

# LIDSTONE & COMPANY

Barristers and Solicitors

June 14, 2023

BY EMAIL

Nanaimo Regional District  
6300 Hammond Road  
Nanaimo, BC, V9T 6N2

**Attention: Sarah Nixon, GM Corporate Services**

**Re: CODE OF CONDUCT**

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## INTRODUCTION

You have asked us to provide a report regarding the options and considerations that a board may consider with respect to codes of conduct. In that respect you have asked about the content of model codes of conduct.

A code of conduct is a written document which sets out shared expectations for conduct or behaviour in advance of a concern about a perceived breach. Rather than trying to delineate the details of expected behaviour in a crisis, a code of conduct sets those expectations in advance. As such it is a tool for good governance.

There is no such thing as a model code of conduct. Subject to the legislated requirements, the expectations of a governing body are determined by the “DNA” of the board. The DNA is revealed during board discussions regarding this issue and the code of conduct which works best for that board is the “model code of conduct” for that board.

Also, while the process of creating a Code can be a useful process, it is up to the Board as to whether they wish to simply adopt a Code from another jurisdiction. There are, for example, Codes which you can download from certain local governments sites that still have headings and metadata from other local governments.

In addition, due to differences between regional districts and other local governments, care should be taken to ensure that the applicable “template” for a regional district is used.

## LEGISLATIVE BACKGROUND

Board consideration of whether to adopt a new code of conduct or amend an existing code of conduct is required by section 113.1 of the *Community Charter*, (made applicable to regional district boards by section 205 of the *Local Government Act*). If the board does not wish to adopt a new code or amend an existing code it must provide the public with its reasons for its decision, (CC s. 113.1(3)).

Section 113.1(2) requires a board to consider prescribed principles for codes of conduct. Those prescribed principles as set out in section 2 of BC Reg. 136/2022 *Principles for Code of Conduct Regulation*:

- (a) council members must carry out their duties with integrity;

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- (b) council members are accountable for the decisions that they make, and the actions that they take, in the course of their duties;
- (c) council members must be respectful of others;
- (d) council members must demonstrate leadership and collaboration.

On January 10, 2023, the Board passed a resolution requesting a staff report on options for the creation of a Code of Conduct for the Board:

*It was moved and seconded that staff return to the Board with information on options for Code of Conduct approaches, such as those adopted in other jurisdictions, including the City of Nanaimo.*

### **PRELIMINARY DECISIONS**

There are two preliminary decisions that a board must make:

- a) Is the code of conduct to be set out in a policy or a bylaw?

*The Community Charter does not require a regional district to adopt a bylaw. There is no “best way”. Both options have been chosen by boards and council in British Columbia. A policy may be interpreted as a guideline, is easier to amend, and is frequently more detailed. A bylaw sets out binding requirements but is less flexible.*

- b) Is the code to be a lengthy detailed document or a brief statement of expectations and behaviours?

*A brief code will use more general language which allows more flexibility in any given circumstance. However, with flexibility comes ambiguity and a possible lack of specific guidance in a particular situation. A lengthy, detailed code sets out more particulars, which particulars may be difficult to apply in a given circumstance.*

### **CODE OUTLINE**

The following is a general outline of the issues and layout of a Code of Conduct:

1. **Introductory Provisions:**
  - a. **Definitions;**
  - b. **Application;**
  - c. **Interpretation.**
2. **Foundational Statements**
3. **Standards of Conduct:**
  - a. **Conduct of members generally based on foundational principles;**
  - b. **Basic compliance with laws of the land;**
  - c. **Contact with staff and others;**
  - d. **Respect for Procedural Requirements;**
  - e. **Conduct of public meetings and statutory or other public hearings;**
  - f. **Improper Use of Influence;**

- g. **Conduct respecting Lobbyist;**
  - h. **Conflicts of Interest;**
  - i. **Election Activities;**
  - j. **Discrimination;**
  - k. **Confidential information;**
  - l. **Closed Meeting Materials;**
  - m. **Use of Public Resources.**
  - n. **Communications:**
    - i. **Social media;**
    - ii. **Interactions with public and media/Communications Protocol;**
    - iii. **Procurement processes.**
  - o. **Specific Requirements:**
    - i. **Intellectual Property;**
    - ii. **Gifts and personal benefits;**
    - iii. **Remuneration, expenses, benefits;**
    - iv. **Mandatory Leave of Absence if Charged with a criminal offense until resolved.**
4. **Enforcement:**
- a. **Complaints:**
    - i. **Who can bring complaint;**
    - ii. **Limitation Periods?**
    - iii. **Election Period Restrictions?**
  - b. **Resolution processes:**
    - i. **Initial Informal Resolution Efforts;**
    - ii. **Assisted Resolution;**
    - iii. **Mediation;**
    - iv. **Formal Investigation;**
    - v. **Appointment of permanent or case by case investigator?**
      - 1. **Process Investigator must follow**
      - 2. **Findings reports**
      - 3. **Recommendation options**
      - 4. **Confidential nature of reports**
      - 5. **No comments pending reports**
      - 6. **Extension of time limits.**
    - i. **Consequences:**
      - 1. **Resolution Options**
      - 2. **Prohibition against reprisals, retaliation**

