the Integrity Commissioner, then the following specific revisions are recommended:

1. Clause 5.1(c) and 5.1(d) of the Acceptable Use of City Technology Resources – Members of Council Policy should be repealed and replaced with the following:

5.1(c) A Member of Council, or any individual, who believes a member of Council is in violation of the policy may report their concerns in accordance with the Integrity Commissioner Complaints Policy.

5.1(d) All substantiated violations and reports shall be addressed by the Integrity Commissioner in accordance with the Integrity Commissioner Complaints Policy.

2. The "Procedure" section of the Members of Council and Election Campaigns Policy should be repealed and replaced with the following:

1. A Member of Council, or any individual, who believes a member of Council is in violation of the policy may report their concerns in accordance with the Integrity Commissioner

2. All substantiated violations and reports shall be addressed by the Integrity Commissioner in accordance with the Integrity Commissioner Complaints Policy.

Recommended revisions

As set out above, Members of Council are governed by a variety of policies in relation to their legal and ethical obligations as members of Council. In our view, those policies do not provide clear or sufficient guidance to Members of Council, and the Integrity and Ethics Office

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recommends that Council direct the Ethics Advisor, in consultation with Members of Council, to undertake a comprehensive review and revision of the governing policies.

This opinion and recommendation are based on two problems with the policies. First, the general Ethical Conduct Policy does not provide clear, coherent or sufficient guidance to Members of Council. There may also be issues with other council Policies in this respect. Second, the conduct standards governing Members of Council are contained in several different policies rather than being set out in a single Code of Conduct.

Those problems will be addressed in turn.

Policy Clarity and Sufficiency

As noted previously, the Ethical Conduct Policy sets out guidelines and restrictions regarding pecuniary interests, provision of preferential treatment, personal conduct and integrity, and management of the workplace and City resources. It addresses these issues in a variety of ways. The Policy includes 1) mandatory specific rules ("Members of Council shall not appear as a paid agent of a third-party before Council..."); 2) mandatory but highly generic rules (Members "must act in good faith, with trust, confidence and candour"; "Members of Council...must exercise freedom of speech responsibly"); 3) rules that apply to Council not Council Members ("Council is committed to creating a vibrant, healthy, safe and caring work environment"); and 4) aspirational rules ("Members of Council ... are expected to demonstrate high standards of personal and professional conduct").

Those different approaches are not necessarily problematic – it may be justifiable to have some matters be dealt with generically and others more specifically – but in some cases the approach of the Ethical Conduct Policy is unjustified and confusing. For example, the Code directs Members of Council to "Avoid conflict of interest with respect to their fiduciary duty to The City of Calgary". It is not clear, however, how conflict of interest in this context relates to the rules against pecuniary interest in the prior section, what conflict of interest means in this context, and what an avoidance of a conflict would require. To say generally "avoid conflicts of interest" at best provides no useful guidance and, at worst, undermines the ability of a Member of Council to understand his or her duties in relation to pecuniary interests.

As another example, the Code directs Members of Council to exercise "freedom of speech responsibly", but does not give any direction to a Member of Council as to what responsible free speech might look like in a political role. Does it go to the manner of expression – civility – or does it go to the substance of the expression – avoiding expression of inflammatory beliefs? On what standard should responsible free speech be assessed, particularly in light of the fact that this is said to be a mandatory duty – "must exercise freedom of speech responsibly". Moreover, would it even be proper for the Integrity Commissioner to sanction a Member of Council who exercised his or her freedom of speech, even if he or she did so in a way that was irresponsible? In our view, for the Commissioner to do so would raise constitutional concerns under the *Charter of Rights and Freedoms*.

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A related problem arises from the fact that incorporating generic, aspirational and somewhat unclear guidelines risks muting the force of the clearer guidelines – it makes the whole Policy seem less important and meaningful. A Member of Council could read a direction like “Treat others equitably and fairly” and think, ‘this Policy just requires me to be sensible and a decent person’. If that is the case, the Member could as a consequence be less sensitive to the fact that there are also specific and less obvious guidelines, such as not using City resources for outside employment or business activities, which require action and attention to detail beyond being a good person. A code of conduct can incorporate generic and specific duties, and also incorporate both duties and aspirations, but it needs to do so in a way that makes what they require, and the differences between them, clear.

In addition, problems arise from how the Policy references or incorporates matters of legislative obligation (e.g., avoidance of pecuniary interests) or City policy (e.g., the Workplace Violence Policy). When it incorporates those other obligations it does so in a way that may in fact make the obligations of a Member of Council less clear than if they had not been referenced or incorporated at all.

