



Committee of the Whole Report

For the Meeting of August 3, 2023

To: Committee of the Whole
From: Tom Zworski, City Solicitor
Curt Kingsley, City Clerk
Subject: Code of Conduct for Council Members
Date: July 28, 2023

RECOMMENDATION

That Council instruct the City Solicitor to bring forward a bylaw containing a code of conduct for Council members, and that such bylaw:

1. includes robust rules for conduct and handling of complaints;
2. does not expand on regulations already established by legislation that apply to Council members;
3. provides for an independent third party, whose role is limited to reacting to complaints rather than doing pro-active work;
4. applies to the conduct of Council members and committees of Council only;
5. allows any individual person (i.e. not an organization or anonymous complainant) to make a complaint;
6. includes a freeze on releasing investigation reports during the period beginning 90 days before general voting day;
7. provides that any complaint received regarding a Council member seeking re-election in the period from the first day of the nomination period to the general voting day is to be rejected;
8. includes a list of potential sanctions that may be imposed by Council for breach of the code; and
9. provides that Council may allow for reimbursement of legal fees incurred by a Council member pertaining to a complaint, on a case by case basis.

EXECUTIVE SUMMARY

On May 4, 2023, Council directed that there be a code of conduct for Council members.

The aim of this report is to seek Council's instructions on what the content of the code of conduct should be. A bylaw implementing a code of conduct will be prepared based on the directions provided and submitted to Council for adoption.

It is recommended that the bylaw include the content contained in the recommendation above; however, the final form of the code is a Council decision.

PURPOSE

The purpose of this report is to seek Council's instructions on what the content of the code of conduct should be. A bylaw implementing a code of conduct will be prepared based on the directions provided.

BACKGROUND

Bill 26, the *Municipal Affairs Statutes Amendment Act* (No. 2), 2021 came into force on June 13, 2022. This Bill amended the *Community Charter* to insert the following new sections:

Requirement to consider code of conduct

- 113.1** (1) Within 6 months after its first regular council meeting following a general local election, a council must decide
- (a) whether to establish a code of conduct for council members, or
 - (b) if a code of conduct for council members has already been established, whether it should be reviewed.
- (2) Before making a decision under subsection (1), the council must
- (a) consider the prescribed principles for codes of conduct,
 - (b) consider the other prescribed matters, if any, and
 - (c) comply with the prescribed requirements, if any, including requirements respecting public notice or consultation.
- (3) If the council decides, under subsection (1), not to establish a code of conduct or review an existing code of conduct, it must make available to the public, on request, a statement respecting the reasons for its decision.

Reconsideration of decision respecting code of conduct

- 113.2** (1) If a council decides, under section 113.1, not to establish a code of conduct or review an existing code of conduct, the council must reconsider that decision before January 1 of the year of the next general local election.
- (2) In a reconsideration under subsection (1), the council must
- (a) consider the prescribed principles for codes of conduct,
 - (b) consider the other prescribed matters, if any, and
 - (c) comply with the prescribed requirements, if any, including requirements respecting public notice or consultation.
- (3) If the council confirms the decision that is the subject of the reconsideration, the council must make available to the public, on request, a statement respecting its reasons for confirming the decision.

On May 4, 2023, Council directed that there be a code of conduct for Council members.

Over the last number of months, Legal Services has been researching codes of conduct and ethics/integrity commissioners of other jurisdictions, and case law related to these matters. As a result, it is recommended that the bylaw include the content contained in the recommendation; however, it is for Council to decide what the content of the code will be.

ISSUES & ANALYSIS

1. Are there any principles that should be incorporated within the code in addition to those prescribed by regulation?

The *Principles for Codes of Conduct Regulation*, BC Reg. 136/2022, prescribes the following principles that Council is to consider before making a decision as to whether to establish a code of conduct (section 2):

- (a) council members must carry out their duties with integrity;
- (b) council members are accountable for the decisions that they make, and the actions that they take, in the course of their duties;
- (c) council members must be respectful of others;
- (d) council members must demonstrate leadership and collaboration.

These are the foundational principles of codes of conduct in BC, and Council should consider whether there are any additional principles it wants to guide the development of its code.