### 3. Restrictions on public comment

#### 5. Consequential amendments to Bylaws and existing policies

#### OPTIONS FOR CONSIDERATION

1. **Introductory Provisions:** These are general provisions setting out the purpose of the Code, its scope, application, and interpretation. These provisions are necessary to any Code.
  - a. **Definitions:** The definition section's importance should not be overlooked. *For example, the definition of "workplace" can be broad or narrow encompassing just the RD offices or places where a member is involved in board related work or travel.*
  - b. **Application:** Who is subject to the provisions of the Code? *In regional districts it is normal for the Code to apply to appointed directors, their alternates, members of committees of the Board and members of commissions. While some Codes do apply to staff as well, there are usually existing policies that apply to staff and if the Code is to apply to staff, consideration must be given those existing policies as well as consequences for existing employment contracts and collective agreements.*
  - c. **Interpretation:** This is usually an administrative section which simplifies subsequent drafting.
2. **Foundational Statements:** These provisions set out at a high level the values and resulting principles that provide a foundation for the Code. It is desirable to have these statements to guide the drafting and justification for subsequent provisions. If adopting a bylaw some or all of these can be included in the preamble to the bylaw.

It should be noted that the legislation requires consideration of requirements to carry out duties with integrity and in a respectful manner demonstrating leadership and collaboration in an accountable manner. Additional key values may include accountability, leadership, and openness.

3. **Standards of Conduct:** These provisions described the conduct required.

The Board should be thinking about behaviours referenced in the Code that they seek to encourage or discourage. The standards of conduct should be clear and easy to interpret and apply so that Board members can readily determine whether or not they are meeting the standard. However, some boards/councils take a simpler approach and simply state: "The members shall align their conduct with the regional district's corporate values of ..." In that respect the language used should be simple and direct, avoiding the passive tone. The Code can deal with some or all the following areas:

- a. **Conduct of members generally based on foundational principles:** Some Codes of Conduct include provisions requiring compliance with provisions of the *Local Government Act* and *Local Elections Campaign Financing Act*. These are not necessary but can be included if the Code is viewed as a one stop shop for all information on the conduct of elected officials.

It can include, for example, requirements that restrict participation in civic events during an election period, distributing election materials during local government events, etc.

- b. **Basic compliance with laws of the land:** The minimum requirement is that elected officials comply with any laws that apply to them and their conduct. This provision should be included as its absence may be interpreted as a determination by the Board that failure to comply with legal requirements will be left the courts as opposed to Board processes; that the Board has declined to act for breaches of the law and has deferred to other law enforcement processes.

- c. **Contact with staff and others:** The premise of the Code requirement regarding contact with staff is that the board plays a policy rather than an administrative role. This premise can be exemplified in a direction:
- that all communications are through the CAO
  - that staff, volunteers, contractors, and other similar parties are not to be interfered with in the exercise of their duties; and,
  - that staff, volunteers, contractors, and others are to be treated with respect and dignity.
- d. **Respect for Procedural Requirements:** this is a requirement that the Board be familiar with the Procedural Bylaw and abide by its directions.
- e. **Conduct of public meetings and statutory or other public hearings:** Specifically with respect to public hearings there is a range of possible requirements. The caselaw recognizes the political context of public hearing matters and the fact that in the midst of public discourse various positions can be expressed. Some Codes require that board members have an open mind on the matter and not discuss their positions. Others simply require members not to have a closed mind. The latter more closely aligns with current law.
- f. **Improper Use of Influence:** This is linked to behaviour described as “exercising the influence of their office in the good faith exercise of duties”. In other words, board members shall not use their office to speed up a process such as the issuance of a building permit for their own residence or for other residents or businesses.
- g. **Conduct respecting Lobbyist:** The primary concern here is that members do not jeopardize hearing processes by receiving information from an applicant after a public hearing. However, there is a balancing that must be struck here since members cannot stop the receipt of external information that is sent to them unbidden.
- h. **Conflicts of Interest:** These provisions are not required but can be included to provide additional guidance regarding conflicts of interest. Care needs to be taken to ensure that any definitions of conflict of interest align with statutory definitions and the caselaw.
- i. **Election Activities:** This section would prohibit board members from performing official civic duties during the election period without board approval. This type of section is not as relevant to board members and does not need to be included in a regional district Code.
- j. **Discrimination:** These provisions can include requirements that members do not attempt to influence personnel decisions, (including hiring, firing, or disciplining), except when those decisions are directed to the Board or its committees.
- k. **Confidential information:** This provision will provide guidance about when personal information can be disclosed. In all cases, there is a requirement to comply with FOIPPA requirements.
- l. **Closed Meeting Materials:** Regional Districts are in unique positions regarding disclosure of closed meeting materials since the Directors are both Board members and councillors. The default provision is that closed meeting materials cannot be disclosed to any third parties. That would include the Directors’ own municipal council, municipal CAO, and municipal senior staff. This is the approach that is now set out in the Nanaimo Regional District’s bylaw;

