



**INTEGRITY
COMMISSIONER REPORT
ACTION REQUIRED**

**Report on Release of Confidential Information by
Councillor Michael Walker**

Date:	July 29, 2009
To:	City Council
From:	Integrity Commissioner
Wards:	All
Reference Number:	

SUMMARY

The conduct of Councillor Walker in disclosing confidential information relating to the TEDCO Board proposal regarding Filmport on April 3, 2009, did not violate the Member's *Code of Conduct*. The rules respecting the release of confidential information for purposes of obtaining an expert opinion – in this case, a report from a forensic accountant – have in the past varied in the circumstances. In this instance, Councillor Walker acted on the genuine belief that his disclosure was necessary to inform himself of the matters at issue in the document. He did not intend that the confidential document enter the public domain, and took responsible steps to ensure the confidentiality of the document in the hands of the forensic accountant whom he had retained. The confidential document did not, in fact, enter the public domain.

While Councillor Walker acted responsibly in this instance, the disclosure of confidential material by Councillors (or their staff) for purposes of obtaining an outside opinion remains problematic under the *Code of Conduct*. In my view, the general rule going forward should be that disclosure of confidential information for the purpose of obtaining an outside expert opinion is not permitted under the *Code of Conduct*.

I recommend that a narrow exception to this general rule be recognized where the outside expertise sought by a Councillor is clearly necessary, where the Councillor has first attempted without success to obtain the expertise from City staff, and where the Councillor has received an opinion from the Integrity Commissioner confirming that the disclosure in the circumstances would not constitute a violation of the *Code of Conduct*. Where this narrow exception applies, Councillors should be permitted to use their office funds to cover costs associated with obtaining the outside expertise.

RECOMMENDATIONS

Integrity Commissioner Recommendations:

- 1) **That the matter of the duties of Councillor staff under the *Code of Conduct* be referred to the Integrity Commissioner, City Clerk, City Manager and City Solicitor for further recommendations;**
- 2) **That a protocol be issued by the Integrity Commissioner clarifying that Councillors may not disclose confidential material for purposes of obtaining an outside professional expertise, except where the need for the expertise is demonstrated, and where the Councillor has first:**
 - a) **attempted without success to obtain the expertise from City staff,**
 - b) **confirmed that the recipient of the confidential material is bound by an obligation not to disclose the confidential material that is equivalent to or greater than the Councillors' obligation, and**
 - c) **obtained an opinion from the Integrity Commissioner concluding that the disclosure would not constitute a violation of the *Code of Conduct* in the circumstances; and**
- 3) **That the City Clerk develops a protocol regarding the use of Councillor office expenses to pay for external expert opinions.**

Financial Impact

This report will have no financial impact.

DECISION HISTORY

On April 6, 2009, City Council adopted Item CC34.1 as amended ("Filmport Update and Pinewood"). During City Council's review of the Order Paper, it was revealed that Councillor Michael Walker submitted a letter dated April 6, 2009 from the firm of Smedmor & Associates, Litigation and Forensic Accountants.

Councillor Walker retained this firm in order to provide a general review of Toronto Economic Development Corporation (TEDCO) documents due to the limited time available before the matter was to be considered by City Council and to provide a preliminary assessment of the proposed transaction/investment of Toronto Economic Development Corporation (TEDCO) ("Filmport Update and Pinewood"). Item CC34.1 states:

4. *Confidential Attachment 1 to the Report (April 3, 2009) from the City Manager and the Deputy City Manager and Chief Financial Officer remain confidential*

under the provisions of the City of Toronto Act, 2006, as it relates to the security of the property of the municipality or local board.

The matter of Councillor Walker's actions was forwarded to the Integrity Commissioner with a request to investigate and make recommendations to City Council.

ISSUE BACKGROUND

On April 6, 2009, City Council adopted Item CC34.1 as amended ("Filmport Update and Pinewood"). During City Council's review of the Order Paper, it was revealed that Councillor Michael Walker submitted a letter dated April 6, 2009 from the firm of Smedmor & Associates, Litigation and Forensic Accountants.

