

City Councillor's disclosure of confidential material to own lawyer breaches Code of Conduct

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In Ontario, members of municipal council are obligated to behave according to codes of conduct adopted by their respective city or town. Members of a municipal council are, in general, responsible for among other things, communicating with and responding to constituents, debating issues and passing bylaws that help to govern a city or town. The responsibilities of an elected municipal representative are described under the *Municipal Act, 2001* (or *City of Toronto Act* for Toronto's elected representatives). In assessing issues, elected city representatives are supported by bureaucrats, including either in-house lawyers or external lawyers. However, sometimes elected representatives seek the advice of others, including their own lawyers and provide their lawyers with city documents to review to ensure that the advice they receive is sound. However, doing so may not be wise, particularly where the document or information is confidential or was disclosed in a closed session of council.

In *Fallis v. Orillia (City)*, 2022 ONSC 5737, the Divisional Court considered whether an Integrity Commissioner's decision holding that the applicant councillor breached Orillia's Council Code of Conduct for disclosing closed session documents and information in the course of seeking legal advice should be reversed on a judicial review.

For over six years, the City had been working on a waterfront redevelopment project that had proceeded in two phases. The first phase dealt with a Request for Qualifications. The second phase dealt with a Request for Proposals.

The City had established a Waterfront Working Group (the "WWG") and a Waterfront Development Team (the "Development Team") to implement the project. The WWG was comprised of the Mayor and three council members. The Development Team was comprised of senior City staff and the City's lawyer.

Prior to the City's 12 May 2021 council meeting, City Councillors received a confidential report from the Development Team. The report set out the process for the selection of the preferred proponent and the requests for proposals. At the meeting, the applicant councillor wanted the City to obtain a further external legal opinion. However, his request was rejected. Accordingly, following the meeting, he sought out legal advice at his own expense.

In order to obtain the legal advice, the applicant councillor provided his lawyer with the following confidential documents:

- the Request for Proposals;
- the proposals that had been submitted in response to the Request for Proposals;
- an email exchange between the applicant and the City's lawyer about the interpretation of the Request for Proposals provisions; and
- the report.

A month later, the applicant retained a second lawyer who also received the same documents.

Prior to a Special Council Meeting scheduled for 19 May 2021, the applicant met with the City's Integrity Commissioner to discuss concerns about potential personal liability. He disclosed to the Integrity Commissioner that he had sought independent legal advice. The Integrity Commissioner advised him that, among other things, there was no ethical concern in the applicant seeking legal advice, but that providing confidential documents to an outside lawyer could result in a Code of Conduct complaint.

At the Special Council Meeting, the applicant disclosed the legal opinion he had been provided. He again urged his colleagues to seek external legal advice. The applicant also disclosed that he had provided confidential documents to his lawyer. The Mayor and others responded with concerns that the applicant had breached the Code of Conduct. Eventually, the Mayor made a Code of Conduct complaint.

The Integrity Commissioner found that while council members could retain experts in regard to discussions and documentation that were already public, they could not disclose documents and discussions that were confidential and exclusively confined to a closed session with anyone outside of Council or other senior staff who were already aware of the discussions or documentation. However, the Integrity Commissioner recognized that there could be circumstances where confidential information could be shared in order to receive legal advice if it involved a matter of personal liability. But in the applicant's circumstances, the disclosure of information was unrelated to issues of personal liability. The Integrity Commissioner recommended that the applicant's pay be suspended between 30 and 45 days.

The Divisional Court found that the applicant had clearly disclosed confidential information to his lawyers, including solicitor-client privileged legal advice without the City's authorization and without the authority to waive the City's privilege. Although the applicant argued that the disclosure was made in the context of a protected solicitor-client relationship, the Integrity Commissioner's decision was still found to be reasonable.

With respect to the solicitor-client privileged information that was disclosed, the Divisional Court explained, relying on *Elliot v. Toronto (City)*, 2001 CanLII 28070 (ON SC), that only the City could decide to waive privilege and to disclose to a third party the City Solicitor's privileged advice.

As well, the Divisional Court stated that the applicant's breach was not negated by the absence of any prejudice to the City. The court noted: "Disclosure of solicitor-client privilege advice by a party other than the privilege holder, even if such disclosure is limited to a lawyer, entails a loss of control over the privileged information and advice by the privilege holder."

This does not mean that a councillor can never disclose confidential information to an external professional in order to obtain expert advice. As explained in *Re Walker*, 2009 ONMIC 2, disclosure of confidential information is permitted where:

1. the need for an expert opinion or advice can be objectively demonstrated; and
2. the expert was subject to equivalent or greater confidentiality obligations as the council member.

With respect to non-solicitor-client information, the Divisional Court determined that the Integrity Commissioner's decision was also reasonable. The unauthorized disclosure of this information, since it related to Requests for Proposals, exposed the City to the risk of litigation. Indeed, the City had been required to circulate a litigation hold when it learned that the applicant had disclosed this information to an outside lawyer.

Although the City did not suffer any prejudice as a result of the disclosure of non-solicitor-client privileged information, this, again, did not relieve the applicant from having breached the Code of Conduct. The issue of lack of prejudice only went to the penalty that ought to be imposed. The sanction recommended by the Integrity Commissioner was reasonable.

The takeaway from this case is that elected representatives must carefully consider their actions when discussing and disclosing confidential or privileged information and when they disagree with advice given by an in-house lawyer or a bureaucrat in relation to a matter that is strictly confidential. Elected representatives should make use of their respective Integrity Commissioner in order to obtain advice before they disclose information, which may be confidential and that they only received because of their position as an elected representative, to an outside expert in order to obtain their own advice, especially when they are not under an Integrity Commissioner investigation or where their personal liability is not at stake. However, many elected representatives are not necessarily educated in the nuances of corporate governance. Accordingly, as a lesson to all levels of government, Integrity Commissioners should ensure that elected representatives receive robust and regular corporate governance training to limit breaches of a Code of Conduct for the disclosure of confidential or privileged information to avoid situations like the one that resulted in the applicant having his pay suspended by council for 45 days. A PDF version is available to download [here](#).

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

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Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com