



## INTEGRITY COMMISSIONER REPORT FOR INFORMATION

### Report to Council: Leak of Confidential Information Concerning the Appointments to Build Toronto

<b>Date:</b>	August 1, 2014
<b>To:</b>	City Council
<b>From:</b>	Integrity Commissioner
<b>Wards:</b>	All
<b>Reference Number:</b>	

#### **SUMMARY**

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On July 16, 17, 18 and 19, 2013, City Council requested that the Integrity Commissioner investigate an alleged breach of confidentiality after a local newspaper published the Corporation Nominating Panel's confidential recommendations on appointments to Build Toronto. The publication took place prior to City Council's consideration of those appointments at its meeting held on June 11, 12, and 13, 2013.

After an investigation into the matter, I am reporting to Council that the source of the breach of confidentiality could not be determined, nor could it be ascertained that a member of Council was the source of the leak. An attempt was made to identify the possible source from the reporter who received the information and wrote the story: the request for an interview was declined. Counsel to the newspaper wrote to advise that the reporter would refuse to answer questions and that if a summons was issued, proceedings would be taken to quash the summons. Preliminary legal advice obtained from the City Solicitor's office was that a balancing would need to take place as between the public interest in such a disclosure and the value of the special place occupied by the media in relation to source-confidentiality and journalist-source privilege.

Other methods were attempted, including a request of all recipients of the confidential material to provide a declaration that the recipient had no knowledge or information concerning the leak of the confidential material. All but two members of Council executed the declarations: one declined to make a declaration on "principle" but confirmed in writing that he had not leaked the material. The second replied through staff that he did not feel that this applied to the Councillor because he was recovering from a health issue and did not attend Council.

The source of the leak could not be established and there is no information linking the breach of confidentiality to any named member of Council. However, confidentiality is important in the public interest and breaches are a serious matter. If Council wished to pursue the matter further, it is recommended that it consider the cost/benefit of pursuing the matter from the publication in question. This will inevitably lead to potentially protracted and costly legal proceedings. I advise that if Council wishes to consider that route, that it seek independent legal advice on the merits of the matter.

## **RECOMMENDATIONS**

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The Integrity Commissioner recommends that City Council receive this report for information.

## **FINANCIAL IMPACT**

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This report will have no financial impact.

## **DECISION HISTORY**

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On July 16, 17, 18 and 19, 2013, City Council requested that the Integrity Commissioner investigate an alleged breach of confidentiality after a local newspaper published the Corporation Nominating Panel's confidential recommendations on appointments to Build Toronto.

Under s. 160 of the *City of Toronto Act, 2006*, City Council may request an inquiry by the Integrity Commissioner into whether a member of council has contravened the *Code of Conduct for Members of Council* ("*Code of Conduct*").

## **ISSUE BACKGROUND**

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Complaints to the Integrity Commissioner may be investigated in one of two ways. The first is by way of a formal complaint, by an individual who has sworn an affidavit that sets out reasonable and probable grounds to allege that a member of Council, local Board (restricted definition) or Adjudicative Board has breached the relevant *Code of Conduct*. The second method is by way of a motion adopted by City Council which requests an investigation by the Integrity Commissioner.

In this case, the investigation was initiated by way of motion adopted by City Council.

## **COMMENTS**

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### **INVESTIGATION**

The following investigative steps were taken:

- Review of City Council Item CC36.8 headed "Appointment of Citizens to the Board of Directors of Build Toronto Inc.";
- Review of Confidential Attachment to Item CC36.8
- Review of Extract of Minutes of City Council meeting of June 13, 2013: closed session;
- Review of DVD of the proceedings at City Council meeting of June 13, 2013;
- Review of Item CC37.16 and confidential attachments to CC37.16;
- Review of extract from minutes of City Council from July 19, 2013 closed session;
- Request for distribution list and summary of the confidential distribution from City Clerk's office;
- Review of media report containing confidential information about candidates recommended for appointment to Build Toronto;
- Interviews with Staff from City Manager's Office: Strategic and Corporate Policy; Interviews with Executive Recruitment personnel for the Build Toronto recruitment process;
- Review of Build Toronto Press Release, October 11, 2013 concerning appointment of President and CEO;
- Review of letter of withdrawal from consideration of a candidate for the Board of Build Toronto;
- Review of Corporation Nominating Panel Candidate Interview and Selection Process Document;
- Review of Emails concerning finalizing the recommendation of the candidates for appointment in June of 2013;
- Review of Email from a candidate dated June 7, 2013 advising staff of a call from a reporter and the information that the list had been "leaked";
- Request for interview with reporter and writer of the exclusive story concerning the candidates;
- Exchange of correspondence with counsel to the newspaper regarding intentions if a summons were to be issued;

- Meeting with counsel from City Solicitor's office re: preliminary opinion on journalist source confidentiality;
- Drafting, circulating and reviewing the declarations to all recipients of the confidential information on the distribution list:
- Follow-up correspondence and telephone calls to members of Council who did not return the declarations: receipt of alternative information about lack of involvement with the leak of confidential information.

## **FINDINGS**

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The documents provided and the media report reveal that the confidential list of recommended appointees for Build Toronto was leaked to the media after distribution to the list and prior to consideration by Council of the matter at its meeting in June 2013. The article in question was published on June 8, 2013 and revealed that the newspaper had obtained the confidential list. The print article published nine names of candidates and some corresponding biographical information. The on-line article published full details that could only have been obtained from the full attachment that was distributed.

One of the candidates on the list withdrew from consideration after City Council met on June 13, 2013. The reason provided was due to other commitments and timing. The media release was not mentioned. Another candidate, who was contacted by a reporter, brought this to the attention of the staff involved with the search.