disclosure is prohibited unless there is a specific resolution to release. The Board may take an alternative approach which permits disclosure to participating areas councils in closed meetings and the municipal CAO, (or additional senior staff), subject to confirmation of compliance with the Regional District's requirements regarding security, disclosure, and possibly the execution of a Non-disclosure Agreement by municipal staff. If such an approach is taken, this limited disclosure would be permitted subject to a specific Board direction that disclosure is not to be made.

m. **Use of Public Resources:** These are standard provisions regarding the use of the regional district's resources, personnel, intellectual property, or other assets for personal, private, or business advantages.

n. **Communications:**

i. **Social media:** This normally includes prohibitions against publication of confidential or closed meeting information. However, it can include delineation about when a Director must indicate that they are expressing an opinion, on which platforms such matters can be published, obligations to monitor social media accounts to prevent abuse by third parties, etc.

These provisions may also address issues of bullying and the need to avoid creating evidence of bias that might undermine a requirement regarding a statutory or other public hearing.

ii. **Interactions with public and media/Communications Protocol:**

This section would set out provisions regarding the role of official spokesperson(s) for the Regional District and Board members communications on Regional District matters. It may also include an obligation to accurately communicate Board decisions, even if the members disagree with those decisions.

iii. **Procurement processes:** This section would address prohibitions from interacting with third parties who seek to submit, or have submitted, bids, tenders, and expressions of interest for regional district procurement processes. Normally there is a total prohibition on such interactions.

o. **Specific Requirements:**

i. **Intellectual Property:** Defines intellectual property and confirms Regional District ownership and control over such property.

ii. **Gifts and personal benefits:** Section 105 and 106 of the *Community Charter* address the issue of gifts. Section 106 requires Directors to disclose any permitted gifts in excess of \$250. The Board could also broaden the definition of gifts and set a lower dollar limit if it wishes. For example, the Regional District of Central Okanagan has set a gift limit of \$50.00 but has acknowledged the ability of Directors to receive gifts that are an incident of protocol reasonably related to their duties but limit the ability to receive multiple gifts from the same source or individual.

It should be noted that the provisions of a Code of Conduct cannot lessen the requirements of the *Charter*; it can lower the limits to make gift receipt more restrictive, but cannot permit the acceptance of gifts greater than \$250 contrary to the provisions of the *Community Charter*. The Board can also require additional particulars of

disclosure regarding gifts such as the source, date of receipt, and circumstances of event at which it was given and require in forfeiture of the gift in circumstances delineated in the Code.

The Code should also list those items not considered gifts or personal benefits such as compensation authorized by s. 105 of the *Community Chart*, reimbursement for out of pocket expenses, a lawful contribution to an elections campaign and, possibly, a random draw prize at an event.

iii. **Remuneration, expenses, benefits;**

- iv. **Mandatory Leave of Absence if Charged with a criminal offense until resolved.** This is required by sections 109.1-109-3 of the *Community Charter*. Since it is dealt with in the CC it is not necessary to include it in the Code. However, including the CC requirements here does provide members with notice of the requirements of the *Act*.

4. **Enforcement:** These provisions deal with matters related to enforcement of the Code from the initial complaint process to consequences of findings of a breach of the Code. While older codes of conduct do not have such provisions, the current trend is to include these enforcement processes and guidelines.

