



Codes of Conduct, Complaint & Inquiry Protocols,  
and Appointing Integrity Commissioners

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Guide for Municipalities

Ombudsman Ontario

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# Codes of Conduct, Complaint & Inquiry Protocols, and Appointing Integrity Commissioners: Guide for Municipalities

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## Introduction

An integrity commissioner is a municipal accountability officer who is responsible for applying the rules governing the ethical conduct of members of municipal councils and local boards, including codes of conduct, and for providing advice and education on those rules.

The *Municipal Act, 2001*<sup>1</sup> provides the framework within which municipal integrity commissioners are appointed and carry out their functions.

Every municipality must establish a code of conduct for members of council and local boards [s. 223.2(1)], and appoint an integrity commissioner or use the services of an integrity commissioner from another municipality [s. 223.3(1.1)–(1.2)]. Integrity commissioners must function in an independent manner and report directly to municipal council [s. 223.3(1)].

The functions of integrity commissioners include:

- Applying the code of conduct and any procedures, rules and policies governing the ethical behavior of members of councils and local boards, including conducting investigations and inquiries<sup>2</sup> into complaints about alleged contraventions of a code of conduct;
- Conducting inquiries concerning alleged contraventions of the *Municipal Conflict of Interest Act*;
- Providing advice to members respecting their obligations under the code of conduct, procedures, rules or policies governing the ethical behavior of members, and the *Municipal Conflict of Interest Act*; and
- Providing educational information about the code of conduct and the *Municipal Conflict of Interest Act* [s. 223.3(1)].

## *Municipal Conflict of Interest Act*

In 2019, integrity commissioners were given the authority to review allegations of conflict of interest under the *Municipal Conflict of Interest Act* (“MCIA”).<sup>3</sup> Previously, these matters could only be dealt with through court applications. While individuals who believe the MCIA has been contravened can still apply to a judge for a determination on the matter directly, the legislation now provides an option for integrity commissioners to conduct an inquiry into an alleged contravention and the discretion to apply to a judge themselves.

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<sup>1</sup> SO 2001, c 25. See Part V.1, Accountability and Transparency. The *City of Toronto Act, 2006*, SO 2006, c 11, Sched. A contains the provisions concerning the City of Toronto’s integrity commissioner. This Guide only refers to the relevant section numbers in the *Municipal Act, 2001*.

<sup>2</sup> While the *Municipal Act, 2001* refers to “inquiries”, the word “investigation” is often used interchangeably. We adopt this practice at times in this Guide.

<sup>3</sup> RSO 1990, c M.50.

The *Municipal Conflict of Interest Act* sets out rules to prevent members of councils and local boards from influencing, discussing, or voting on any matter that is before the body for consideration if they have a pecuniary interest in the matter. The interest can be direct or indirect, and the *MCIA* provides that the pecuniary interest of a parent, spouse, or child of the member is also deemed to be the member's pecuniary interest [*MCIA*, s. 3]. Any member who has a pecuniary interest in a matter is required to disclose the interest before it is considered, and is prohibited from attempting to influence voting or to vote on the matter [*MCIA*, s. 5].<sup>4</sup> If the matter is considered in a closed meeting, the member must leave the meeting. The *MCIA* sets out specific exceptions for circumstances where a member is not barred from influencing, discussing or voting on a matter despite a pecuniary interest [*MCIA*, s. 4].

Members who have a pecuniary interest in a matter are also barred from using their office to attempt to influence a municipal employee, officer, or other delegate responsible for making a decision or recommendation on the matter [*MCIA*, s. 5.2]. Additional rules apply to the special powers granted to heads of council in cases where the head has a pecuniary interest in a matter [*MCIA*, s. 5.3].

Any member who declares a conflict is required to file a written statement of the interest and its general nature [*MCIA*, s. 5.1].

## Complaint / inquiry protocols

In addition to developing a code of conduct, municipalities should adopt a complaint or inquiry protocol or procedure. A protocol can set out how to file complaints against members of council and local boards relating to alleged contraventions of the code of conduct, and applications alleging contraventions of the *Municipal Conflict of Interest Act*. It can also guide the integrity commissioner's inquiries.

## Ontario Ombudsman role

The Ombudsman is an office of last resort, and recognizes that municipal issues are generally best addressed locally. The Ombudsman does not act as an integrity commissioner for municipalities. However, the Ontario Ombudsman can review and investigate complaints about municipal integrity commissioners once they have completed their process or declined to review a complaint.<sup>5</sup> The Ombudsman can also initiate an investigation on his own motion.<sup>6</sup>

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<sup>4</sup> There is an exception in the legislation if the discussion is about whether a penalty should be imposed on a member where the integrity commissioner has found that they violated the code of conduct: *Municipal Conflict of Interest Act*, RSO 1990, c M.50, s 5(2.1), 5.2(2) [*Municipal Conflict of Interest Act*]. In such cases, the member is not prevented from participating at the meeting where the penalty is being considered or attempting to influence the decision on the matter, but is not entitled to vote on the matter.