City Council deferred some of the decisions in relation to the search to its July 2013 meeting. At that time, the motion included the reference to this office to look into the leak of the confidential information.

The distribution of the information was to approximately 65 named individuals which included City staff and members of Council. Paper distribution took place on June 6, 2013 and the confidential attachments were printed on purple paper, as is the practice with all confidential attachments for Council meetings. Each package was stamped with a number assigned to persons who receive confidential attachments. Each was placed in a sealed, individually addressed envelope. The agenda and the envelopes with the confidential material were delivered by hand to the members' offices on the second floor of City Hall. Staff agendas with confidential attachments were picked up directly by staff with the City Manager's Office and Legal Services, hand delivered to City Clerk's staff and delivered to the City Hall mailroom for pick up by divisional staff (Deputy City Managers, Financial Planning and Human Resources).

A cover letter was provided to each member of Council stating, "Confidential Material Attached." The letter reminded members of their obligations under the *Code of Conduct*, Article V (Confidential Information) as well as the *Municipal Freedom of Information and Protection of Privacy Act*. Members were reminded that:

Every Council Member demonstrates his or her commitment to confidentiality by how these materials are handled and maintained.

Those involved with the recruitment identified leaks of this kind of information as a "huge issue" because qualified people may be reluctant to put their names forward if the process is not confidential pending Council's approval.

None of the materials reviewed, interviews or minutes reveal any source of suspicion. There were a large number of recipients and a number of places of distribution. Carelessness versus deliberate distribution could not be determined. Accordingly, after the preliminary investigation, an attempt was made to meet with the reporter responsible for the story. After an initial conversation with the reporter, I was directed to provide any queries directly to the lawyer for the newspaper. This led to correspondence in which I requested access to the reporter as a material witness to the matter referred to my office by City Council. The response from counsel for the newspaper advised that the reporter could not and would not attend for the purposes of any investigation. Counsel agreed to accept service of a summons to witness, but advised that if such a summons were to be served, there would be a refusal to answer questions and/or a motion to quash the summons would be brought.

Preliminary advice was sought from litigation counsel with the Office of the City Solicitor, based upon the position taken by the newspaper. Counsel advised that there would be a question of the balancing of the harm to the public interest in the leak of the confidential material versus the claim of confidentiality recognized at common law as between a reporter and a source. This has been tested in the courts in other factual circumstances and it is clear that the principle is significant enough to predict that it could require trial level and appellate proceedings prior to obtaining a final answer on any question. It was clear that litigation could be anticipated if the best available source of the information about this leak was pursued. The outcome could not be predicted.

As a further measure to attempt to narrow down the source of the leak, I corresponded with all of the recipients and invited them to complete a declaration, if applicable to them, which declared no "knowledge or information to provide to the Integrity Commissioner for the City of Toronto" about the leak. Every recipient received a copy of the article to ensure the subject matter of the declaration was known to each person.

All but two members of Council executed the declarations: one declined on principle but provided a written statement that he had not leaked the material. The second replied through staff that he did not feel that this applied to the Councillor because he was recovering from a health issue and did not attend Council for the June and July, 2013 Council meetings. All other recipients completed the declaration.

As a result of the steps taken to date, the means and source of the leak has not been established. The most direct source would be from the receiver of the leaked confidential information; however that would entail legal costs with an uncertain outcome.

## ANALYSIS

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It is important to note that because it is unclear whether a member of Council was the source of the leak of information, it cannot be said that there was a violation of the *Code of Conduct*. All that is known is that there was a leak of confidential material, that steps were taken by the Office of the Clerk to alert recipients to the confidential nature of the material and the importance of maintaining confidentiality.

As noted in a prior report to Council in the circumstances of alleged breaches of confidential material, which similarly could not be traced to a particular individual:

Councillors and their staff are reminded that the confidentiality provisions in the *Code of Conduct* include matters discussed *in camera*, communications from constituents and personal information obtained as a result of their work. Part of the role of a Councillor is being familiar with these responsibilities. A copy of Article V from the *Code of Conduct* is appended to this report. In addition, the definition of "personal information" from the *MFIPPA* is also appended, because it is referred to in the *Code of Conduct*. The significance of the obligation to keep confidences is multi-faceted. Breaches affect the public confidence, the City's ability to do business, the reputations of others and commercial interests. Councillors are entrusted by the public with confidential and sensitive information. This trust is strengthened whenever Council demonstrates its intention to ensure that confidential material remain confidential. (September 5, 2012, Report to Council Regarding Two Alleged Breaches of Confidentiality: <http://www.toronto.ca/legdocs/mmis/2012/cc/bgrd/backgroundfile-50529.pdf>).

I leave the question of whether to request consideration of pursuing this information from the publication to the discretion of Council in consultation with the City Solicitor.

## SIGNATURE

*(original signed)*

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Janet Leiper, Integrity Commissioner

## CONTACT

Janet Leiper, Integrity Commissioner  
Phone: 416-397-7770; Fax: 416-696-3615  
Email: [jleiper@toronto.ca](mailto:jleiper@toronto.ca)

## Attachments:

1. Article V (Confidential Information) – *Code of Conduct for Members of Council*
2. Definition of "personal information" from the *MIFIPPA*

## **Attachment 1 – Article V of the *Code of Conduct for Members of Council***

### **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 Freedom of Information and Protection of Privacy Act*; and

- statistical data required by law not to be released (e.g. certain census or assessment data).
- 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.

## **Attachment No. 2 – Definition of “personal information” from the MFIPPA, R.S.O. 1990, Chapter M.56**

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual; ("renseignements personnels")