There are advantages to creating enforcement processes which trigger particular actions by particular responsible parties rather than relying on *ad hoc* responses. For example, appointing a permanent advisor, mediator, ethics commissioner, or an investigator to undertake the complaint process rather than appointing an investigator for each complaint avoids allegations of bias and unfairness that can arise if appointments are made on an *ad hoc* basis in response to a particular complaint.

In addition, it is preferable to have a process with resolution steps which proceed from informal to more formal processes. For example, the initial step could be person to person, with or without the assistance of an advisor, followed by an optional mediation and then a formal investigation and review.

There is also a trend in some jurisdictions to attempt broader transparency in the enforcement of Codes of Conduct. This creates a tension between the obligations of regional district to protect the privacy of individuals/personal information and a desire to hold censure and sanction hearings in public as opposed to closed sessions.

In addition, it is necessary to adopt processes that meet procedural fairness requirements. We have appended a separate memo regarding this issue below.

The standard provisions address the following.

- a. **Complaints:** There are a variety approaches about who can make a complaint and about whom. The Code applies to appointed Board members, their alternates, and appointees to Board committees or commissions. Any complaints must be directed towards the actions of those who are required to comply with the Code.

The permitted complainants can be restricted to members and staff or broadened to include members of the public and former board or committee members. The trend is to narrow the classes of complainants rather than permitting members of the public to bring complaints for violations of the Code. This reduces the possibility of the public using the Code of Conduct for political purposes.

## b. Complaints: Process

- i. **Limitation Periods** The Code can limit the time within which a complaint must be brought. For example, 6 months from the last activity which might be the subject the complaint is the normal limitation period. If there is no limitation period, complaints might be difficult to investigation because of the expiry of time, loss of evidence and information, and the fading of memories. It is best practice to have a reasonable limitation period to ensure that complaints are brought quickly.
- ii. **Election Period Restrictions:** Most Codes prohibit the ability of complaints to be made during the election period in order to avoid politicization of the complaint process.
- iii. **Submitted to whom?:** The complaints could be submitted to the CAO, Chair of the Board, an investigator, or an ethics commissioner. However, the receipt of complaints by other than an independent investigator raises the issue of bias in processing as well as confidentiality. Generally, the Codes in BC local governments tend to appoint the CAO as the first recipient of a complaint with an option for the CAO to retain an advisor to address the issue.

There should be a requirement that only complaints in writing will be responded to and that they will be treated in confidence.

## c. Steps to Resolution

- i. **Mutual Resolution:** The Code should encourage the complainant and the person about whom a complaint is made to attempt to resolve the matter directly or with the assistance of an advisor. However, it is not advisable to require the parties to undertake this step as the circumstances may not permit the persons to address the problem without increasing rancor between them.

The resolution that would normally be acceptable at this stage would be an apology and, if applicable, a promise to stop the contravention now and in the future.

- ii. **Mediation:** This step involves the use of a mediator or an advisor. The Code should indicate how the mediator will be chosen or appointed and who has a right to do so. It is good practice, as noted above, to have a pool of potential mediators from whom a particular mediator can be selected.

The Code should also address the costs of the process. Normally, in light of the fact that the ultimate purpose of this process is to ensure the good governance of the local government, the costs will be born by the local government.

If this process is not successful, the parties may move on to the formal complaint process.

### iii. Formal Review

1. **Submission of a Formal Complaint:** The initiation of a formal complaint starts with the delivery of a complaint in writing to the person designated by the Code. The designated person may be a staff person or an independent third party.

The considerations to apply here include the desirability and need for processing independence and confidentiality.

2. **Investigation Process:** This section should delineate the investigation process including:



- the steps the investigator may or must take;
- the investigator's ability to compel witnesses under section 134 of the *Community Charter*;
- process and information confidentiality including agreements that the investigators work may not be used or disclosed if the parties are subsequently engaged in litigation;
- the investigator's ability to compel the participation of the complainant and person about whom the complaint is being made;
- the investigator's access to corporate records; and,
- the ability of the parties to the process to engage legal counsel or some other representative for the process.

Some Codes have included council/board conduct, control, or input in the investigation process. However, such involvement raises the spectre of bias unfairness, and politicization of the process and it is recommended that the investigator be delegated responsibility rather than subject to ongoing direction from the Board or staff.

3. **Investigation Report:** The investigation report should be required to contain certain essential elements such as:
  - a description of the allegation(s);
  - a summary of the evidence of the parties and witnesses; and,
  - a determination whether, on the balance of probabilities, a contravention of the Code occurred.

The Code should clarify that the Report and work of the investigator are confidential.

The Code may also request or require that the report contain recommendations as to the potential outcome, response, or resolution. However, this raises the spectre of limiting the Board's discretion.