For example, the Policy references legislative obligations of Members of Council in relation to the avoidance of pecuniary interests under the *Municipal Government Act*, RSA 2000 c. M-26. Yet it neither comprehensively incorporates nor explains those obligations. It purports, for example, to define when a Councillor has a pecuniary interest, but does so by referencing s. 170(1) of the MGA, without also including s. 170(2)-(4), and without indicating that the definition included is incomplete. This approach has the potential to confuse or mislead, suggesting to Members of Council that they can follow the Ethical Conduct Policy in identifying their duties on declaring pecuniary interests, while not giving enough information or guidance to Members to ensure that, if they do so, they will have in fact satisfied their legislative duties. In our view the Ethical Conduct Policy either should simply indicate to Members of Council the existence of their legal duties and the need to comply with them, or should provide clear, accurate and comprehensive guidance to Members of Council about what compliance with those legal duties requires. A more appropriate approach is found in Clause 3 of the Disclosure Policy, which provides:

The purpose of this Council Policy is to supplement existing legislation in the MGA that addresses the disclosure of pecuniary interest. ***This Council Policy does not supersede or replace the MGA requirements with respect to pecuniary interests in matters before Council*** [emphasis in original]

As another example, the Ethical Conduct Policy notes the City of Calgary Respectful Workplace Policy, and Council’s commitment “to creating and sustaining a vibrant, healthy, safe and caring work environment”. But it does not indicate whether it does so to make Members of Council subject to the Respectful Workplace Policy, or whether it is simply suggesting to Members of Council that the Respectful Workplace Policy reflects the sorts of standards for conduct with which Members of Council may want to abide.

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The Ethical Conduct Policy also contains gaps in relation to other municipal codes of conduct. The Cities of Toronto, Windsor and Ontario, for example, provide guidance of several paragraphs or pages on duties of confidentiality; the Ethical Conduct Policy provides only a two-sentence reference and incorporation of the governing legislation. Similarly, while those codes of conduct all include policies related to gifts and benefits, Calgary's Gifts and Benefits Policy is not referenced in the Ethical Conduct Policy. The Ethical Conduct Policy does reference and incorporate the Alcohol Expenses policy, noting that breaches of those policies "will be considered an alleged breach of this Policy", but not the Gifts and Benefits policy; this different treatment is confusing.

In short, while in our view the Ethical Conduct Policy does identify many of the key areas of ethical responsibility for Members of Council, its approach to doing so falls short of what would be optimal for giving appropriate and effective guidance to Members of Council on their ethical and legal duties.

Generally speaking, other Council policies provide greater clarity, likely because they are directed to more discrete ethical issues. Even here, however, there may be areas of possible confusion – at least one was apparent on this review. Specifically, the Gifts and Benefits Policy defines "gifts and benefits" as items, services and entertainment of value received by Members of Council "for their personal use", but it is not clear what personal use means. Personal use could mean that the item is one that the Member of Council will use personally, but which includes items given or used in the course of the discharge of the Member's duties (for example, attending the theatre because the theatre company wanted a Member of Council to be there). It could also mean, however, only items that are for the Member's personal use and which have no connection to the discharge of the Member's duties – this would exclude attending the theatre because the theatre company wanted a Member of Council to be there – in that interpretation, attending the theatre company would not be a gift or benefit. It is not obvious from the face of the Policy which meaning is intended. Further, the Policy does not indicate when a Member has received a gift or benefit in "acting out their duties of office". It does not provide guidance as to when a Member can treat a gift as arising from a personal relationship distinct from the Member's official role, such that it is not required to be disclosed, and when a Member must treat a gift as related to the discharge of his or her official duties, such that it must be disclosed.

Multiple policies

As noted, the duties of Members of Council are set out in multiple policies. This is not inherently a problem, but in our view it is also not the best approach. First, it means that a Member of Council cannot simply reference one document to identify his or her ethical and legal duties. Second – and this makes the first issue worse – the policies do not clearly cross-reference each other. As noted, for example, the Ethical Conduct Policy references some policies as containing ethical duties, but not others. As a consequence, the Member must both reference multiple documents and ascertain what those documents are, without clear guidance on that point from the policies. Third, this approach is different from that adopted by other municipalities, such as Toronto, Ottawa and Windsor, which deal with these matters within a single policy.

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In our view, it would be better to have a single, comprehensive code of conduct to govern Member of Council conduct.

Stakeholder Engagement, Research and Communication

The Ethics Advisor sought feedback from Members of Council on the adequacy of the policies governing conduct by Members of Council. No specific feedback was provided by Members, although general concerns about the clarity and usefulness of the Ethical Conduct Policy were identified.

Strategic Alignment

These changes follow from Council's creation of the Integrity and Ethics Office, and its identification of the importance of ethical conduct by Members of Council.

Social, Environmental, Economic (External)

Not applicable

Financial Capacity

Not applicable

Risk Assessment

Not applicable

REASON(S) FOR RECOMMENDATION(S):

These recommendations are necessary or appropriate to allow the satisfaction of the Terms of Reference for the Ethics Advisor and Integrity Commissioner as adopted by Council.

ATTACHMENTS

1. Proposed Integrity Commissioner Complaints Policy
2. Proposed Policy Revisions – Required By-law and Policy Amendments – Ethics Advisor and Integrity Commissioner Terms of Reference and Procedure Protocol
3. Proposed Policy Revisions for Consideration by Council – Required By-law and Policy Amendments – Ethics Advisor and Integrity Commissioner Terms of Reference and Procedure Protocol