



Cunningham Swan
LAWYERS

Tony E. Fleming
Direct Line: 613.546.8096
E-mail: tfleming@cswan.com

BY E-MAIL: clerk@perth.ca

April 14, 2020

Council – Town of Perth
c/o Lauren Walton, Acting CAO, Clerk
80 Gore Street East
Perth, ON K7H 1H9

Dear Members of Council:

**Re: Integrity Commissioner Services - Annual Report – 2019
Town of Perth; Our file No. 24539-2**

Background

In 2018, Tony Fleming of Cunningham Swan in Kingston, Ontario, was appointed as the Integrity Commissioner for the Town of Perth in accordance with section 223.3(1) of the *Municipal Act*, 2001, S.O. 2001, c. 25 (the "Act").

This report summarizes the services provided by the Integrity Commissioner to the Town of Perth in 2019, in accordance with section 223.6 (1) of the *Act*. The purpose of this report is to highlight the mandate of the Integrity Commissioner and to inform Council and the public about changes to the Act that affect the process of the Integrity Commissioner and subsequently, Councils and Local Boards.

Role of the Integrity Commissioner

The Act mandates that the Integrity Commissioner is responsible for providing the following functions:

1. The application of the code of conduct for members of council and the code of conduct for members of local boards.
2. The application of any procedures, rules and policies of the municipality and local boards governing the ethical behaviour of members of council and of local boards.
3. The application of sections 5, 5.1 and 5.2 of the *Municipal Conflict of Interest Act* ("MCIA") to members of council and of local boards.
4. Requests from members of council and of local boards for advice respecting their obligations under the code of conduct applicable to the member.
5. Requests from members of council and of local boards for advice respecting their obligations under a procedure, rule or policy of the municipality or of the local board governing the ethical behaviour of members.
6. Requests from members of council and of local boards for advice respecting their obligations under the MCIA.
7. The provision of educational information to members of council, members of local boards, the municipality and the public about the municipality's codes of conduct for members of council and members of local boards and about the MCIA.¹

Codes of Conduct

Prior to March 1, 2019, Codes of Conduct for members of Councils and Local Boards were optional. On March 1, 2019 the Province mandated that requirement.² Along with that mandate, Ontario Regulation 55/18: Codes of Conduct – Prescribed Subject Matters, requires municipalities to include specific provisions within those Codes of Conduct:

1. Gifts, benefits and hospitality.
2. Respectful conduct, including conduct toward officers and employees of the municipality or the local board, as the case may be.
3. Confidential information.
4. Use of property of the municipality or of the local board, as the case may be.³

¹ *Municipal Act*, section 223.3(1).

² *Municipal Act*, section 223.2(1).

³ *Municipal Act*, O. Reg. 55/18, section 1.

The Integrity Commissioner notes that although not required by the Province, it is essential that municipalities include a complaint protocol within their Codes of Conduct. Courts have indicated that an Integrity Commissioner relies on the Code of Conduct together with the complaint protocol as the 'home statute' of the Integrity Commissioner.⁴

We note the following important details regarding our initial process in relation to the complaint protocol:

1. The Integrity Commissioner may attempt to resolve all or part of a complaint as part of our preliminary review process; and
2. The Integrity Commissioner may reformulate complaints or applications for inquiry if necessary, to better reflect the intent of the complainant or applicant.⁵

Integrity Commissioner Activity re: Town of Perth

If Council requires ongoing training under the Code of Conduct and the MCI, Mr. Fleming is available upon request. Individual members may request advice from the Integrity Commissioner at any time. Council or members may contact Mr. Fleming in the following ways:

- 1) Council may pose a question to the Integrity Commissioner in writing regarding the broad obligations of all members (not specific to any one member);
- 2) Individual members may request advice in writing from the Integrity Commissioner in accordance with the Act.

There have been no complaints under the Code of Conduct or applications for inquiry under the MCI submitted to the Integrity Commissioner for the Town of Perth. We have also received no requests for advice from individual members. Still, we feel it is of great importance to highlight our process and imperative messages gleaned from cases around the Province to date.

Resolution of Complaints

As referenced above, the Integrity Commissioner begins the process with a preliminary review of all complaints and applications for inquiry. Where possible, we attempt to resolve disputes informally without the necessity of an investigation or inquiry. We do

⁴ *Michael Di Biase v City of Vaughan*, 2016 ONSC 5620 at para. 43.

⁵ *Ibid*, at para. 43.

so where such a resolution is in the best interest of the public. Complaints and applications are dismissed if determined to be frivolous, vexatious or without merit. Applications for inquiry are dismissed if they are determined to be outside of the statutory 6-week requirement as set out in the MCIA.

Although it is not always possible to pursue an informal resolution, we will make every effort to do so where there is the potential for such a resolution. This opportunity is not lost after an investigation or inquiry begins. However, it becomes more difficult where the parties (the complainant/applicant and the member), either individually or collectively, are opposed to an informal resolution.

