

January 5, 2022

**SENT BY EMAIL TO:**

Mayor and Members of Council  
The Municipality of Arran-Elderslie  
1925 Bruce Road 10, Box 70  
Chesley, ON N0G 1L0

**Attention: Christine Fraser-McDonald, Clerk**

Dear Ms. Fraser-McDonald:

**Re: Report of the Integrity Commissioner**

Please accept this letter as my report to Council, covering my work for the Municipality since my report of June 14, 2021.

**Advice and Inquiries**

I have received no requests for advice or inquiries, over the past seven months.

**Recurring Issues**

I want to take this opportunity to review with Council my approach to two issues that I find myself dealing with on a regular basis; anonymous complaints and the recording of confidential information in a closed meeting.

In a recent report for another municipality where I have been appointed Commissioner, I explained my approach to anonymous complaints.

Speaking for myself, to identify or not to identify the complainant is one of the first questions that needs to be answered when a complaint is received. Leaving aside instances where the particular Code of Conduct requires the disclosure, in my view, the answer turns on whether it is necessary that the respondent know the identity of the complainant so as to be able to make a “full answer and defence” to the allegations. If so, generally speaking, the respondent should be told the name of his or her accuser. An example might be a complaint of bullying or intimidation against a person.

On the other hand, if the identity of the complainant is not material to the specific allegation and withholding his or her identity does not in any way prejudice the respondent’s ability to respond, generally speaking, the name should not be revealed. For example, allegations of conflict of interest or improper use of municipal resources would usually not require the

respondent to know the name of the accuser; there either was a conflict or an improper use of a resources or there wasn't. ... I believe that this approach best balances the obvious need for protection of a "whistle blower" against the right of a respondent to properly answer the complaint.

On confidential information in the context of closed meetings, I explained to a Municipal Clerk:

As you know, under section 239(1) of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended (the "Act"), subject to the exceptions in section 239(2), all meetings of Council shall be open to the public. The Act provides no guidance as to the actual methods or mechanics of ensuring that information discussed or used in the closed session part of the meeting is kept confidential.

What is clear from both the Act and the Procedural By-law is that, in certain circumstances, the public may be excluded from meetings of Council, and that anything discussed in the closed part of a meeting of Council must be kept confidential. As well, all printed confidential materials distributed at the meeting must be returned to the Clerk at the end of the meeting for destruction. What is less clear, however, is whether or not members of Council are at liberty to take notes of the discussions, either by hand in a hard copy or digitally.

On the one hand, the taking of notes, in whatever form, in a closed meeting discussion does not, in and of itself, constitute a breach of the prohibition against disclosing or discussing information that has been discussed in a closed session. Moreover, it is entirely plausible that the member is taking the notes solely for his or her own purposes, as a record of the discussion for use as a memory aid; the purpose of the recording does not necessarily portend disclosure.

On the other hand, I can think of several reasons why the practice of recording the discussion is a bad practice. First, if there were to be an improper disclosure, one shown to have revealed a very detailed account of the discussion, the member or members who recorded the session would be the first to come under suspicion.

Second, the presence of a note-taker, other than the Clerk, in the midst of the closed meeting may serve to put somewhat of a chill on the discussion, as members feel less free to speak openly knowing that their words are being recorded (and maybe not entirely accurately). Finally, whether through inadvertence by the member or a deliberate hack by a third party, the creation of a hand-written or digital transcript of the meeting creates a level of risk that does not exist if the discussion is not recorded, but only preserved in the

memory of the attendees. (This final complication is obviously obviated in situations where the closed session is officially recorded by audio or video.)

In conclusion, while the recording of the discussion may not constitute a transgression of the rule against disclosure, it may affect the openness of the discussion and will add to the risk of disclosure, two good reasons to avoid the practice. Accordingly, it would be my advice that no one but the Clerk or Deputy Clerk take notes in any way during a closed meeting. If it is the will of Council that a recording be made, I would suggest that the recording should be an audio or an audio/visual recording, made through the Clerk's office.

## **Rules About the Election**

As we know, the next municipal election will be held on Monday, October 24, 2022. This date is significant for a number of reasons but, for the purposes of my duties under the Act, it means that if I have not completed an inquiry before nomination day (Friday, August 19, 2022, between 9:00 a.m. and 2:00 p.m.) I must terminate the inquiry on that day.

If an inquiry is terminated, I cannot commence another inquiry in respect of the matter unless, within six weeks after voting day in a regular election, the person or entity who made the request or the member or former member whose conduct is concerned makes a written request to me that the inquiry be commenced.

During the period of time starting on nomination day:

1. There shall be no requests for an inquiry about whether a member of Council or of a local board has contravened the code of conduct.
2. The Commissioner shall not report to the municipality or local board about whether, in his or her opinion, a member of Council or of a local board has contravened the code of conduct applicable to the member.
3. The municipality or local board shall not consider whether to impose the penalties referred to in subsection (5) (reprimand or suspension of remuneration) on a member of Council or of a local board.

For inquiries under the *Municipal Conflict of Interest Act*, no application may be made to the Commissioner during the period of time starting on nomination day and ending on voting day.

## **Integrity Commissioner's Message**

As municipal Councils in Ontario finish the third year of this term and start in on the final leg, I am sensing a certain level of fatigue setting in. It may be that the excitement and enthusiasm that greeted the beginning of the session has been subdued by the long hours, late nights and seemingly endless important issues that you are called upon to consider and deal with. The fact that most of your term has been in the midst of a pandemic has certainly contributed to any feelings of exhaustion and discontent.

# H.G. ELSTON

Barrister & Solicitor | Integrity Commissioner

Against that backdrop and knowing that you will each have to make a profoundly personal decision within the next six months or so as to whether to again seek public office, I humbly offer the following thoughts:

1. Whether it was your first term or your tenth, you have undoubtedly learned much about your community, its issues and its residents. If you feel you have made mistakes or have regrets, remember that these experiences serve to make you a better Member of Council and a stronger leader. Science tells us that there is a causal connection between failure and future success. As Nietzsche said: "What does not kill me makes me stronger".
2. For all the celebrations with family and friends, and all the personal time and favourite activities that you have had to miss because of your duties as a Member of Council, ask yourself whether, despite the sacrifices, you are happier and feel more connected to your community.
3. Finally, have you achieved what you set out to achieve, or is there unfinished business or on-going projects that you can help to complete? Think of these as part of your legacy to your community.

I look forward to working with you as you finish out your term and hope you will forgive my proselytizing.

Yours very truly,



H.G. Elston

c.c. Sylvia Kirkwood, Chief Administrative Officer  
Julie Reid, Deputy Clerk