<sup>5</sup> *Ombudsman Act*, RSO 1990, c O.6, s 14(4.4).

<sup>6</sup> *Ibid*, ss 14(2), 14(4.5).

If a municipality receives a complaint about an integrity commissioner after the completion of a review or inquiry, they may wish to refer the individual to the Ontario Ombudsman.

When reviewing decisions of integrity commissioners, the Ombudsman's Office does not act as an appeal body and the Ombudsman does not substitute his decisions for those of commissioners. Instead, what the Ombudsman's Office looks at includes whether commissioners:

- Acted in accordance with relevant legislation or procedure, including with respect to timelines;
- Considered the issues before them;
- Followed a fair practice;
- Obtained and considered relevant information; and
- Provided sufficient and adequate reasons to support their decision based on the available evidence.

The role of Integrity Commissioners is broad and includes providing advice and education regarding codes of conduct, ethical rules, and the *Municipal Conflict of Interest Act*. However, the complaints received by the Ombudsman generally relate to Integrity Commissioner inquiries into alleged contraventions of a Code of Conduct or the *MClA*. Based on our experience in this area, the Ombudsman has developed this best practice guide to help municipalities develop codes of conduct, establish complaint/inquiry protocols, and appoint integrity commissioners.

The Ombudsman has also produced a separate guide to help integrity commissioners in their work. These guides are also available to the public to help individuals better understand the requirements and best practices for codes of conduct and integrity commissioners.

**Note:** Unless otherwise indicated, all references to legislative provisions are to the *Municipal Act, 2001*. For provisions governing the integrity commissioner for the City of Toronto, see the *City of Toronto Act, 2006*.

## Codes of Conduct

Subsection 223.2(1) of the *Municipal Act, 2001* requires every municipality to establish codes of conduct that apply to members of council and local boards. There can be one code for all members, or separate ones for members of council and members of local boards.

All council members and members of local boards should be provided with training to ensure they are familiar with and understand the code of conduct. The code of conduct should be easily accessible to the public – e.g., posted on the municipality's website.

Once a code of conduct applying to local boards is developed, municipalities should identify all of their local boards and ensure that all members understand their obligations under the code. Local boards include municipal service boards, transportation commissions, planning boards, and any other board, commission, committee, body or local authority established or exercising any power under any Act with respect to the affairs or purposes of one or more municipalities.

In 2018, the Ontario Court of Appeal found that the City of Hamilton’s Property Standards Committee and Election Compliance Audit Committee were not local boards for the purposes of the open meeting rules, because neither body provided “services which are integral to the day- to-day operation of the business” of the city. In 2021, Ontario’s Divisional Court provided additional guidance, finding that the City of Hamilton’s Lesbian, Gay, Bisexual, Transgender and Queer Advisory Committee was a local board. The decision noted that the function of the Committee related to the city’s “affairs and purposes” by helping the city meet its obligations to all members of the community. The Court found the committee was not an “independent and/or adjudicative” body, and was also not an *ad hoc* informal committee.

We have come across local boards, such as Business Improvement Area boards, that did not know they were subject to a code of conduct or integrity commissioner oversight. Municipalities should provide education and support to these bodies to ensure they understand their legal obligations and have the capacity to comply. For greater clarity, municipalities should publicize a list of local boards.

## What a code of conduct should include

### *Prescribed subject matters*

Regulation 55/18 under the *Municipal Act, 2001* requires codes of conduct to address four topics:

1. Gifts, benefits and hospitality;
2. Respectful conduct, including conduct towards officers and employees;<sup>7</sup>
3. Confidential information;<sup>8</sup> and
4. Use of property of the municipality or the local board.<sup>9</sup>

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<sup>7</sup> The code should reference other relevant policies and by-laws, such as the mandatory staff-council relations policy required by s. 270 of the *Municipal Act, 2001*.

<sup>8</sup> The code can specifically require members not to disclose information discussed during closed meetings.

<sup>9</sup> O Reg. 55/18, s 1.

### ***Additional subject areas***

Beyond these four topics, it is up to council to determine any additional ethical standards to be applied to council members and members of local boards. Municipalities should consider incorporating additional provisions or policies into the code of conduct, such as:

#### **Decorum during meetings**

Generally, conduct during meetings is governed by the Chair in accordance with the municipality or local board's procedure by-law. If a municipality intends for its code to apply to such conduct – and enable the integrity commissioner to review complaints about it - this should be stated explicitly.

#### **Social media use**

If a municipality intends for its code of conduct to apply to members' conduct on social media and other online platforms – e.g., sharing information and communicating with the public – this should be clearly stated in the code.

#### **Communication on behalf of council or the local board**

A code of conduct can address whether, when and how members may communicate on behalf of the council or local board, including to the media.

