



REPORT FOR ACTION

Review of Code of Conduct for Members of Local Boards (Restricted Definition), including Adjudicative Boards, the Toronto Investment Board and the Realty Agency Board

Date: January 10, 2018
To: Executive Committee
From: Valerie Jepson, Integrity Commissioner
Wards: All
Reference:

SUMMARY

When it established the Toronto Investment Board (the "Investment Board"), City Council requested that the Integrity Commissioner review the Code of Conduct for Members of Local Boards (Restricted Definition) to recommend any amendments to reflect the fiduciary duties of the Investment Board. More recently, City Council also requested that the Integrity Commissioner to carry out a similar review relating to the Toronto Realty Agency Board (the "Realty Agency Board").

As a result of these reviews, the Integrity Commissioner recommends changes to strengthen and clarify the Code of Conduct for all local boards, including the Investment Board and the Realty Board. The changes recommended to the Code of Conduct for Members of Local Boards (Restricted Definition) are indicated in Appendix A to this Report.

Adjudicative boards are sub-set of local boards (restricted definition), and are bound by a unique, but similar, code of conduct. The recommended changes to Code of Conduct for Members of Local Boards (Restricted Definition) must also be made to the Code of Conduct for Members of Adjudicative Boards. Accordingly, the changes recommended to the Code of Conduct for Members of Adjudicative Boards are indicated in Appendix B to this Report.

The Commissioner has additionally written to the Investment Board recommending that it follow best practice for similar boards and establish an appropriate personal trading policy, to further strengthen the duties its board members have not to disclose or use confidential information for private gain. Personal trading policies range in complexity depending on a number of factors, including the nature and timing of information available to affected people, the nature of the investments or acquisitions made, the

terms between third party managers and the board, and the type of investments and transactions over which affected people have influence.

The Investment Board is at the development stage of its mandate, and accordingly this is an opportune time to design a personal trading policy that accurately accounts for its business model and the manner in which it oversees the City of Toronto's investments. A copy of the Commissioner's letter to the Investment Board is attached as Appendix C to this Report.

The Realty Agency Board is also at the development stage of its mandate. Different considerations apply given the nature of its mandate; however, it is clear that the Realty Agency Board will have access to commercially-sensitive information. Accordingly, the Commissioner has recommended that the Realty Agency Board consider developing appropriate policies to enhance the confidentiality obligations owed by members of its Board. A copy of the Commissioner's letter to the Realty Agency Board is attached as Appendix D to this Report.

As indicated in the letters to the Investment Board and the Realty Agency Board, the Integrity Commissioner will meet with each board to provide more detailed information about what is expected, and will remain available to consult with and provide necessary expertise in support of the development of appropriate policies.

RECOMMENDATIONS

The Integrity Commissioner recommends that Executive Committee recommend that City Council:

1. Amend the Code of Conduct for Members of Local Boards (Restricted Definition) to reflect the changes described in Appendix A.
2. Amend the Code of Conduct for Members of Adjudicative Boards to reflect the changes described in Appendix B.

FINANCIAL IMPACT

The anticipated policy work of the Office of the Integrity Commissioner, City divisions, and the impacted boards will require use of staff resources and consultation with external advisors with relevant expertise. The Acting Chief Financial Officer has reviewed and agrees with this financial impact statement. The decision to adopt the recommendations in this report should have no financial impact upon the City's budgetary requirements in 2018.

DECISION HISTORY

At its March 2017 meeting, City Council approved the establishment of the Investment Board. At that time, City Council requested that the Integrity Commissioner review the Code of Conduct for Local Boards (Restricted Definition) and recommend any required amendments to that Code of Conduct for the Investment Board, given its fiduciary responsibilities.

(<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.EX23.2>)

At its November 2017 meeting, City Council requested that the Integrity Commissioner conduct a similar review relating to the Toronto Realty Agency Board.

(<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.CC34.2>)

COMMENTS

1. Description of the Review

To assess the suitability of the existing Code of Conduct for Local Boards (Restricted Definition), the policy frameworks in place for several boards that manage investment funds were reviewed: Alberta Investment Management Corp.; BC Investment Management Corp.; Ontario Pension Board; OP Trust; Healthcare of Ontario Pension Plan; OMERS; Public Service Pension Investments ("PSP"); Canada Pension Plan Investment Board ("CPPIB"); Ontario Teacher's Pension Plan ("OTPP"); and the conflict of interest rules for provincial agencies.