2. Should the code be basic, or a “gold standard” code?

The City's code of conduct does not necessarily need to be one as extensive as those established by cities like [Vancouver](#)¹, [Edmonton](#)², [Surrey](#)³, [Calgary](#)⁴, and [Toronto](#)⁵. There is the option of establishing a more modest code of conduct, as has been done in [Saanich](#)⁶, [Maple Ridge](#)⁷ and [Halifax](#)⁸. The most extensive codes of conduct provide very elaborate rules to govern Council conduct and for the handling of complaints. They also establish integrity commissioner positions whose role goes beyond just investigating complaints. Under a modest code of conduct, no integrity commissioner would be provided for, complaints would be dealt with on an ad hoc basis, and the code could be more focused on basic principles, rather than providing robust rules for conduct and handling of complaints. There would be cost savings associated with pursuing a modest code, and likely fewer complaints resulting, but the process for dealing with complaints would have less certainty, and the City Manager and the Mayor would very likely have more involvement in the resolution of any complaints.

It is recommended that the City's code be somewhere between a basic code and a “gold standard” code, so that there are robust rules regarding conduct expectations and the handling of the complaints. More robust rules rather than basic principles are recommended because generally worded principles can be difficult to interpret and apply to the specific circumstances of a complaint.

¹ https://vancouver.ca/docs/council/12886_Code_of_Conduct_Bylaw.pdf.

² <https://www.edmonton.ca/sites/default/files/public-files/assets/Bylaws/C18483.pdf?cb=1690303098>. Note that Edmonton also has an Integrity Commissioner Bylaw at <https://www.edmonton.ca/public-files/assets/document?path=Bylaws/C18567.pdf>.

³ https://www.surrey.ca/sites/default/files/bylaws/BYL_reg_20020.pdf. Note that Surrey also has a bylaw on appointment and role of an Ethics Commissioner at https://www.surrey.ca/sites/default/files/bylaws/BYL_reg_20018.pdf.

⁴ <https://publicaccess.calgary.ca/ldm01/livelink.exe?func=ccpa.general&msgID=WTTcckKcyqF&msgAction=Download>.

⁵ <https://www.toronto.ca/wp-content/uploads/2022/08/8eb9-2022-06-08-Appendix-1-New-Code-of-Conduct-for-Members-of-Council-Copy-FINAL.pdf>.

⁶ <https://www.saanich.ca/assets/Local-Government/Documents/Bylaws-and-Policies/Council-Policies/code-of-conduct.pdf>.

⁷ <https://mapleridge.ca/DocumentCenter/View/24862/Council-Conduct-Bylaw?bidId=>.

⁸ <https://www.halifax.ca/sites/default/files/documents/city-hall/legislation-by-laws/AO-52.pdf>.

{00130475:4}

Ultimately, having specific rules will be of benefit to whoever is applying the code, though they will make the code more extensive. However, where legislation establishes rules related to a matter – for example, related to gifts or conflicts of interest – the City’s code would not expand on the legislation. Nor is the code of conduct intended to deal with conduct that is illegal; such conduct would be dealt with through the applicable legislation.

In future, the code of conduct can be expanded or narrowed based on experience.

3. Who should the code apply to?

The code of conduct can apply as broadly as Council wishes – potentially Council, its committees, advisory bodies, the board of variance, development advisory bodies, and even past Council members could be caught by it (to a limited extent). It is recommended that at first, its application be limited to current Council members and committees of Council, so that the City has time to become familiar with the process and acquire some experience with it before possibly expanding it to other entities.

The alternative is that the City begin with a broader scope for the code and hold other people associated with the City in different capacities to the same standard that Council is held to. The risks of proceeding this way are that:

- (a) the City may potentially be taking on more than it can manage, in terms of complaint volume, as there is no way of anticipating how many complaints may arise;
- (b) an increase in scope very likely has a corresponding cost increase; and
- (c) doing so would likely add complexity to the code, because some provisions that are appropriate for Council are not appropriate for members of other bodies, such as the board of variance, for example.

4. Who can make a complaint?

Many codes of conduct allow any person to make a complaint – including those in Vancouver, Edmonton, Surrey, Calgary and Toronto. However, some codes of conduct, such as those in Saanich and Maple Ridge, only allow for another member of Council to make a complaint. Alternatively, complaints could be limited to Council members, committee members and City staff, as is the case in [Nanaimo](https://www.nanaimo.ca/bylaws/ViewBylaw/7348.pdf)⁹ and the [District of Squamish](https://squamish.civicweb.net/filepro/document/218433/Code%20of%20Conduct%20(Bylaw%202919).pdf)¹⁰. Members of advisory bodies may also be allowed to make complaints.