#### **Conflicts of interest outside the scope of the *Municipal Conflict of Interest Act***

The *Municipal Conflict of Interest Act* applies specifically to pecuniary conflicts of interest, as defined in the legislation. If a municipality intends for its code of conduct to apply to conflicts outside the scope of that Act, this should be explicitly stated. For instance, the code could address a member using their position to benefit a friend, or a family member other than a parent, spouse, or child.

#### **Workplace harassment**

Some complaints may raise issues that could be covered by both the code of conduct and the municipality's workplace harassment policy. We have received complaints from council members who did not know if they were being "investigated" under the code of conduct or for harassment under a workplace policy. In some cases, the integrity commissioner themselves did not distinguish between the two, or take care to clarify which procedures applied to their review.

Codes of conduct should set out whether the integrity commissioner can investigate complaints related to workplace harassment, or whether these should be directed to another process. Workplace harassment and violence policies should specify whether they are intended to apply to members of council and local boards.

## Penalties

Under subsections 223.4(5)–(6) of the *Municipal Act, 2001*, an integrity commissioner can recommend that council or a local board impose a penalty on a member (e.g., a reprimand and/or a suspension of remuneration for up to 90 days) if the commissioner has found that the member contravened the code of conduct. Codes of conduct should reflect these statutory penalties.

Council is entitled to impose a penalty on members of council or a local board following a finding by the integrity commissioner that the member has violated the code of conduct. Local boards are also entitled to impose a penalty on a local board member, if council has not imposed a penalty on the member for the same contravention [s. 223.4(6)].

## Remedial measures

In addition to recommending penalties for members who have contravened the code of conduct, integrity commissioners can recommend that councils or local boards impose remedial measures. The courts have found, for example, that commissioners can recommend “other actions” as long as they are remedial and not punitive,<sup>10</sup> are permitted in law and designed to ensure that the inappropriate behaviour does not continue,<sup>11</sup> and do not prevent the member from carrying out their duties.<sup>12</sup>

Municipalities that wish to authorize their integrity commissioners to recommend such measures – such as apologies to council or to complainants, or the return of municipal property – should expressly do so in their codes of conduct.

## Protection from reprisal

Codes of conduct should specify that members should not engage in any reprisal or threat of reprisal against anyone for filing a complaint under the code of conduct or for co-operating with an integrity commissioner during their inquiry.

## Co-operation with the integrity commissioner

Codes of conduct should clearly require that members of council and local boards co-operate with the integrity commissioner’s inquiries. They should also specifically prohibit members from obstructing or attempting to obstruct an inquiry by the integrity commissioner; this enables the commissioner to find that failure to co-operate with an inquiry is a contravention of the code.<sup>13</sup>

## Expansion beyond council and local boards

If a municipality wishes to have its code of conduct apply to members of committees who are not members of council or a local board, the code should state this explicitly.

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<sup>10</sup> *Magder v. Ford*, 2013 ONSC 263 at para 67; *Dhillon v. The Corporation of the City of Brampton*, 2021 ONSC 4165 at para 94 [*Dhillon*].

<sup>11</sup> *Ibid* at para 87.

<sup>12</sup> *Villeneuve v. North Stormont (Township)*, 2022 ONSC 6551 at para 59 [*Villeneuve*].

<sup>13</sup> *Dhillon*, *supra* note 10 at paras 69–76.



## Complaint / inquiry protocols

Municipalities should have clear procedures and processes for complaints and applications filed with integrity commissioners.<sup>14</sup> Most of the complaints the Ombudsman receives about integrity commissioners relate to their processes – or lack thereof. Many could have been prevented if the municipalities had a robust, fair, and flexible protocol to deal with complaints and applications.

The courts have recognized that a municipality is “master of its own procedure” for such matters.<sup>15</sup> Municipalities can choose to have separate protocols for complaints related to codes of conduct and applications related to the *Municipal Conflict of Interest Act*, or combine them.

### **Adopt a complaint/inquiry protocol, as a best practice:**

In addition to a code of conduct, every municipality should adopt a clear process for any person to file a complaint about a council or local board member related to the code of conduct or an application respecting the *Municipal Conflict of Interest Act*. The protocol should set out how the integrity commissioner will respond to complaints and applications, from receipt to final disposition. Complaint protocols not only provide valuable guidance to integrity commissioners, they also let the public and members of councils and local boards know what to expect.

### **Make complaint/inquiry protocols public and easy to access:**

Protocols should be published and easily accessible to members of the public, e.g., posted on the municipality’s website.

## Terms Common to code of conduct and *MCIA* matters

Municipalities should consider including the following provisions in their complaint / inquiry protocols. These apply to matters involving codes of conduct as well as those related to the *Municipal Conflict of Interest Act*.

### **Complaint instructions**

Complaint protocols should include instructions on how to submit a complaint under a code of conduct or an application under the *MCIA* to the integrity commissioner and information about what to expect from the process. They should also include information for individuals who may require an accommodation to participate in the process.