We generally recommend that the report from the investigator be presented to the Board in closed meeting. However, as noted above, there is a trend to hold such hearings in open meetings in order to ensure transparency. One of the difficulties with presenting the report in public and having the censure and sanction hearing in public is the difficulty of ensuring that all of the information needed for the Board to make a decision is presented while also ensuring that personal information is not disclosed. In that sense, a report going to a public meeting will have to be very carefully drafted to ensure that personal information is not accidentally disclosed. Appended as a separate opinion is an in depth consideration of this option and the requirements for procedural fairness.

4. **No comments pending reports:** This would be a requirement that the Board/Committee members and the parties involved refrain from commenting, publicly or at meetings, regarding the process, report, or related matters prior to the presentation of the investigation report regardless of whether that presentation is in a public or closed meeting.

5. **Extension of time limits:** This is a desirable provision since due to vacations, illnesses, nature of the inquiry *etc.*, it may not be possible to complete the investigation process in the time period required by the Code.
- d. **Consequences:** The Board should consider whether there are differences in the consequences that may be applicable to members appointed to the Board and appointees to committees or commissions.
- i. **Board Considerations:** Guidance in the Code of Conduct for Boards regarding the matters it may consider in determining the appropriate measures to be taken in response to a finding of a contravention of the Code are helpful. It is also helpful for the findings in the report to be taken at face value to avoid the board consideration turning into an appeal process.

The factors can include:

1. the degree and nature of the conduct;
2. whether there was a single or repeated violations of the Code;
3. whether the member was informed about the purported breach and continued the conduct;
4. the relationship between the parties;
5. the impact of the breach of the Code; and,
6. the presence or absence of an apology.

e. **Resolution Options**

- i. **Sanctions/Censure:** It is not recommended that a Code of Conduct set out pre-set sanctions or censure requirements. Rather the Board may wish to set out parameters which decision makers must consider. For example; that the measures must be proportionate to the findings of the Board with respect to the specific complaint. The Board must not consider other past behaviour or histories that were not the subject of the complaint process.

The possible response could include:

- a) Issuing a formal warning letter;
- b) Requirement to take training;
- c) Restricting access to staff or regional district facilities;
- d) Issuing a letter of reprimand;
- e) Publication of a letter of reprimand;
- f) Request for a written or verbal apology to the board and/or impacted individuals;
- g) Publication of apology;
- h) Rise and report the motion and, subject to privacy considerations, details of the offense; and,
- i) Restrictions of activities, such as revoking an appointment to a committee, board, or commission (which may result in a reduction of pay or stipend corresponding to a reduction in duties related to that appointment).

While there is no need to set these out specifically in the Code, delineating them may assist the Board in narrowing its consideration of possible responses.

Unlawful sanctions would include prohibiting a council member from fulfilling their statutory obligations, such as by preventing them from attending open or closed council meetings, or preventing members from communicating with constituents or expressing opinions.

*Skakun v. Prince George (City)*, 2011 BCSC 1796; *Dupont v. Port Coquitlam (City)*, 2021 BCSC 728.

In addition, there may be a desire to reduce the compensation provided to the director. This option is not available unless the Board has adopted a bylaw, (usually as part of a Board remuneration bylaw), that authorizes the Board to reduce compensation to a director if that director is found to have breached the Code of Conduct. The bylaw provisions may either provide permissive language, (the Board may reduce remuneration by X% where there is a finding of a breach of the Code of Conduct), or mandatory language, (where there is a breach of the Code of Conduct the director's remuneration will be reduced by X%). Where the language is permissive, the hearing process will have to include notice of an intention to reduce compensation and provide the director with an opportunity to address that issue. (See attached memo)

- ii. **Prohibition against reprisals, retaliation:** These provisions will address the consequences of a finding of reprisals or retaliation.
- iii. **Actions to be taken if Complaint totally without merit:** If the investigator determines that a complaint has been filed frivolously, vexatiously, or with a political or personal motive to discredit or harm a member, then that may also be considered a violation of the Code.
- iv. **Restrictions on public comment:** Section 22 of FOIPPA provides that a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. However, there are some Office of Information and Privacy Commissioner decisions that indicate that disclosure of the fact of censure, (as opposed to the report and conclusions), is not an invasion of the members personal privacy. *City of White Rock, Re*, 2019 BCPIC 20 (Order F19-18)

If the censure and sanction hearing was in public the FOIPPA requirements still apply but as noted in the attached memo, elected Board members are not provided with unequivocal rights in this area as the FOIPPA rights may be modified by the need for governmental transparency.

