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**THE CORPORATION OF THE
TOWN OF NIAGARA-ON-THE-LAKE**
OFFICE OF THE TOWN CLERK

DATE: _____ RESOLUTION NO. _____

MOVED BY COUNCILLOR: _____

SECONDED BY COUNCILLOR: _____

BE IT RESOLVED that the letter from the Integrity Commissioner be endorsed by Council, and a copy of the Code of Conduct and an acknowledge to adhere to it's contents BE PROVIDED to Members of Council to sign on semi-annual basis.



ADR
CHAMBERS

Integrity Commissioner Office
for the Town of Niagara-on-the-Lake

EDWARD T. MCDERMOTT

Integrity Commissioner
Town of Niagara-on-the-Lake
Email: integrity@adr.ca

April 27, 2021

Sent via Email to:

Lord Mayor Disero
betty.disero@notl.com

Dear Lord Mayor Disero:

As you will recall, in my Annual Report to Council dated March 24, 2021, I recommended that an in camera education seminar should be scheduled with Council when circumstances permitted. I suggested that it would be preferable to conduct such a session in person in order to address a number of issues arising out of the amendments to the Municipal Act and the Municipal Conflict of Interest Act as well as further impending changes now unfolding as a result of a Government directed Consultation process to strengthen Municipal Codes of Conduct to address “workplace harassment and discrimination of any kind”.

As it now appears that we might not be able to schedule such a session for some time, I thought it would be appropriate and important to address the issue of “Confidentiality” (which I stressed in my Report) through the medium of this letter so that Council will be reminded of and alerted to the importance of abiding by the terms of Niagara-on-the-Lake’s Code of Conduct dealing with this issue.

The Applicable Provisions of the Municipal Act and the Code

As you are aware, section 239 of the Municipal Act requires all meetings to be open to the public unless it relates to any of the eleven (11) named exceptions (and certain other situations specified in the statute e.g. an education session for Members of Council or if the subject matter relates to an investigation by an Ombudsman). If any of these circumstances exist, a meeting of Council may be conducted in “closed session”. While the Municipal Act details when such meetings may be held, it is left to the Code of Conduct of the municipality to define what is confidential about such closed door meetings and what may be disclosed or publicly discussed about the matters canvassed in such a meeting.

The results of any inquiry into a Complaint that there has been a breach of confidentiality by a Councillor may accordingly vary depending on the wording of the particular municipality’s Code of Conduct in relation to this issue. Fortunately, Niagara-on-the-Lake’s Code of Conduct addresses the issue of confidentiality (particularly with respect to closed door sessions) in a very direct manner. The relevant sections are as follows:

“3.0 Definitions

3.1 The following terms shall have the following meanings in this Code of Conduct. .

(c) “confidential information” means information or records that are in the possession, in the custody or under the control of the Town that the Town is either precluded from disclosing under the Municipal Act, 2001 or other applicable legislation, its Procedural By-law or any of its other by-laws, policies, rules or procedures, or that it is required to refuse to disclose under the Municipal Freedom of Information and Protection of Privacy Act or other legislation;

8.0 Confidential Information

8.1 **Members receive confidential information from a number of sources as part of their work as elected officials. This includes** information received in confidence by the Town that falls under the privacy provisions of the Municipal Freedom of Information and Protection of Privacy Act and other applicable privacy laws and **information received during closed meetings of Council. Examples of types of**

information that a Member must keep confidential, unless expressly authorized by Council or as required by law, include, but are not limited to:

- (a) matters related to ongoing litigation or negotiation, or that is the subject of solicitor-client privilege between the Town and its Legal Counsel;
- (b) information provided in confidence, for example the identity of a complainant where a complaint is made in confidence;
- (c) price schedules in contract tender or Request for Proposal submissions if so specified;
- (d) personnel matters about an identifiable individual; (e) "personal information" as defined in the Municipal Freedom of Information and Protection of Privacy Act; and
- (f) any census or assessment data that is deemed confidential.

- 8.2 A Member shall not disclose the content of any confidential information, or the substance of deliberations, of a closed meeting. A Member has a duty to hold any information received at closed meetings in strict confidence for as long and as broadly as the confidence applies. All confidential documents received at a closed meeting are to be turned into the Clerk at the end of the closed meeting. A Member shall not, either directly or indirectly, release, make public or in any way divulge any such information or any confidential aspect of the closed deliberations to anyone, unless authorized by Council or as required by law.
- 8.3 A Member shall not disclose, use or release confidential information in contravention of applicable privacy laws. Members are only entitled to information in the possession of the Town that is relevant to matters before the Council, or a committee. Otherwise, Members enjoy the same access rights to information as any other member of the community or resident of the Town and must follow the same processes as any private citizen to obtain such information.
- 8.4 Members shall not misuse confidential information in any way or manner such that it may cause detriment to the Town, Council or any other person, or for financial or other gain for themselves or others.

- 8.5 Members shall respect the right to confidentiality and privacy of all clients, volunteers and staff, and should be aware of their responsibilities under applicable legislation, Town policies, procedures and rules, ethical standards and, where appropriate, professional standards.
- 8.6 A Member shall not disclose any confidential information received by virtue of his or her office, even if the Member ceases to be a Member."

Application of the Code

As you can see from the foregoing, (especially section 8.2), it is the intent of Council that no Member shall disclose any confidential information or the substance of deliberations at a closed meeting and must hold "any information received at a closed meeting in strict confidence" unless authorized by Council or as required by law.

These prohibitions contained in the Code make it clear that all information received at a closed door session is to be held in confidence and not "discussed or disclosed" unless authorized by Council or the law to do so. A breach of this obligation would lead to a finding of a contravention of the Code and the potential application of a penalty as permitted under the Code.

Things to Keep in Mind

- Of course there is always the potential that comments by Councillors may relate to matters that are already clearly in the public realm, notwithstanding they were also discussed in closed session. In such circumstances Councillors have occasionally been able to successfully argue that such circumstances do not amount to a breach of the obligation of confidentiality.

It should be remembered however that the obligation of confidentiality in the Code applies to all information received at the closed door meeting and precludes disclosure and public discussion of such information. There will accordingly be an onus on the Councillor to satisfy the Integrity Commissioner that he/she did not breach the provisions of the Code with respect to comments made about the issue outside of the closed session. Prudence would suggest that the preferable course of action is simply to refrain from commenting on matters canvassed in the closed session on the basis that the Code of Conduct precludes you from doing so.

- Similar precautions should be kept in mind when you are asked to “comment on” or “confirm” information received in closed session leaked or allegedly leaked by someone to the media or other third parties. The best response in order to fulfil your obligations under the Code is simply to decline to comment as you are precluded from discussing information which may have been received in closed session.
- It should also be remembered that the rationale for a lot of the exceptions to the open meeting policy is that to permit public disclosure or discussion would result in potential damage or detriment to the municipality and accordingly the reasons for permitting confidential discussions about the matter are obvious and compelling in the interest of the Town.

I trust the foregoing comments on this important issue are of assistance to you. In view of the number of Complaints I am receiving from the several municipalities for which I serve as IC, I wanted to highlight this issue for Council now, rather than wait until circumstances permitted a formal education seminar.

I trust this letter will be brought to Council’s attention at the earliest opportunity and I might suggest that documentation be requested from each member of Council acknowledging receipt of same which should then be filed with the Clerk.

Yours very truly,



Edward T. McDermott
Integrity Commissioner, Town of Niagara-on-the-Lake