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<sup>14</sup> Many municipalities refer to these documents as “complaint protocols” because they address the receipt and processing of complaints under a Code of Conduct or applications under the *MCIA*. Others refer to them as “inquiry protocols” because they set out the processes to be followed during a commissioner’s inquiry. In this Guide, we refer to complaint / inquiry protocols interchangeably.

<sup>15</sup> *Michael Di Biase v. City of Vaughan*, 2016 ONSC 5620 at para 131 [*Di Biase*].

## Independence and discretion

Integrity commissioners are intended to perform the functions assigned by a municipality in an independent manner [s. 223.3(1)]. Complaint protocols should make note of the integrity commissioner's independence.

In our experience, members of the public often do not understand that integrity commissioners have considerable discretion in carrying out their functions. Accordingly, municipalities may want to note that if a matter is not covered specifically in the protocol, the commissioner can exercise their discretion to address it.

## Evidence

Municipalities and local boards are required to provide information or access to property that integrity commissioners believe is necessary for their review of complaints, whether it is an inquiry under the code of conduct [s. 223.4(3), (4)] or related to the *MCIA* [s.223.4.1(10), (11)]. Complaint protocols should note that integrity commissioner may gather any additional information, including by speaking with people and obtaining documents, that they consider necessary.<sup>16</sup>

## Confidentiality

Integrity commissioners are required to preserve the secrecy of all matters that come to their knowledge in the course of their work [s. 223.5(1)]. This confidentiality prevails over the *Municipal Freedom of Information and Protection of Privacy Act*<sup>17</sup> [s. 223.5(3)]. However, integrity commissioners can disclose information in certain specific circumstances set out in the Act.<sup>18</sup> In reporting findings about a member's conduct under the code to council or a local board, for instance, they "may disclose in the report such matters as in the commissioner's opinion are necessary for the purposes of the report" [s. 223.6(2)].

Complaint/inquiry protocols should state that information obtained by integrity commissioners is confidential, subject to the limits in the legislation. They should provide commissioners with discretion to decide how much information to disclose, taking local circumstances into account.<sup>19</sup>

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<sup>16</sup> In reviewing a similar complaint protocol provision, the court noted that the commissioner is not limited to the information provided by the complainant: *Ibid* at para 34.

<sup>17</sup> RSO 1990, c M.56.

<sup>18</sup> Integrity commissioners may disclose information that is required to be disclosed during a criminal proceeding; during an inquiry respecting the *Municipal Conflict of Interest Act*, if the integrity commissioner holds a public meeting, applies to a judge, or when publishing reasons; or in summary form when providing a periodic report to the municipality on their activities, without including confidential information that could identify an individual: *Municipal Act, 2001*, SO 2001, c 25, ss 223.5(2), 223.5(2.3), 223.6(1) [*Municipal Act*].

<sup>19</sup> *Di Biase, supra* note 15 at para 121.

In accordance with procedural fairness, the council or local board member who is the subject of a complaint should be made aware of the substance of the allegations in order to have a fair opportunity to answer. A commissioner can satisfy this requirement by providing the broad grounds for the complaint, and need not disclose details, share evidence, or identify witnesses.<sup>20</sup>

Complaint protocols should specify that commissioners can disclose such information as they consider necessary when informing respondents about allegations, and when reporting their findings to councils or local boards.

### **Declining to commence or discontinuing an inquiry**

Complaint protocols should give integrity commissioners the discretion to decline to commence or to discontinue an inquiry in certain circumstances. For example, if:

- The matter is outside of the integrity commissioner's jurisdiction;
- The complaint or application is frivolous, vexatious, or not made in good faith;
- The issue has already been, or is being, addressed by the commissioner or another process (e.g., a court proceeding, or a workplace harassment investigation); or
- It is clear that even if the allegations are proven, there would be no breach of the code of conduct or the *Municipal Conflict of Interest Act*.

Municipalities can also give commissioners the discretion to discontinue an inquiry if they determine that the matter does not warrant further action, or that it would not be in the public interest to take further steps.

Complaint protocols should clearly specify whether integrity commissioners can exercise their discretion to decline to commence or discontinue an inquiry at any stage of the process. They should also require commissioners to inform complainants in writing of such decisions (and, where appropriate, respondents as well), and provide reasons, with reference to the information considered.

### **Informal resolution**

Municipalities should consider incorporating options for mediation or informal resolution in their complaint/inquiry protocols. Establishing an informal mechanism alongside a formal complaint process provides a range of ways for integrity commissioners to resolve matters, and can save time and money for all involved.

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<sup>20</sup> *Ibid* at paras 146–49, citing *Syndicat des Employés de Production de Québec et l'Acadie v. Canada (Canadian Human Rights Commission)*, 1989 CanLII 44 (SCC), [1989] 2 SCR 879 at para 27; *Irvine v. Canada (Restrictive Trade Practices Commission)*, 1987 CanLII 81 (SCC), [1987] 1 SCR 181 at para 71.