In order to address the issues arising from Councillor Walker's release of the Confidential Attachment 1 to the Report (April 3, 2009) from the City Manager and the Deputy City Manager and Chief Financial Officer (the "Confidential Filmport Report"), it is necessary to set out a brief chronology of the events leading up to the Council decision of April 6, 2009.

The Factual Background

Filmport is a film studio project in Toronto, covering twenty hectares in the Port Lands site. The studio is designed to accommodate the production of multiple film projects. TEDCO leased the land to Filmport.

At 12:09 pm on Friday, April 3, 2009, a report was received by the City Clerk from TEDCO (the "TEDCO Report"), enclosing the forty-three page Confidential Filmport Report. At 1:08 pm, the City Clerk notified Councillors by email that a special meeting of City Council would be convened at 1:30 pm on April 6, 2009 to deal with the TEDCO Report.

At approximately 4:00 pm on Friday afternoon, Councillors received the agenda for the special meeting of City Council. Delivery was made to Members' City Hall Offices in person by City Clerk staff.¹ The agenda included the TEDCO Report (providing an update on the Filmport project and a proposal from the TEDCO Board), and the Confidential Filmport Report as an attachment. The materials for the meeting also included a report and confidential attachment from the City Solicitor.

A one-page memorandum summarizing the recommendations from the TEDCO Board which accompanied the confidential document stated under the heading "Reason for Confidentiality" that "This report involves the security of property belonging to the City or one of its subsidiaries, agencies, boards and commissions." The cover page

¹ A supplementary report from the City Manager, Deputy City Manager and Chief Financial Officer was hand delivered to Members' offices at approximately 7:15 pm, and an email to Members advising them of the distribution was sent at 7:24pm from the City Clerk.

accompanying the confidential document from the Office of the City Clerk a standard notice regarding confidential attachments, which is set out as Appendix "A."

A further notice to Members of Council and Staff stated that "It would be appreciated if Members and staff placed any confidential materials (that they will not be retaining) into the red container located outside the Chamber. Please do not put confidential materials into your recycling box."

In my view, there can be no doubt that the Confidential Filmport Report was understood and recognized by Councillors as confidential information within the meaning of Article V of the Member's *Code of Conduct*.

Councillor Walker and the Confidential Filmport Report

Councillor Walker was not at City Hall on the afternoon of April 3, 2009 when the Confidential Filmport Report was distributed. His executive assistant, Chris Sellors, on Councillor Walker's instructions, reviewed the attachment and discussed its content with Councillor Walker over the phone.

Acting on Councillor Walker's direction, Mr. Sellors contacted Charles Smedmor of Smedmor & Associates: Litigation and Forensic Accountants, to discuss a possible retainer to provide an opinion on the confidential document. Mr. Sellors stopped by Mr. Smedmor's office early in the evening on April 3, 2009. After a brief discussion, a retainer agreement was signed by Mr. Smedmor and Chris Sellors, who signed "for Michael Walker."

The Retainer Agreement & the Relationship between Councillor Walker and Smedmor & Associates

The Retainer Agreement signed April 3, 2009, covers the scope of Mr. Smedmor's analytic accounting review of the Confidential Filmport Report, and contemplated providing a reporting letter, together with an in-person briefing on April 6, 2009, in advance of the special meeting of City Council to deal with the TEDCO Board proposal.

The Retainer Agreement emphasizes the confidential nature of the assignment. The Retainer Agreement states that:

"Charles Smedmor will be working as an adviser to you on this matter. He will be bound by the same terms and conditions as you, as a City Councillor, are governed by for confidential work."

The Retainer Agreement further specifies that:

Due to the confidentiality of this material, no staff of Smedmor & Associates will be used in the preparation of this analysis.

Finally, the Retainer Agreement incorporates by reference the “Standard Practices of Investigative and Forensic Accounting Engagements,” issued by the Canadian Institute of Chartered Accountants in November of 2006. That document also references the duty of confidentiality owed by all accountants to their clients.