There may also be circumstances where complaints contain facts that require a thorough investigation or inquiry and report in order to provide guidance to members and the public about certain types of behaviour or incidents that generate several complaints which highlight areas of obvious public concern. In these circumstances, a public report may assist in a wider resolution of such complaints or applications, or answer questions that may avoid future complaints or misunderstandings about the role of Council.

Confidentiality

The Integrity Commissioner includes only the information in his reports that is necessary to understand the findings. In making decisions about what information to include, the Integrity Commissioner is guided by the duties set out in the Municipal Act.

Section 223.5(1) of the Act sets out the Integrity Commissioner's duty to maintain confidentiality throughout any process:

Duty of confidentiality

223.5 (1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

This requirement applies to every person acting under the instruction of the Integrity Commissioner as well. Our process includes notifying the complainant or applicant, the named member(s), and any witnesses that they must keep the process confidential as required under section 223.5(1).

If a member were to share details of a complaint process with any other individual prior to the Integrity Commissioner issuing a public report, the Integrity Commissioner may

view that act as a breach of the confidentiality provisions of the Code of Conduct. Further, any information not included in the report of the Integrity Commissioner remains confidential and ought to be treated as such by all parties.

Finally, any advice provided by the Integrity Commissioner to a member is confidential and the member has no obligation to share that advice with Council or any other person. The Integrity Commissioner may not release any advice that has been provided to a member without their consent. Should the member share part of the advice on their own, the advice no longer enjoys the cloak of confidentiality and the Act allows the Integrity Commissioner to release the full text of the advice at their discretion.

Independent Role of the Integrity Commissioner

Council has assigned to the Integrity Commissioner the duty to independently conduct investigations and inquiries. The Integrity Commissioner is bound by the statutory framework to undertake a thorough investigation or inquiry in an independent manner. The findings of any report represent the Integrity Commissioner's final decision.

Investigative Process

Our process for all investigations and inquiries includes:

1. Reviewing the merits of the complaint or application to determine if it is:
 - a. Frivolous;
 - b. Vexatious; or
 - c. Without merit.
2. Following this initial review (and barring any finding under paragraph 1(a) through (c)), we conduct a more thorough preliminary review that allows the named member an opportunity to respond and provides the complainant with the opportunity to respond to the member's reply. The member is then provided with one last opportunity to respond to the reply comments of the complainant.
3. Following these steps and any additional steps the Integrity Commissioner deems necessary to complete the preliminary review, the Integrity Commissioner reviews all materials and submissions to that point and decides whether to explore any opportunity for an informal resolution or move on to the investigation/inquiry stage.
4. If there is an investigation or inquiry, the Integrity Commissioner interviews those witnesses he deems relevant to the allegations, and collects all information deemed relevant to the process.

5. At the completion of the investigation or inquiry, the Integrity Commissioner issues a public report of his findings to Council for their acceptance and consideration on any recommended sanctions or penalties.

Investigation Reports

If Council finds itself in the position where it receives a report from the Integrity Commissioner, Council is performing an adjudicative function and it is required to act with a greater degree of neutrality than it normally would for other business that may come before it. It may debate the recommendations of the Integrity Commissioner only, but not the findings.

Council must avoid going "behind" the findings of the Integrity Commissioner or challenging the lines of inquiry or analysis undertaken by the Integrity Commissioner. Council does not have the benefit of the detailed investigation undertaken, as it is impossible to distill all the interviews and documents into one report. The Integrity Commissioner exercises his discretion to report only those facts that are most relevant; which is not to say that other facts were not considered when drafting the report. Any attempt to challenge the findings of the report undermines the integrity of the process and the conclusions of the report. That type of action is unfair to the complainant or applicant, the member, and witnesses, and is beyond the scope of Council's authority under the Municipal Act.

We note that if the Integrity Commissioner recommends a financial sanction (suspension of pay up to 90 days), then the member (even though he or she would have a resulting pecuniary interest) is entitled to attempt to influence Council's decision on that recommended financial sanction. However, the member is not entitled to participate in any other portion of the debate, must still declare a conflict at the outset of Council's consideration of the report, and may not vote.⁶

Closing Remarks

We thank the Town of Perth for the opportunity to act as its Integrity Commissioner. We remind members that the Integrity Commissioner is available to provide advice in accordance with the Act regarding a member's obligations under the Code of Conduct and the MClA. We note that this service provides members with the proactive ability to avoid potential complaints by requesting and acting on advice which may apply to the circumstances of the member.

⁶ Section 5(2.10) of the *Municipal Conflict of Interest Act*.

Members are held to the highest standards of office in their elected positions and we thank members for their continued attention to the ethical obligations expected of them.

Please contact us with any follow-up questions. In the meantime, please find enclosed a copy of the up-to-date Certificate of Insurance for the Town of Perth.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP

A handwritten signature in black ink, appearing to read 'Tony E. Fleming', with several long, sweeping horizontal strokes extending to the right.

Tony E. Fleming, C.S.
LSO Certified Specialist in Municipal Law
(Local Government / Land Use Planning)
Anthony Fleming Professional Corporation
TEF:am
Enclosures