Complaint/inquiry protocols should clearly distinguish between informal complaint resolution mechanisms and formal inquiries, and include clear paths for each. Municipalities may choose to note that it is not mandatory to engage the informal process before pursuing a formal complaint.

Municipalities should proceed cautiously if they intend for integrity commissioners to have the ability to deal informally with applications relating to alleged contraventions of the *Municipal Conflict of Interest Act*. Even if an inquiry protocol includes an informal resolution mechanism, there is still a strict 180-day time limit applying to *MClA* inquiries [s. 223.4.1(14)]. The 180-day period begins when a completed application is received, whether or not the commissioner chooses to engage in an informal review process.

### **Contravention of another Act**

Any integrity commissioner who, during an inquiry, has reasonable grounds to believe there has been a contravention of the *Criminal Code* or other legislation, with the exception of the *Municipal Conflict of Interest Act*, must immediately refer the matter to the appropriate authorities. The commissioner's inquiry must be suspended until "any resulting police investigation and charge have been finally disposed of," and commissioners are required to report the suspension to council [s. 223.8]. Commissioners can resume their inquiry into such matters after any charges have been finally disposed of. As the courts explained in *Di Biase v. Vaughan*:

"The onus of proof in a criminal case is higher than the onus of proof in a civil matter. This means that a police service may decide not to lay charges, or charges may be dismissed because they are not provable beyond a reasonable doubt. Conduct that cannot be proven beyond a reasonable doubt may be provable on a balance of probabilities and thus a violation of the Code of Ethical Conduct may be proven despite an acquittal or a decision not to proceed with criminal charges."<sup>21</sup>

Complaint protocols should reflect this, and provide for a process by which integrity commissioners can restart inquiries following disposition of a police investigation and/or any charges.

### **Public inquiry powers**

Complaint/inquiry protocols should note that integrity commissioners can elect to exercise the powers under sections 33 and 34 of the *Public Inquiries Act, 2009*<sup>22</sup> when conducting a code of conduct inquiry [s. 223.4(2)] or *MClA* inquiry [s. 223.4.1(9)]. These powers include the ability to summon witnesses to give evidence under oath or affirmation and to produce documents.

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<sup>21</sup> *Di Biase, supra* note 15 at para 210.

<sup>22</sup> SO 2009, c 33, Sched. 6.

## Record keeping

Complaint/inquiry protocols should specify the records that integrity commissioners must keep and for how long (e.g., the original complaint, correspondence related to the case, evidence collected, and any reports issued).

## Municipal elections

Complaint/inquiry protocols should explain the special rules that apply during regular municipal election periods. For example, between nomination day and voting day:

- No complaints alleging contravention of codes of conduct or applications related to the *MCIA* can be filed with integrity commissioners [s. 223.4(9)(1), s. 223.4.1(3)];
- Commissioners cannot report on any alleged code contraventions, and councils and local boards cannot consider imposing penalties for code violations [s. 223.4(9)(2)–(3)];
- If a commissioner has not completed a code of conduct or *MCIA* inquiry before nomination day for a regular municipal election, the inquiry must be terminated on that day [s. 223.4(7), s. 223.4.1(12)]. If that occurs, the commissioner cannot start another inquiry into that matter unless, within 6 weeks of voting day for the election, the original complainant/applicant or respondent member makes a written request to the commissioner to recommence the inquiry [s. 223.4(8), s. 223.4.1(13)].

## Best practices specific to a Code of Conduct complaint protocol

Certain specific procedures should be included in protocols for complaints alleging members of councils or local boards have violated a code of conduct. These procedures are distinct from those that apply to an inquiry into an alleged violation of the *Municipal Conflict of Interest Act*, which are addressed below.

### Remove barriers to making a complaint

There should be no barriers to making a complaint to the integrity commissioner, such as fees or onerous administrative requirements (e.g., requiring complainants to swear an affidavit). Municipalities sometimes impose such conditions in an attempt to discourage frivolous and vexatious complaints. Instead, they should address this concern by giving integrity commissioners discretion to dismiss complaints for these reasons.

The Ombudsman has strongly and repeatedly denounced the practice of charging a complaint fee because it penalizes complainants for exercising their statutory rights and may prevent legitimate complaints from being raised. He has noted that it is “entirely inconsistent with the primary intent of the integrity commissioner scheme, which is to

foster democratic legitimacy and public trust at the local level.”<sup>23</sup> A number of municipalities have removed their fees and changed their codes of conduct in light of this position.

### **Do not restrict who can make a complaint**

There should be no restrictions on who can file a complaint, whether or not they live in the municipality. The *Municipal Act, 2001* does not restrict municipal employees from filing a complaint with the integrity commissioner.<sup>24</sup> Complaint/inquiry protocols should specify whether anonymous complaints will be accepted by the integrity commissioner, and whether the commissioner has the discretion to protect the identity of complainants.