The Code of Conduct should include provisions permitting the issuance of a press release. Obviously the press release and the release of other information would need to be reviewed by a qualified person to ensure that the release does not result in a breach of FOIPPA provisions.

- 5. **Acknowledgement/Confirmation Section:** The Code can include an acknowledgement section located at the end of the document which requires each member's signature indicating that they have read and understand the Code. These would be kept by the Corporate Officer together with the Oaths of Office.

6. **Consequential amendments to Bylaws and existing policies:** The review process is not complete until there has been a review of the existing bylaws such as the Procedure Bylaw and the Remuneration, Expenses, and Benefits Bylaw to determine if they or any Board or organizational policies need to be amended to align with the Code of Conduct. Amendments of other documents should proceed in tandem with the adoption of the Code of Conduct to ensure that there are no gaps during which there is ambiguity about applicable provisions.

Sincerely,

LIDSTONE & COMPANY

A handwritten signature in blue ink, appearing to be 'R. Hildebrand', written over a light blue circular stamp or watermark.

Ralph G. Hildebrand

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Direct: 236.838.4114

RH/rh

Attachments: City of Surrey Code of Conduct Bylaw  
RD Okanagan-Similkameen Policy

**MEMO RE: Process for Board Consideration of Motion of Censure and Sanction**

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This memo addresses some of the procedural issues raised by motions of censure and sanction. against a Board member.

A motion of censure and sanction is a tool available to a board to address a breach of the Code of Conduct by a Board.

Even though the authority to censure or sanction a Board member is not found in the *Community Charter* or the *Local Government Act*, the courts have confirmed that this authority can be implied. For example, the Court has confirmed that boards and councils may use motions of censure to express disapproval of a members' conduct, such as for unlawful or unprofessional behaviour including breaches of confidentiality. [See *Dupont v. The Corporation of the City of Port Coquitlam*, 2021 BCSC 728 [Dupont 2] at paras 22 – 26]

Because the meeting concerns potential future findings of conduct that may have an impact on the Board member's office, reputation and career, the Board member is owed a high level of procedural fairness in respect of the meeting at which any discipline or remedy is considered. It may be that procedural fairness standards are increased where the meeting is held in public.

There are two stages to what constitutes procedural fairness:

- (1) **Advanced Fair notice** of the meeting to discuss a motion to censure, of what the allegation is and what the potential punishment or sanction might be; and
- (2) **The right to be heard** at the actual meeting where the censure motion and possible sanctions are discussed and decided and the right to a fair hearing.

It is similar to the process to hear and consider the termination of a statutory officer pursuant to s. 152 of the *Community Charter*.

Fair notice is achieved by sending the Board member a letter giving notice of a meeting at which Board will consider the Board member's conduct along with a copy of a draft resolution Board will deliberate and a copy of the documents they will rely on. As part of the right to be heard, the Board member must be provided with an opportunity to make a presentation to Board, or make written submissions, prior to any decision to impose a consequence. The Board member must also be provided with the opportunity to retain legal counsel and for their legal counsel to address the Board prior to any consequences being considered and imposed.

If Board decides to consider a motion to censure and/or sanction a Board member following the receipt, review, and consideration of an investigation into a breach of the Code of Conduct, we recommend the following:

- 1) Consider a resolution to direct deliver to the member, on behalf of Board, a written notice of censure and sanction and draft resolution. The written notice should contain a summary of the reasons why the rest of Board is considering the motion/sanctions, which should detail the known facts regarding their conduct as well as all documents Board will consider; and

- 2) Advise the Board member at issue that they will have the opportunity to respond (orally or in writing) at meeting and that they may be accompanied by legal counsel who may make submissions to Board on their behalf.

We recommend giving the Board member at issue at least 10-14 days' advance notice of the hearing to enable them to retain a lawyer if they choose and prepare their submissions.

The Code of Conduct should set out whether the hearing will be in public or in a closed meeting. This will ensure that the Investigator has clear instructions regarding the need to protect personal information when drafting the report and will avoid allegations that a determination to hold a hearing in public is politically motivated.

### **Privacy Considerations for Publicizing the Censure or Sanction**

Where a board holds Censure and Sanction hearings in an open meeting, or discloses after a closed meeting that a fellow Board member has been censured or sanctioned, the requirements of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ("FOIPPA") must be considered.

There are Orders of the Office of the Information and Privacy Commissioner ("OIPC") that indicate that disclosure of information regarding the reasons for the censure of a Board member and their removal from committees is presumed to be an unreasonable invasion of personal privacy pursuant to s. 22(3)(b), (d) and (g) of FOIPPA :

22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(d) the personal information relates to employment, occupational or educational history;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party;...