It is relevant to this investigation to note that this was not the first time Councillor Walker had sought an opinion from Mr. Smedmor. The Retainer Agreement includes by way of background the following provision:

We have previously assisted you on a confidential basis, as an adviser on various matters concerning TEDCO.

I understand that Mr. Smedmor's relationship with Councillor Walker dates back to analysis and advice Mr. Smedmor provided to him concerning the finances of Toronto's proposed Olympic bid in the period 1998 to 2001.

In addition, on at least one earlier occasion, Mr. Smedmor, under retainer, provided confidential advice to Councillor Walker on another TEDCO matter. No action was taken to investigate the release of confidential material in that instance."

The Issue of Disclosure for the Purpose of Councillors Obtaining Outside Expert and Professional Opinions

By directing Mr. Sellors to provide the Confidential Filmport Report to Mr. Smedmor, it is clear that Councillor Walker disclosed confidential information on April 3, 2009. He did so for the sole purpose of obtaining an expert opinion from Mr. Smedmor, a qualified forensic accountant, in order to assist with his decision-making process in the Filmport matter.

The question I must therefore address is: in what circumstances, if any, may Councillors disclose confidential information for the purposes of retaining the services of outside experts and professional opinions?

It is important to reiterate the expansive language of Article V of the Member's *Code of Conduct*, reproduced below as Appendix "B", which states in part that:

No member shall disclose or release by any means to any member of the public, any confidential information acquired by virtue of their office, in either oral or written form, except when required by law or authorized by Council to do so.

While the disclosure of confidential information to a professional bound by confidentiality, either as a component of the professional relationship or as set out by contract, may be distinguished from disclosure to "the public," the *Code* does not provide a clear basis for such an exception. In my view, the only possible justification for a

Member to disclose confidential information, other than the circumstances recognized by Article V of the *Code* (i.e. where required by law or where authorized by Council) may be on the basis of “necessity.”

The doctrine of “necessity” has many meanings in different settings, but here, it acts as an implied exception to the general prohibition on disclosure of confidential information. Necessity arises where the nature of the circumstances necessitates disclosure, and where there are no practical alternatives to disclosure.

For example, under a strict reading of Article V of the *Code*, it would have been a violation for Councillor Walker to allow his Executive Assistant to review the confidential document. However, given Councillor Walker’s absence from the office and the short timeline between receipt of the document on the afternoon of Friday, April 3, 2009 and the special meeting called to deal with the issue on Monday, April 6, 2009, it was *necessary* that Mr. Sellors, acting on Councillor Walker’s instruction, review the Confidential Filmport Report.

By the same token, where a Councillor is in a position where the need for an external professional or expert opinion can be objectively demonstrated, and where that external professional or expert is subject to the equivalent or greater confidentiality obligations as the Councillor, disclosure may be permitted as an implied exception to the prohibition on the disclosure of confidential information under Article V of the *Code*.

An example of such a circumstance would be where a Councillor was facing a possible prosecution under the *Municipal Conflict of Interest Act*. The City’s legal department does not provide services to Councillors in relation to their duties or liabilities under the *Municipal Conflict of Interest Act*. The Integrity Commissioner’s Office may provide general advice on such duties but this cannot take the place of a legal opinion. If it were necessary to obtain a legal opinion in relation to possible liability under this Act, it would be *necessary* that a Councillor retain a lawyer. Further, as part of that retainer, it may be *necessary* to summarize confidential information or disclose a confidential document. The relationship between the Councillor and the lawyer would be governed by solicitor and client privilege, which is at least equivalent to and likely greater than the confidentiality requirement applicable to Councillors. In my view, such a disclosure would not violate the *Code of Conduct*, or if a technical violation, would not justify a sanction.

Where the City does provide the service sought, however, the necessity of the outside retainer would change. For example, where the legal department has concluded that a particular course of action on litigation involving the City is recommended, and the City Solicitor is available to brief Councillors or discuss her advice, it is not *necessary* that a Councillor seek an outside legal opinion on the matter, and the disclosure of confidential information for that purpose would not be justified.