### **Include reasonable time limits for filing complaints**

The *Municipal Act, 2001* does not include any restriction on how soon a complaint must be filed after an alleged violation of a code of conduct. Municipalities can choose to include a time limit for complaints, but complaint protocols should give integrity commissioners the discretion and flexibility to accept complaints outside of that limit, based on the specific circumstances of the case.

### **Include reasonable time limits for review of complaints**

There are no statutory timelines for integrity commissioners to complete inquiries concerning code of conduct complaints – unlike *MCIA* matters, which are subject to strict timeframes.<sup>25</sup> However, delays can undermine public confidence in the complaint process, and we frequently hear from members of the public who are dissatisfied with the length of time some integrity commissioners take to complete reviews.

To increase accountability and ensure all parties know what to expect, complaint protocols should set out reasonable timelines for integrity commissioners to respond to code of conduct complaints. They should include timeframes for:

- Acknowledging receipt of the complaint;
- Completing a preliminary review;
- Engaging an informal complaint resolution mechanism (if appropriate); and
- Completing an inquiry (if warranted), and report.

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<sup>23</sup> Letter from Ontario Ombudsman Paul Dubé to Hamilton City Council (January 12, 2022) in Ontario Ombudsman, *Annual Report 2021-2022* (10 August 2022) at 27, online: <https://www.ombudsman.on.ca/resources/reports,-cases-and-submissions/annual-reports/2021-2022-annual-report#Integrity%20Commissioners%20and%20local%20accountability>.

<sup>24</sup> *Villeneuve, supra* note 12 at para 20.

<sup>25</sup> Integrity commissioners must complete a review of complaints made under the *MCIA* within 180 days after receiving the complaint: *Municipal Act, supra* note 18, s 223.4.1(14).

Integrity commissioners should also have the flexibility to extend timelines if required, based on the specific circumstances of the case. Complainants and respondents should be informed in writing of any extensions and the reasons for them, along with a new expected completion date.

### **Include a preliminary reporting process**

Complaint protocols should include a preliminary reporting process. In the interest of fairness, integrity commissioners should provide members who are the subject of an inquiry with the opportunity to review and respond to preliminary findings before any report is made public. Complaint protocols should specify how and when members will be provided with this opportunity, and indicate that any comments they provide should be considered by the commissioner before any report is finalized. Generally, only the member subject to a complaint is provided with the chance to comment on preliminary findings. If a municipality wishes to give other parties, such as complainants, the opportunity to comment on the commissioner's preliminary report, this should be set out clearly in the protocol.

### **Make reports public**

When integrity commissioners report their findings on code of conduct inquiries to council or a local board, the municipality or board is required to make these public [s. 223.6(3)] (e.g., as part of a published meeting agenda). Complaint protocols should address how and when such reports will be made available to the public.

### **Consider reports during an open meeting**

In cases where an integrity commissioner finds that a member contravened the code of conduct, council or the local board can consider the commissioner's report and decide whether to impose penalties and/or remedial measures. The meeting should be open to the public, unless the subject of the discussion fits squarely within one of the exceptions to the open meeting rules set out in s. 239(2) of the *Municipal Act*. This should be noted in the complaint protocol.

### **Reflect the role of council**

If the commissioner reports that a member has contravened the code of conduct, council can decide to impose a penalty or remedial measures on the member of council or local board. In the alternative, the local board can do so if council has not already imposed a penalty for the same contravention.

Commissioners may suggest specific penalties or remedial measures in their reports, but it is up to councils or local boards to decide whether any penalty or remedial measure should be imposed, and if so, what it should entail.

As the court noted in a 2021 case involving the City of Ottawa, council plays an adjudicative role when deciding whether to impose a sanction based on a commissioner’s report,<sup>26</sup> and members should do so fairly and with an open mind (while acknowledging that members are also acting in a political capacity).<sup>27</sup> The commissioner determines if the complaint is sustained, but council’s duty is to consider and respond to the commissioner’s report.<sup>28</sup> The council or local board decides what steps to take, including voting on appropriate penalties and/or remedial actions.

Complaint protocols should set out the respective roles of the commissioner and council.

### **Note the respondent’s right to participate**

In the interest of fairness, members whose conduct is the subject of an integrity commissioner’s report should be given a reasonable opportunity to address council or the local board about the report and any potential penalties and remedial measures.<sup>29</sup> While the member cannot vote on the matter, they can attempt to influence the decision despite their pecuniary interest – a specific exception in the *MClA* permits this [*MClA*, s. 5(2.1)].

Complaint protocols should set out how the member will be able to address a report, including whether it will be in writing, orally, or both.

### **Consider including a process for reopening an inquiry**

Municipalities can choose to give integrity commissioners discretion to reopen inquiries. Complaint protocols should set out under what circumstances this can occur – e.g., in cases where new evidence is submitted – and the process for doing so. They should also specify any time limitation for requests to reopen inquiries and the process for reporting back to council.