There is a range of practice across those various boards. In some cases, boards manage ethical conduct of their members through a responsible investment policy alone; but in other cases, there are comprehensive schemes with detailed codes of conduct and conduct notification mechanisms (e.g., ethics executives). Generally speaking, the codes of conduct reviewed include duties regarding the following issues:

- acting in professionally and courteous manners;
- gifts and benefits;
- conflicts of interest;
- engaging in outside activities;
- restrictions regarding personal trading in securities; and
- restrictions regarding provision of services to the board.

Board members for OMERS, PSP, CPPIB, and OTPP are all required to adhere to policies or codes of conduct that restrict their abilities to engage in personal trading of securities. OMERS has a separate policy (outside of the code of conduct) regarding personal trading in securities; it applies equally to board members and staff, and defines trades that are restricted and establishes a mechanism for pre-clearing certain trades. PSP regulates personal trades of staff and directors through a code of conduct that establishes a list of restricted and exempt securities. The CPPIB regulates board members' trading by requiring pre-clearance of all trades other than those identified as

exempt securities. OTPP restricts trading for board members and certain employees unless the security qualifies as an "exempt securities" -- which, generally speaking, include government bonds, mutual funds, pooled and segregated funds, exchange-traded funds, and foreign currency, etc.

To obtain necessary expertise about the work of the Investment Board and the concept of personal trading policies in general, I consulted with Professor Anita Anand of the University of Toronto Law School. At the University of Toronto, Professor Anand is the J.R. Kimber Chair in Investor Protection and Corporate Governance, professor of law, and Academic Director of the Centre for the Legal Profession and Program on Ethics in Law and Business. Professor Anand advised me that a personal trading policy is a best practice for boards with similar mandates to the Investment Board, although the size and scope of the policy could be limited based on how the board conducts its business.

My review respecting the Investment Board was near completion in Fall 2017 when City Council made its request for me to review the Code of Conduct relating to the Realty Agency Board. However, I have determined that my review respecting the Investment Board was sufficient to also provide this advice to Council as pertaining to the Realty Agency Board.

As much as possible throughout the review, I consulted with City staff who support local boards (i.e., the City Manager's Office, Legal Services, the Business Improvement Area Office, the Realty Agency Board, and the Investment Board) and kept them informed of the status of my review.

2. Improving the Existing Code of Conduct for all Local Boards (Restricted Definition)

The Municipal Conflict of Interest Act and the existing Code of Conduct for Local Boards (Restricted Definition) adequately address the duties of the Investment Board and the Realty Agency Board, with the following exceptions:

1. The existing language in the Code of Conduct relating to use and disclosure of confidential information should be clarified and strengthened;
2. There are currently no restrictions respecting board members' outside activities;
3. There are currently no restrictions respecting board members providing services to the board; and
4. There are currently no restrictions respecting board members personally trading in securities.

I recommend that the Code of Conduct for Members of Local Boards (Restricted Definition) be amended to address the gaps outlined in items #1-3 immediately above. Those recommended changes are described in the next section of this Report. I will address item #4, personal trading in securities, in section 3 of this Report.

Application to all Local Boards

The recommended changes to the Code of Conduct are relevant and of value to all local boards. Establishing unique codes for specific boards would lead to unnecessary

confusion. I accordingly recommend that the Code of Conduct, as it applies to all local boards, be amended. The recommended amendments to the Code of Conduct for Members of Local Boards (Restricted Definition) are detailed in Appendix A.

Adjudicative boards are a sub-set of local boards and are bound by a unique, but similar, code of conduct. The recommended changes to the Code of Conduct for Members of Local Boards (Restricted Definition) must also be made to the Code of Conduct for Members of Adjudicative Boards. The changes recommended to the Code of Conduct for Members of Adjudicative Boards are indicated in Appendix B to this Report.

Summary of Recommended Amendments

What follows is a summary of the changes described in Appendices A and B.

Acknowledging that board members' conduct may, in certain circumstances, also be governed by the provincial Securities Act.

Amended Article II (Statutory Provisions Regulating Conduct) will include reference to the Securities Act (RSO 1990, c. S.5). Board members who obtain information through board membership have duties and responsibilities arising by virtue of s. 76 of the Securities Act. (There are also obligations under the Criminal Code, but the existing Code of Conduct has long included reference to Criminal Code obligations.)

Clarification of language with respect to the duty to avoid disclosing or using confidential information gained or received as a result of board membership.

Amended Article V (new title: Disclosure and Use of Confidential Information) has been re-ordered, clarified, and includes a more detailed definition of confidential information, plus additional examples.