In the case of Councillor Walker's retainer of Mr. Smedmor, would the doctrine of "necessity" apply? The City Manager's office has both the responsibility and the capacity to brief Councillors on the relationship between the City and TEDCO, and transactions related to TEDCO. In this case, time was short between the Friday distribution of the Confidential Filmport Report and the Monday meeting of Council. The City Manager's Office may not have been able (or prepared) to provide an adequate briefing to Councillor Walker on the information he sought. Had Councillor Walker taken reasonable steps to seek such a briefing and was unsuccessful, seeking an outside opinion with the confidentiality protections put in place by the retainer agreement between Councillor Walker and Mr. Smedmor may well have met the standard outlined above.

There is no indication, however, that Councillor Walker attempted to contact the City Manager's Office for such a briefing. Further, my understanding is that the City Manager's Office has arranged for briefings on a variety of matters on short notice in the past, and there is no indication that such a briefing would not have been possible in these circumstances. Therefore, I conclude that retaining an outside forensic accountant in these circumstances, while potentially helpful to Councillor Walker, was *not necessary* in a way that would justify the disclosure of confidential information going forward.

While "necessity" may justify Councillors seeking outside opinions in some circumstances, those circumstances would be rare and unlikely to recur on a regular basis. For this reason, and to ensure consistency, an additional requirement for invoking this exception to the general prohibition on the disclosure of confidential information under Article V of the *Code* should be to obtain an opinion from the Integrity Commissioner, in advance of the proposed disclosure, that the disclosure would be justified in the circumstances based on the standard set out above.

The Issue of Councillors' Staff under the Code of Conduct

As indicated above, Councillor Walker's Executive Assistant was directed both to review the Confidential Filmport Report and to disclose it to Mr. Smedmor for the purpose of obtaining an expert opinion.

The issue of which ethical guidelines govern the conduct of Councillors' staff is as yet unsettled. In some circumstances, such as the one at issue in this case, Councillors' staff act as the "alter ego" of the Councillors and the ethical duties imposed by the *Code of Conduct* would be substantially eroded if they did not apply to Councillors' staff. For example, if a Councillor was under a duty by virtue of Article VII of the *Code* not to use the influence of his or her office to gain a private advantage, but could send a staff member to improperly use influence for the private benefit of the Councillor, then the *Code* would be of little use. Further, the duty set out under Article XIII of the *Code* dealing with "Conduct Respecting Lobbyists" specifically includes "Members of Council and their staff" (Emphasis added) as "public office holders" who are covered by the provisions set out in the Lobbyist Code of Conduct (Chapter 140).

Whether or not Councillors' staff are covered by provisions of the *Code* such as Article V dealing with the disclosure of confidential information, it is important to keep in mind that City employees are also under a duty of confidentiality. The relevant Human Resources Conflict of Interest Policy for the City (approved by Council in August of 2000) provides that,

Employees may not disclose confidential or privileged information about the property, or affairs of the organization, or use confidential information to advance personal or others' interests. Employees cannot divulge confidential or privileged information about the City's employees without those employees' written authorisation.

Having concluded above that the "necessity" of Councillor Walker's absence and the short timelines likely required that Councillor Walker authorize the disclosure of the confidential information to his Executive Assistant in these circumstances, it is beyond the scope of this report to address the status of Councillors staff more generally. I would, however, highlight the need for clarity and certainty as to the ethical duties which apply to Councillors' staff. There is an existing policy initiative to develop recommendations on a number of issues relating to Councillors' staff, including the ethical obligations of Councillors' staff, which involves the City Manager, the City Clerk, the City Solicitor and other officials. The Integrity Commissioner is participating in this process as well. Rather than offer specific recommendations in relation to the ethical obligations of Councillors' staff under Article V of the *Code of Conduct*, it is preferable to consider this issue in relation to the other issues under discussion as part of this process.

COMMENTS

To conclude, to the extent that it is permissible for Councillors to release confidential material for the purposes of obtaining an opinion from a forensic accountant, it is clear to me that Councillor Walker took appropriate steps to safeguard the confidentiality of the confidential material that was provided to Mr. Smedmor. He retained a trusted professional, bound by general confidentiality duties and further specified in the retainer agreement the specific confidentiality requirements under which the work would be undertaken. Safeguards such as not allowing other staff to work on the report demonstrate the seriousness with which the confidentiality obligation was taken both by Councillor Walker and by Mr. Smedmor.