Limiting the potential complainants very likely will reduce the number of complaints. But doing so may also negatively impact the public’s perception of fairness, as members of the public would not be able to make complaints themselves. For this reason, it is recommended that the code allow for any individual person (i.e. not an organization or anonymous complainant) to make a complaint.

It is noted that it is also possible to limit complaints to residents of the City, taxpayers, voters, or other similar distinction¹¹. However, such a distinction is likely to cause administrative difficulty and not be perceived as fair by many members of the public, so this approach is not recommended.

⁹ <https://www.nanaimo.ca/bylaws/ViewBylaw/7348.pdf>.

¹⁰ [https://squamish.civicweb.net/filepro/document/218433/Code%20of%20Conduct%20\(Bylaw%202919\).pdf](https://squamish.civicweb.net/filepro/document/218433/Code%20of%20Conduct%20(Bylaw%202919).pdf). Note that District of Squamish also allows complaints to be made by volunteers of the District.

¹¹ Traditionally, many provisions of local government legislation were applicable to “ratepayers” but that is generally considered an outdated approach not reflective of current community expectations.

5. How can the City ensure that problematic complaints do not waste resources?

If the number of potential complainants is broad, the risk of frivolous, baseless, or bad faith complaints increases. Such complaints could potentially be mitigated through having a “gatekeeper” at the City so that all complaints had to be reviewed and accepted by someone at the City prior to the complaint process being initiated – for example, by a Council member or the City Clerk. Another potential option is for a fee to be required to make a complaint. That fee could be made refundable if the complaint is substantiated.

Implementing either of these options (gatekeeper or fee) would present administrative and practical problems, while it is unclear that it would have any practical benefit in reducing frivolous or vexatious complaints. Therefore, neither of those options is recommended at this time.

Unless Council instruct otherwise, the code will include (as most existing codes of conduct do) a requirement that the person tasked with handling a complaint, conduct a preliminary assessment of the complaint upon receipt. At such time, they would be empowered to dismiss or reject complaints immediately if they are found to be frivolous, baseless, in bad faith, not related to a breach of the bylaw, or would be more appropriately addressed through another process (for example, an allegation of a criminal nature, or a matter related to an existing human rights complaint). It is expected that this initial screening will mitigate the number of problematic complaints that go through the complaint process and consume City resources.

6. Should the City have an integrity commissioner?

An integrity commissioner is an independent person appointed to investigate and report on any complaints under the code. Having an integrity commissioner:

- (a) relieves the Mayor and the City Manager of duties related to administering the code (to the extent prescribed by the code);
- (b) clarifies the process for complaints;
- (c) increases perception of neutral and unbiased treatment of complaints;
- (d) decreases awkwardness for the Mayor and City Manager in dealing with complaints; and
- (e) potentially provides simpler enforcement for the code.

However, having an integrity commissioner:

- (a) has a potentially significant financial cost;¹²
- (b) may be seen as encouraging complaints; and
- (c) creates the potential for duplication of process (for example, privacy or WorkSafe complaints).

Some municipalities that have integrity commissioners also include the following as part of their duties:

- (a) provide advice and recommendations to Council members or Council itself on questions of conflict of interest or compliance with the code;
- (b) publish annual report including summary of work and any advice on improving the language or operation of the code;
- (c) provide written materials for public education on the code;
- (d) provide bulletins to Council to educate them about frequent code issues arising;
- (e) annotate the code with prior advice rulings and links to related policies approved by Council.

¹² Both Surrey and Vancouver have estimated the cost of an integrity commissioner to be approximately \$200,000 per year.

At this time, there is no clear need for any of these additional tasks in the Victoria context. Furthermore, many of the benefits of an integrity commissioner can be achieved by having an independent third party handle complaints. Therefore, establishment of a permanent integrity commissioner is not recommended. A preferred way is for the code to provide for complaints to be handled by an independent third party but not to appoint one until there is a complaint. If this approach is taken, it is recommended that Council select one or more persons¹³ to act as in that role when needed. Having such person(s) selected prior to any complaints being received preserves the appearance of neutrality and avoids delays in handling of complaints. At the same time, it also avoids the disadvantages and costs of establishing a permanent integrity commissioner discussed above.