## **Best practices specific to a *Municipal Conflict of Interest Act* inquiry protocol**

There are specific statutory requirements relating to applications alleging contraventions of the *Municipal Conflict of Interest Act* that should be reflected in complaint/inquiry protocols.

An integrity commissioner may conduct “such inquiry as he or she considers necessary” [s. 223.4.1(7)] regarding *MClA* contraventions, and may hold a public meeting to discuss it [s. 223.4.1(8)].

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<sup>26</sup> *Chiarelli v. Ottawa (City of)*, 2021 ONSC 8256 at para 147.

<sup>27</sup> *Ibid* at para 151.

<sup>28</sup> *Ibid* at para 148.

<sup>29</sup> For instances where members were provided an opportunity to address council, see e.g. *Villeneuve*, *supra* note 12 at para 49; *Kroetsch v. Integrity Commissioner for the City of Hamilton*, 2021 ONSC 7982 at paras 69–72.



### **Explain who can make an application**

Unlike in code of conduct cases, only an elector (a person entitled to vote in an election for the body in question) or a person demonstrably acting in the public interest can make an application to the commissioner regarding an alleged *MCIA* contravention [s. 223.4.1(2)]. Complaint/inquiry protocols should specifically outline these requirements for applications made under the *MCIA*.

### **Note the required time limits to file applications and for completing an inquiry**

An application under the *MCIA* can only be made to the commissioner within six weeks of when the applicant became aware of the alleged contravention [s.223.4.1(4)] or within six weeks of voting day if the applicant became aware of the alleged contravention after nomination day [s. 223.4.1(5)]. Complaint/inquiry protocols should reflect these time limits.

There is a strict 180-day time limit within which integrity commissioners must either terminate or complete *MCIA* inquiries [s. 233.4.1(14)], and the *Municipal Act, 2001* does not provide for any extensions. Complaint/inquiry protocols should reflect that the clock begins to tick on the day the commissioner receives a completed application. No additional time is provided for the commissioner, regardless of whether they choose to conduct a preliminary review or engage in an informal resolution process.

### **Specify how applications must be made**

Applications regarding allegations of *MCIA* contraventions must be made in writing [s. 223.4.1(2)]. They must set out the reasons the applicant believes the member contravened the *MCIA*, and include a statutory declaration attesting that the applicant became aware of the alleged contravention during the applicable six-week limitation period [s. 223.4.1(6)]. Complaint/inquiry protocols should include these requirements.

### **Set out the process and requirements for completing an inquiry**

After completing an inquiry, a commissioner may choose to apply to a judge under section 8 of the *MCIA* for a determination as to whether a member has violated that Act [s. 223.4.1(15)]. This is discretionary; an application to a judge is not required even if a commissioner believes a contravention of the Act may have occurred, but the applicant must be advised [s. 223.4.1(16)].

Integrity commissioners must publish written reasons for their decisions [s. 223.4.1(17)]. Complaint/inquiry protocols should reflect this, as well as where and how the commissioner's reasons will be made public.

If a commissioner chooses not to apply to a judge, the applicant can do so directly. They have only six weeks to do so, from either the expiry of the commissioner's 180 day inquiry deadline, or the date the integrity commissioner advises that they will not be applying to a judge (whichever comes first) [MCIA s. 8(3)].<sup>30</sup>

No application to a judge can be made more than six years after the date of the alleged contravention [MCIA, s. 8(6)].

Given these time limits, complaint protocols should require commissioners to notify applicants as soon as possible once they terminate an inquiry or decide not to apply to a judge.

## Best practices for appointing integrity commissioners

Every municipality must make the services of an integrity commissioner available, either by appointing a commissioner [s. 223.3(1)], or by making arrangements for another municipality's commissioner to provide this service [s. 223.3(1.1)–(1.2)]. The commissioner is not required to be an employee of the municipality [s. 223.3(5)].

Integrity commissioners deal with complex, sensitive issues. It is important that they carry out their duties in a way that earns them the trust and confidence of the community and the members whose conduct they oversee. It is also important that the municipality have a formal, transparent appointment process.

Municipalities should consider the following best practices in making such appointments.

### 1. Research potential appointees

During the recruitment process, municipalities should obtain as much information as possible about prospective integrity commissioners' services, skills, experience and availability, in order to make informed decisions about their qualifications. Municipalities should consider factors like experience with local government and municipal law in Ontario, understanding of administrative fairness, and written and oral communication skills.

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<sup>30</sup> The applicant also has 6 weeks to apply to a judge directly if the commissioner's inquiry was terminated at the start of a regular election: *Municipal Conflict of Interest Act*, *supra* note 4, s 8(3).

