ADVISORY BULLETIN REGARDING CONFIDENTIAL INFORMATION

Bruce P. Elman
Integrity Commissioner
15 June 2018

PURPOSE OF THE BULLETIN

[1] This Bulletin is intended to assist Council Members ("Members") in understanding their obligations regarding Confidentiality under the adopted **Code of Conduct for Members of Council** ("**Code of Conduct**").

[2] The Integrity Commissioner is a confidential resource available for clarification and advice on breaches of Confidentiality. Pursuant to section 6.1.2.4 of the **Code of Conduct**, the Integrity Commissioner is to provide written and oral advice to Members, staff, and the public on concerns of interpretation and compliance with the **Code of Conduct** and other ethical dilemmas facing Members. However, it is important to note that advice that is general in nature cannot be relied upon to the same extent as advice given in writing and based upon specific facts. General advice is subject to change when applied to specific facts that become known after the time when the general advice was provided. Failure to follow the guidelines set out in this Bulletin may lead to a finding that a Member has contravened the **Code of Conduct**.

THE CODE OF CONDUCT

[3] Members must always adhere to the entire **Code of Conduct** (Section 6.4 of **Code of Conduct**). However, the following parts are particularly relevant to the rules surroundings confidentiality:

a. Section 4.0 (Definitions)
b. Section 6.12 (Confidential Information)
c. Section 6.13 (Use of Town Property, Services and Other Resources)

Relevant Legislation, Policies, and Guides

[4] The current versions of the following provincial legislation and Town policies and guides apply to Members' duties regarding Confidentiality:

a. *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched.;
b. *Municipal Freedom of Information & Protection of Privacy Act*, R.S.O 1990, c. M.56 (*MFIPPA*); and
c. The Corporation of the Town of Amherstburg *Closed Meeting Policy and Procedures*; hereafter referred to as "*Closed Meeting Policy*".

Confidential Information

[5] The general rule on Confidentiality is clear: Members shall not disclose, publish, or release by any means to any person or to the public any confidential information acquired through their position in office in any form. The only exception to this is when it is authorized by Council or otherwise required by law to do so (**Code of Conduct**, section 6.12.3).

[6] The general definition of Confidential Information is found in section 4.5 of the **Code of Conduct.** It states that Confidential Information consists of "any information in the possession of Members, or received in confidence that is prohibited from disclosure."

[7] Council Members have a fiduciary duty to the Town to keep confidential information from the public disclosure until it has been authorized to be released by Council or by law (i.e. *MFIPPA* or any other legislation). According to the **Code of Conduct**, confidential information includes any information in the possession of, or received in confidence by the Town that the Town is prohibited from disclosing or has refused to disclose under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* or any other law. (See **Code of Conduct**, section 6.12.1).

[8] The following are examples of confidential information: information of a corporate, commercial, scientific, or technical nature received in confidence from third parties; personal information; information subject to solicitor-client privilege; and information that concerns any confidential matters pertaining to personnel, labour relations, litigation, property acquisition, and the security of property of the Town, Committee, or Board. Any other information deemed by Council to be confidential, or required to remain

or be kept confidential by legislation or order, is also included. (See **Code of Conduct**, section 6.12.2).

[9] It is important to note that this list is not exhaustive. (See for Example: In a decision on May 11 and 12, 2010, the Toronto City Council, reprimanded then Councillor Rob Ford for disclosing confidential pricing information concerning the purchase of a house by the City on the floor of Council.)

[10] Without limiting the generality of the foregoing, no Member shall, without lawful authority, disclose or make any personal use of any of the following types of confidential information:

a. Information concerning litigation, negotiation, or personnel matters (See **Code of Conduct**, section 6.12.7.1);
b. Information which may infringe on the rights of any person (e.g. the source of a complaint where the identity of the complainant is given in confidence) (See **Code of Conduct**, section 6.12.7.2);
c. Price schedules in any contract, tender, or proposal document while such remains a confidential document (See **Code of Conduct**, section 6.12.7.3);
d. Information deemed to be "personal information" under *MFIPPA* (See **Code of Conduct**, section 6.12.7.4); and
e. Any information or statistical data required by law not to be released (See **Code of Conduct**, section 6.12.7.5).

[11] Furthermore, Members may not use confidential information for their own personal or private gain, or for the personal or private gain of any other person or body (See **Code of Conduct**, section 6.12.4).

[12] Consequently, no Member may access, or try to access, confidential information in the custody of the municipality unless such access is necessary for the performance of his or her duties and is not prohibited by Council or any law (See **Code of Conduct**, section 6.12.8).

CLOSED MEETINGS

[13] Closed meetings are also referred to as "*In-Camera*" meetings. This refers to any meetings of Council, Board, or Committee that excludes Members of the public (See *Closed Meeting Policy*).

[14] Open democratic debate is the hallmark of municipal governance in Canada. Nonetheless, in order for municipal government to run efficiently and effectively, there will be times when the matters of the Town will need to be discussed out of the public sphere before being disclosed to members of the public. Matters of closed meetings will remain confidential unless authorized by Council or legislation to be released, either generally or with conditions. Information pertaining to such a matter, the manner in which it was dealt with at the meeting **or even that the matter was debated** shall not be disclosed unless authorized by Council or by law (See **Code of Conduct**, section 6.12.5).

[15] Council Members may disclose such matters of In-Camera meetings only after the Council, Committee, or Board lawfully and knowingly discusses the information at a meeting that is open to the public or releases the information to the general public (See **Code of Conduct**, section 6.12.6 – Confidential Information). In connection with this proposition, note that section 6.8.1 of the **Code of Conduct** provides that "The Mayor is the official spokesperson for Council" and that "The Mayor is responsible for communicating the Town's position on all municipal matters and those decisions of Council". (section 6.8.2)

[16] It is not a defence to a charge of violating the Code of Conduct that the matter should not have been taken *in camera*. (Note the Precedent: In a Report to Toronto City Council on June 14, 2006, the Integrity Commissioner noted: "Councillors cannot find justification for releasing confidential information to the Press in their own conviction that their colleagues have erred in going *in camera*.")

[17] Fundamentally, there are three main propositions to be taken from Section 6.12 of the **Code of Conduct**. First, it will be a violation of the **Code of Conduct** if a member discloses information from an *In Camera* meeting even if the Member claims it came from a different source.

[18] Second, it will be a violation of the **Code of Conduct** for a member to confirm the substance of a matter discussed in an *In Camera* meeting when the source of the confirmation comes from the confidential information obtained in the closed meeting.

[19] Third, even if another member or a third-party releases confidential information, it will be a violation of the **Code of Conduct** if a member releases confidential information before it is authorized by Council, Committee, or Board to do so.

FURTHER INFORMATION

This Advisory Bulletin is intended to provide general information. To rely on the advice of the Integrity Commissioner with respect to specific situations, Members of Council must seek written advice consistent with the provisions of Section 6 of the **Code of Conduct**. If you have any questions or wish to seek written advice on this matter, please contact:

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