The decision on the selection of a third party to investigate and report on complaints is not part of this report as the selection, if there is one, would only be undertaken after the code is adopted.

7. How should the code deal with complaints during an election period?

Releasing the results of an investigation during an election period can impact election results. For this reason, Council may wish to put a freeze on releasing investigation reports in the run-up to an election. This is recommended (during the period beginning 90 days before general voting day) as it protects the perception that the complaint process is unbiased and neutral. However, the risk of this approach is that the City is prevented from releasing the results of an investigation that arguably the public should be aware of when voting.

A related question is whether complaints received during an election period about a Council member seeking re-election should be rejected outright, or simply put on hold during the election period.¹⁴ It is recommended that when complaints are received regarding a Council member seeking re-election in the period from the first day of the nomination period to voting day, such complaints are rejected outright to avoid the complaint process potentially impacting election results.

8. Should the code include a list of potential remedies for breaching the code?

Should a complaint pursuant to the code of conduct be found to be valid and some sanction is deemed to be warranted, in determining what an appropriate remedy against the person who is the subject of the complaint may be, Council may find it helpful to have a list of potential sanctions contained within the code. The benefits of including a list of sanctions within the code are:

(a) It may assist Council, as Council is effectively choosing the appropriate remedy(ies) from the list, rather than having to come up with an appropriate punishment every time.

(b) It may prevent Council from imposing a remedy that is susceptible to legal challenge.

For these reasons, it is recommended that a list of possible sanctions be included in the code.

9. Should the code allow for reimbursement of legal fees incurred by a Council member in relation to a complaint?

In the event of a complaint made against a member of Council pursuant to the code of conduct, that Council member may incur legal fees in attempting to respond to the complaint. Because the City's

¹³ While the person assigned to handle a complaint should always be a specific individual, it is possible to establish a roster of qualified persons who would be appointed as needed. Thus, there would not be a single integrity commissioner but there would always be a pre-selected person to handle a complaint when needed.

¹⁴ And if the code only applies to current Council members, the complaint will be dismissed if the Council member is not re-elected.

lawyers act for the City – not individual members of Council – the Legal Services department will not be involved in complaints aside from possibly advising the City Manager and Council with respect to the process. If Council do wish the City's code to include provisions regarding reimbursement, some questions to consider are:

- (a) Would the code only allow for reimbursement when it was determined that the Council member did not breach the code, or if it was the first formal complaint process against that Council member, or based on some other qualification? Or leave the determination of whether reimbursement was appropriate up to Council?
 - It is recommended that this determination is for Council to decide, in order to avoid preventing reimbursement when Council feels it is warranted.
- (b) Should there be a maximum amount of reimbursement specified in the code? If so, how much?
 - It is recommended that no maximum amount is provided for, and Council assesses the appropriate reimbursement on a case by case basis, should it decide to provide one. The costs incurred by a Council member in responding to a complaint are likely to vary.

OPTIONS & IMPACTS

The content of the code of conduct is a decision for Council to make and the bylaw will be drafted in accordance with Council's instructions.

Once Council provides the City Solicitor with instructions, Legal Services will draft the code of conduct bylaw accordingly. It is expected that the bylaw will be presented to Council for consideration in late September. Once the code is adopted, if it provides for independent third party to handle complaints, the City will need to take the necessary procurement steps in order to pre-select such person(s) and Council will be provided with recommendations for the selection process in due course.

2023 – 2026 Strategic Plan

As part of “Economic Health and Community Vitality”, the City is to continue exploring governance reforms including the MNP Governance Review Report. The MNP Report included as a recommendation that Council establish a code of conduct and appoint an integrity commissioner.

Accessibility Impact Statement

There are no specific accessibility impacts in this report.

Impacts to Financial Plan

Legal Services will draft the code of conduct and there will be no direct budget impact. Costs associated with independent handling of complaints, if it is included as part of the code, will be incorporated into the future draft financial plan.

CONCLUSIONS

Council have resolved to establish a code of conduct. Council's directions pursuant to this report will instruct Legal Services in drafting the code of conduct bylaw. The bylaw will be brought forward for consideration at a future date.

Respectfully submitted,

Tom Zworski
City Solicitor

Curt Kingsley
City Clerk

Report accepted and recommended by the City Manager