Pursuant to s. 22(1), the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. That said, the OIPC has confirmed that s. 22 is intended to prevent only unreasonable invasions of personal privacy, not all invasions of personal privacy.<sup>1</sup>

If the personal information falls within a category set out in s. 22(3), the presumption can be rebutted. One basis for rebutting the presumption is contained in s. 22(2)(a) of FOIPPA, where "the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny".

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<sup>1</sup> Order 02-45, *Justice Institute of British Columbia, Re*, 2002 CanLII 42479 (BC IPC) at para 16, referring to Order 01-40, [2001] B.C.I.P.C.D. No. 41.

The Adjudicator in OIPC Order F05-18 stated:

What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy.<sup>2</sup>

Other OIPC decisions have confirmed that disclosure of the fact of a censure motion is not an unreasonable invasion of a Board member's personal privacy. For example, in Order F19-18<sup>3</sup>, an applicant made an FOI request to the City of White Rock for information relating to a Board member's censure and the reasons for it. It was not a case where the council proactively disclosed personal information. In that case, the council member disclosed confidential information in contravention of s. 117 of the *Community Charter* [duty of confidentiality]. The City withheld the information from disclosure on the basis that its disclosure would constitute an unreasonable invasion of privacy under s. 22 of FOIPPA.

The OIPC confirmed that the fact of the censure and the reasons for it were part of the councillor's "occupational history" within the meaning of s. 22(3)(d). Although the disclosure of such information is presumptively an unreasonable invasion of personal privacy, the Adjudicator determined the presumption was overcome on the basis of factors set out in s. 22(2) (a); namely, the fact the councillor was an elected official and was acting in his capacity as elected official when he disclosed the material. Essentially, the policy reasons in favour of disclosing and subjecting the elected official to public scrutiny were held to outweigh the privacy considerations in that case and the presumption was rebutted.

Based on the Order F19-18, and previous OIPC decisions, we are of the view that it is possible to disclose information relating to the fact that a Board member has been censured and/or sanctioned and how the Board responded to the reason for the censure or sanction. The removal from one or more discretionary appointments can also be disclosed as it can properly be considered to concern a Board member's "position, functions or remuneration as an officer, employee or member of a public body" within the meaning of s. 22 (4)(e) of FOIPPA and the regional district may disclose that information proactively pursuant to s. 33 (2) (b) and 22 (4) (e) by adopting a resolution to rise and report it out of in-camera.

However, the municipality must carefully consider the information it wishes to disclose on a case by case basis and weigh it against the various factors set out in s. 22 and s. 33 (2) of FOIPPA, especially if it decides to proactively disclose any further information about a censure motion.

We do not think Order F19-18 supports the proposition that *any* personal information of an elected official relating to a censure motion can be disclosed. For example, information relating to the *substance or deliberations* of a Board can be withheld. The personal information of other third parties (staff) would also need to be protected and withheld.

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<sup>2</sup> *College of Psychologists of British Columbia, Re*, 2005 CanLII 24734 (BC IPC), at para 49.

See also the Interpretation Note 3 regarding s. 22(2)(a) contained in the FOIPP Act Policy and Procedures Manual, published by the Ministry of Citizens' Services and Open Government, available online at [http://www.cio.gov.bc.ca/cio/priv\\_leg/manual/sec20\\_29/sec22.page?](http://www.cio.gov.bc.ca/cio/priv_leg/manual/sec20_29/sec22.page?)

<sup>3</sup> *City of White Rock, Re*, 2019 BCPIC 20 (Order F19-18).

That said, we think that information that is directly related to a Board member's conduct (for example that they were found to have breached the regional district's Code of Conduct), can be disclosed, as well as how the regional district responded to such conduct.

If Board wishes to disclose any personal information that is presumed to be an unreasonable invasion of personal privacy, Board ought to take a cautious approach and comply with the notice provisions set out in sections 23 and 24 of FIOPPA notifying the Board member and other third parties of its intention to disclose their personal information, what information they intend to disclose and give them an opportunity to make submissions against disclosure before making such a decision.

The penalties for a breach of FOIPPA are severe. Pursuant to s. 25.1, an employee, officer or director of a public body or an employee or associate of a service provider must not collect, use or disclose personal information except as authorized under FOIPPA. Pursuant to s. 65.4(1) and 65.5, contravening Part 3 is an offence. If a corporation commits the offence, an officer, director or agent of the corporation who authorizes, permits or acquiesces in the commission of the offence also commits an offence, whether or not the corporation is prosecuted for the offence. The potential penalty for an individual is a fine of up to \$50,000. For a corporation the fine may be up to \$500,000.