## 2. Appoint by resolution or by-law

When appointing an integrity commissioner or making arrangements to use one appointed by another municipality, municipalities should do so via a resolution or by-law. A new integrity commissioner should be appointed promptly if the role is vacant, for instance, if the incumbent retires or their term expires. The courts have recognized that an appointment by-law can apply retroactively.<sup>31</sup>

## 3. Establish clear terms of reference

Terms of reference that set out the integrity commissioner's duties can help council, the public, and the commissioner understand the role and the processes to be followed.

Terms of reference should detail:

- The duties of the integrity commissioner, including any obligations to report to council;
- That the integrity commissioner is intended to perform in an independent manner;
- The scope of issues that the integrity commissioner can investigate, including the code of conduct and any additional responsibilities assigned by council;
- If and when the integrity commissioner may delegate their duties and the process they should follow to do so. Delegation must be in writing and can be to anyone other than a member of council [s. 223.3(3)];
- Indemnification of the commissioner, as required by s. 223.3(6) of the Act;
- That the municipality or local board will pay the costs associated with a commissioner applying to a judge under the *MCIA* [s. 223.4.1(18)], and specify whether costs of any associated appeals will be covered; and
- Under what circumstances the commissioner can be removed or replaced, including provision for how any ongoing inquiries will be dealt with if this occurs.

## 4. Set a fixed term

To reinforce their independence and reduce the risk of political interference, integrity commissioners should be appointed for a fixed term, subject to dismissal by council. Council should have the option to renew or extend the commissioner's term, and the authority to dismiss and replace the commissioner when necessary. Decisions to dismiss or replace an integrity commissioner should be well informed, and evidence-based.

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<sup>31</sup> *City of Elliot Lake (Integrity Commissioner) v. Patrie*, 2023 ONSC 223 at para 82.

## 5. Avoid conflicts of interest

Municipalities should require integrity commissioners to declare, as a condition of their appointment, that they have no potential conflicts of interest, including financial interests, which might interfere with their ability to carry out their role independently. Municipalities should impose an ongoing obligation on commissioners to declare any potential conflicts that might arise during their term, and define the process for doing so.

An integrity commissioner's independence, both real and perceived, from the council, local boards and municipal staff should be maintained to the greatest degree possible. Integrity commissioners should be prevented from taking on other roles or responsibilities for the municipality during the time they serve as commissioner, including acting as legal counsel, municipal clerk, workplace harassment investigator or policy advisor.

When integrity commissioners carry out multiple functions in a municipality, there is significant potential for public confusion, distrust, and both real and perceived conflicts of interest. This practice undermines public confidence in the independence of integrity commissioners and their decisions, and it should be avoided.

### Case Examples

Our Office received a complaint about the investigative process followed by an integrity commissioner. The municipality did not have a complaint protocol in place. The integrity commissioner told our Office they<sup>32</sup> adopted their own personal practice when reviewing complaints. However, it was not clear to the public or to council members what process would be followed. After our staff spoke with municipal officials, the municipality adopted a complaint protocol that formally set out the process.

A group of residents complained to the Ombudsman that an integrity commissioner shut down an inquiry because the same allegations were being investigated by local police, but did not re-open the matter when the police closed their file. Council ultimately referred the matter back to the integrity commissioner, and amended the municipality's code of conduct to clarify that if a complaint is closed because of a third-party investigation, it should be reopened upon the completion of that third-party process.

We reached out to a municipality that does not allow non-residents to make complaints to the integrity commissioner, after a non-resident raised a concern about an interaction with a council member acting in their official capacity. The Ombudsman wrote to the municipality to encourage it to remove the barrier to making a complaint. Council declined to do so, but the Ombudsman continues to monitor this case closely.

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<sup>32</sup> Where possible, we confirm the gender of people referred to in case examples, but in some cases, to protect an individual's identity, gendered or non-binary pronouns are randomly chosen.

After waiting a year and a half to hear back from the integrity commissioner about his complaint about a councillor's conduct, a man contacted our Office. Our staff noted that there were no timelines in the municipality's complaint protocol, and discussed the delay with municipal staff. They encouraged the integrity commissioner to complete his review, and he issued a report on his investigation shortly thereafter.

A council member complained to us that the integrity commissioner did not give him an opportunity to review her report before she made it public. He felt this was unfair. After we contacted the municipality about this concern and discussed best practices for giving members a chance to respond, the municipality adopted a complaint protocol that includes a preliminary reporting process.

We received a complaint from an individual who felt unable to make a complaint to the integrity commissioner, as the facts related directly to advice that the integrity commissioner had provided to a member of council while acting as municipal clerk. We noted that it is not a best practice for commissioners to play multiple roles with respect to the same municipality.

An integrity commissioner also acted as an external governance consultant for a municipality. We investigated a closed meeting that the integrity commissioner attended. We noted that the lack of clarity about the capacity in which the integrity commissioner attended the meeting, either as integrity commissioner or external governance consultant, contributed to confusion and concerns that the meeting was improperly closed.