I would also observe that, in these circumstances, Councillor Walker did not believe he was *disclosing* confidential material, since the Retainer Agreement provided for the same confidentiality obligations to operate on Mr. Smedmor as operated on Councillors, and further, both Mr. Smedmor and Councillor Walker took special care to ensure that the confidential document did not enter the public domain.

I have concluded, however, that as a general matter it should not be open to Councillors in the future to retain their own experts to review confidential material and provide them

with opinions unless the Councillor has exhausted internal avenues to obtain the information or expertise sought, and it is *necessary* in the circumstances to do so.

In light of the analysis above, I have made recommendations in the issues in relation to the issues raised by this matter.

CONTACT

Lorne Sossin, Interim Integrity Commissioner
Phone: 416-397-7770; Fax: 416-696-3615
email: lsossin@toronto.ca

SIGNATURE

Lorne Sossin
Interim Integrity Commissioner

LS/cb

Attachments: Appendix A - Cover Page from Confidential Document
Appendix B - Article V of the Member's *Code of Conduct*

APPENDIX “A”

Cover Page from Confidential Document

The information contained in the attached is subject to the *Municipal Freedom of Information & Protection of Privacy Act* (The Act) and is provided in confidence to Members of Council solely for the purpose of Councillors’ review and decision-making processes.

The Act imposes **mandatory confidentiality obligations** on government institutions to refuse to disclose personal and proprietary information and provides for the protection of *in camera* reports and information which, if disclosed would prejudice the City’s economic, financial, legal or other interests. The attached falls within one or more of these categories of confidential information.

Accordingly, Members of Council **may not copy, disclose or otherwise disseminate** the information contained in the attached confidential report(s).

(Emphasis in original)

APPENDIX “B”

Article V of the Member’s Code of Conduct

V. CONFIDENTIAL INFORMATION

Confidential information includes information in the possession of, or received in confidence by the City that the City is either prohibited from disclosing, or is required to refuse to disclose, under the *Municipal Freedom of Information and Protection of Privacy Act* (often referred to as “MFIPPA”), or other legislation. Generally, the *Municipal Freedom of Information and Protection of Privacy Act* restricts or prohibits disclosure of information received in confidence from third parties of a corporate, commercial, scientific or technical nature, information that is personal, and information that is subject to solicitor-client privilege.

The *City of Toronto Act, 2006* allows information that concerns personnel, labour relations, litigation, property acquisitions, the security of the property of the City or a local board, and matters authorized in other legislation, to remain confidential. For the purposes of the *Code of Conduct*, “confidential information” also includes this type of information.

No member shall disclose or release by any means to any member of the public, any confidential information acquired by virtue of their office, in either oral or written form, except when required by law or authorized by Council to do so.

Nor shall members use confidential information for personal or private gain, or for the gain of relatives or any person or corporation. As one example, no member should directly or indirectly benefit, or aid others to benefit, from knowledge respecting bidding on the sale of City property or assets.

Under the Procedures By-law (passed under section 189 of the *City of Toronto Act, 2006*), a matter that has been discussed at an in-camera (closed) meeting remains confidential. No member shall disclose the content of any such matter, or the substance of deliberations, of the in-camera meeting until the Council or committee discusses the information at a meeting that is open to the public or releases the information to the public.

The following are examples of the types of information that a member of Council must keep confidential:

- items under litigation, negotiation, or personnel matters;
- information that infringes on the rights of others (e.g., sources of complaints where the identity of a complainant is given in confidence);
- price schedules in contract tender or Request For Proposal submissions if so specified;
- information deemed to be “personal information” under the *Municipal Conflict of Interest Act*; and
- statistical data required by law not to be released (e.g. certain census or assessment data).

APPENDIX “B”

Members of Council should not access or attempt to gain access to confidential information in the custody of the City unless it is necessary for the performance of their duties and not prohibited by Council policy.