If there is a desire to issue a press release, it should be carefully vetted by legal counsel prior to release.

## **Procedural Requirements**

### **A. Commencing the Process and Giving Notice**

1. **Motion to consider a censure motion:** At an *in-camera* meeting, the Board should adopt a resolution to consider a motion of censure against the Board member at issue and to direct delivery of a written notice and draft resolution to the Board member at issue.

The meeting at which the censure motion itself is considered is commonly referred to as a 'censure hearing'. The censure hearing should be scheduled at least 10-14 days after delivery of the notice in order to give the Board member notice, an opportunity to retain a lawyer (if they choose) and an opportunity to prepare submissions.

2. **Give notice to Board Member at Issue:** A duty of procedural fairness lies on public authorities who are making decisions which affect the rights, privileges, or interests of individuals.<sup>4</sup> In the context of a censure hearing, the duty of procedural fairness requires that a Board member be given the following:
  - a. written notice that Board will be considering a censure motion on a specified date;
  - b. a summary of the reasons Board is considering a censure motion (which should detail the known facts regarding the Board member's misconduct with enough specificity that they can respond);
  - c. details of any proposed sanctions Board will be considering; and

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<sup>4</sup> *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.



- d. notice that the Board member will have an opportunity to address Board before it votes on the censure motion and that they may be accompanied by legal counsel who can make submissions to Board on their behalf, if they choose.

The Board member at issue should also be given a draft copy of the proposed resolution of censure or sanction.

If the Board member chooses to retain legal counsel to represent their interests, they may ask for indemnification from Board for some or all of their legal fees. Board can consider this request at the censure hearing. In our experience, it is uncommon for Board to agree to indemnify a Board member for their legal costs, though they have the authority to do so.

## **B. Censure and Sanction Hearing Process**

If Board does proceed with a censure hearing, the meeting should proceed as follows:

### **1. Chair of the Hearing**

- a. Unless the Chair is in a conflict because they are the subject of the censure and sanction hearing, the Board chair should preside at the meeting. Where the Chair has a conflict, follow the Board Procedure Bylaw provisions for who chairs a meeting in the absence of the Chair.

### **2. Open Meeting**

- a. If the Hearing is to be held in open meeting the board member should be advised about this in advance and prior to the meeting the Board should receive a “refresh” on the privacy and personal information limitations that must be met in the meeting.

### **3. Closed Meeting**

- a. A motion to permit attendance of persons other than municipal officers and employees, namely the solicitor or agent for the Board member and the municipality’s lawyer under s. 91 (2) (b);

### **4. Hearing**

- a. Mayor, Deputy Mayor or their delegate: *The purpose of this procedural fairness hearing is to allow [Board member] [and their solicitor] to make submissions to Board. They and their counsel will be given a reasonable opportunity to make submissions to Board regarding Board’s consideration of a censure and sanctioning motion further to the notice delivered to the Board member on [DATE]. Every document that Board might consider in relation to the motion was provided to the Board member along with the notice. Board members must keep an open mind during this hearing.*
- b. *I would now invite [Board member], [and their solicitor if so desired], to address Board regarding this matter. If you have a written copy, I would like you to hand Board a copy.*

### **5. Submissions by Board Member and their Solicitor**

*[no time limit]*

## **6. Questions from Members of Board**

It is not necessary to ask questions of clarification. However, if there are relevant questions of clarification on the Board member's presentation they may be asked. However, the intent is not to engage the member or their solicitor in a debate or discussion regarding facts or proposed sanction/censure motion. The member has right to be heard, not a right to argue or debate the matter. If Board members wish to ask questions, that should be agreed to before. Questions for clarification, if any, must not display any degree of bias and Board should be advised of that prior to the hearing.

## **7. Board Deliberation**

- a. Following the submissions, the Board member should be invited leave while the rest of Board deliberates and considers what they heard and read.
- b. Mayor, Deputy Mayor or their delegate: *Board will now debate and vote on the motion. [Board member at issue] has a conflict of interest in regard to Board's debate and vote on the motion. Accordingly, [Board member at issue] is requested to make the conflict statement and depart from the meeting room.*

*[Board member at issue and their solicitor, if any, are excused].*

## **8. Motion**

- a. A motion respecting the proposed resolution is
- b. Consider the resolution or parts of it, and vote on the motion; and
- c. Communicate the decision and copy of the resolution to the Board member at issue as soon as possible.