Restrictions regarding providing services to the board

Amended Article IX (Business Relations) in the Code of Conduct for Local Boards -- which is Article XI (Business Relations) in the Code of Conduct for Adjudicative Boards -- will prohibit members from personally directly providing goods or services to the board. It will require members to consult with the Integrity Commissioner if the member is aware that a corporation or entity for which they are a director, employee, or agent is seeking to, or will, provide goods or services to the board.

Introducing a duty regarding appropriate outside activities

New Article X.1 (Outside Activities) in the Code of Conduct for Members of Local Boards (and new Article XII.1 (Outside Activities) in the Code of Conduct for Members of Adjudicative Boards) will require that members of local boards cannot hold a senior position with an organization whose objectives are in conflict with the board.

Various housekeeping refinements and to ensure that the language more closely reflects the experience of a local board.

Amendments to the Preamble and Articles I (Definitions), III (Application), IV (Gifts and Benefits), XII (Conduct Respecting Lobbyists) in the Code for Local Boards, XV (Conduct Respecting Lobbyists) in the Code for Adjudicative Boards, XVI (Reprisals

and Obstruction) in the Code for Local Boards, XIX (Reprisals and Obstruction) in the Code for Adjudicative Boards, XVII (Compliance with the Code of Conduct) in the Code for Local Boards and XXI (Compliance with the Code of Conduct) in the Code for Adjudicative Boards are non-substantive changes, but will improve and clarify the application of the Code of Conduct, making it more applicable to the experience of a local board.

3. Personal Trading Policies

I considered whether the Code of Conduct should be amended to include personal trading restrictions for members of the Realty Agency Board or the Investment Board. As noted, it is my view and recommendation that it is unnecessary to amend the Code of Conduct applicable to all of the City's local boards with personal trading restrictions.

However, it is my view that it is necessary for the Investment Board establish an appropriate personal trading policy. I form this view based on my review of boards with similar mandates (previously described in this Report), and on specific advice in the field of corporate governance. Accordingly, I have written to the Investment Board requesting that it develop appropriate policies to assist board members and relevant staff to ensure proper conduct if a board member or staff comes into possession of information that would legally restrict them from trading in securities. A copy of my letter to the Investment Board is attached as Appendix C. When a policy is established, members of the board will be duty-bound by the Code of Conduct to follow it by virtue of Article XV (Failure to Adhere to Council or Local Board Policies and Procedures).

A personal trading policy for the Investment Board could be a fairly short document requiring annual signed acknowledgements of the board members' obligations with respect to confidential information and securities, or it could range to a more comprehensive pre-clearance scheme. The right-sized policy for the Investment Board will require detailed consideration of the manner in which the Investment Board conducts its business, such as:

- What information will be available to the Board when making decisions about investments?
- What types of funds will it manage using third-party service providers and under which contractual terms?
- What types of funds or assets (if any) will the Board manage on its own?
- With respect to third-party managers, will the Board direct third parties to invest in individual listed securities or sectors?

In consideration of the Realty Agency Board's work, it is not immediately clear that a personal trading policy is necessary. That will depend on the manner in which the Realty Agency Board conducts its business, and the level of information received by the Board and staff. However, it is clear that the Realty Agency Board and staff will have access to highly confidential and commercially-sensitive information, and will have oversight of significant public assets. While the duties set out in the Code of Conduct (if amended) are robust, the Realty Agency Board should establish additional policies as necessary to further enhance the proper use of confidential information and to eliminate

potential for improper personal gain. Policies could include a proactive disclosure mechanism or personal trading policies. I have written to the Board to inform them of my view; a copy of my letter is attached at Appendix D.

Both boards are at early stages of their development, establishing foundational policies and determining how their work will be undertaken. It is therefore an appropriate time for each board to establish an appropriate policy framework to protect themselves--and the City--from the risk of improper use or disclosure of confidential information.

As outlined in the letter to each board, my Office will remain available to provide more detailed consultation and expertise into the development of each policy, in the context of each board.

CONTACT

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SIGNATURE

Valerie Jepson, Integrity Commissioner

ATTACHMENTS

Appendix A: Code of Conduct for Members of Local Boards (Restricted Definition), with tracked changes to reflect proposed amendments

Appendix B: Code of Conduct for Members of Adjudicative Boards, with tracked changes to reflect proposed amendments

Appendix C: Letter from the Integrity Commissioner to the Toronto Investment Board (January 9, 2018)

Appendix D: Letter from the Integrity Commissioner to the Toronto Realty Agency Board (January 9, 2018)