



REPORT TO
CITY OF VANCOUVER COUNCIL, COMPLAINANT AND RESPONDENT

In this matter of

AN INTEGRITY COMMISSIONER INVESTIGATION
ALLEGATIONS, FINDINGS & DECISION

Submitted by Lisa Southern
Integrity Commissioner
City of Vancouver

September 29, 2023

Background

On March 7, 2023, Mayor Ken Sim (the “Complainant”) brought forward a *Code of Conduct By-Law No. 12886* (“Code of Conduct”) complaint against Councillor Christine Boyle (“Cllr. Boyle” or the “Respondent”) to the Integrity Commissioner under Part 3 – Communications and Confidentiality, section 3.5 regarding disclosures to the public about how she voted at an *in camera* Council meeting (the “Complaint”).

This report is issued in accordance with section 6.32 of the Code of Conduct. In this report, I summarize my process and the evidence, make findings of fact with respect to the allegations set out in the Complaint, and conclude there was not a breach of section 3.5 of the Code of Conduct.

Process

After receiving the Complaint, I conducted a preliminary assessment of the Complaint and determined the allegations set out in it, if true, may constitute a violation of the Code of Conduct. Accordingly, on March 15, 2023, the Respondent was provided with notice of the Complaint.

On March 15, 2023, I asked the Complainant if he would be open to Informal Resolution. On March 17, 2023, the Complainant declined this process. I therefore determined Informal Resolution was not possible and the matter should proceed to a Formal Resolution process (i.e., an investigation; see sections 6.24 to 6.28 of the Code of Conduct).

On June 6, 2023, the Respondent provided a written response to the Complaint through her legal counsel. I requested and received relevant documents from the City of Vancouver (“City”), and reviewed City By-Laws, City internal memoranda and the Legislative Operations Manual (pertaining to the City’s legislative operations) that was given to Councillors. I also reviewed communications between the Respondent and City staff and evidence provided by the Respondent and City staff.

The Complainant was given an opportunity to provide a response to those submissions, which he declined to do.

Summary of Complaint

The following facts are not contested:

- On October 31, 2022, Council-elect attended a presentation about legislative operations and were given the Legislative Operations Manual;
- On November 16, 2022, Mayor and Council received a confidential memo (the “*In Camera* Memo”) with an overview of the procedures and policies about *in camera* Council meetings (also called “closed” Council meetings), handling of confidential information and written material at *in camera* meetings, and protocols for the public release of *in camera* reports and decisions;
- In January 2023, Council held an *in camera* meeting and voted on a motion to make changes to the City’s Living Wage Program (the “January Meeting”). Cllr. Boyle voted against the motion;

- On February 7, 2023, Cllr. Boyle asked my Office what could, and could not, be said about an *in camera* Council decision after the decision was released publicly;
- On February 16, 2023, my office suggested Cllr. Boyle consult the City’s Legal Department (the “Department”) for further direction on this issue;
- On February 16 and 27, 2023, Cllr. Boyle wrote to the Department and other City senior management and asked specific questions about what she could say about the Living Wage Program *in camera* decision and about the communication plan for the release of this decision to the public (the “Communication Plan”);
- On February 28, 2023, the City Manager emailed Cllr. Boyle, communicating a position largely consistent with Cllr. Boyle’s understanding;
- On March 1, 2023, the City issued a memorandum to Mayor and Council about the Communication Plan (the “Memorandum”);
- On March 2, 2023, the City released its decision on the motion to revise the Living Wage Program;
- Also on March 2, 2023, Cllr. Boyle issued a media statement through OneCity Vancouver, which said she voted against the motion, and she strongly supported the Living Wage Program;
- Several news outlets reported on Cllr. Boyle’s media statement and Cllr. Boyle also appeared on a radio program and spoke about her vote on the Living Wage Program; and
- Voting information has never been released for *in camera* Council meetings.

Summary of Respondent Submissions

Cllr. Boyle denied she breached any confidentiality requirement under the Code of Conduct. She made four points in response to the Complaint:

1. A Councillor’s own vote was not confidential information learned by virtue of her position, and as such the Code of Conduct was not breached;
2. *In camera* sessions must be subject to a meaningful “Rise and Report” to comply with the *Vancouver Charter*, SBC 1953, c 55;
3. There was no guidance in the Procedural By-Law No. 12577 (“Procedure By-Law”) for the City that specified or required all votes made in closed meetings be kept confidential; and
4. Cllr Boyle acted diligently and in good faith and relied on advice she received from my Office, City officers, staff and the Department.

First, the Respondent said an individual’s opinion was not “learned” by virtue of their position and the Code of Conduct was not meant to capture the circumstances of the Complaint. Rather, she said it intended to limit disclosure of information an individual would not otherwise possess, would impact on the integrity of a City process or decision, or would otherwise expose the City to harm.

Second, the Respondent said although *in camera* discussion had a role to play in the City's governance, the public must also be able to scrutinize *in camera* votes. She noted "Rise and Report" process requirements from committees and closed sessions sought to balance between the creation of a safe and privileged space for a governing body to consider sensitive personal, legal and similar matters while preserving the requirement for open government. She said different governing bodies used different approaches to closed meetings and the City's "Rise and Report" process was to disclose the decision but not disclose the votes for or against it. While there was nothing in the *Vancouver Charter* that expressly prevented the City from doing this, the Respondent said considering the *Vancouver Charter's* provisions on voting, participation and influence when there was a conflict of interest and provisions on when closed meetings were permitted, and considering the lack of any guidance in the City's Procedure By-Law on whether how Councillors voted in closed sessions could be made public, the *Vancouver Charter* implicitly required publication of the voting record from closed sessions. In the alternative, the Respondent said the issue was at least ambiguous.

Third, the Respondent said there was no City By-Law, policy or direction that Councillors could not, or in the case of the Living Wage Program specifically, say how they voted *in camera*. Once the result was made public, she stated the votes were then presumptively public. She said a closed session did not prevent any Councillor from continuing to oppose or support a particular viewpoint publicly, and therefore, it was artificial to suggest a Councillor could lawfully state, "I support a living wage," but when questioned about a vote by the City on the issue would have to go say something like, "Closed session votes do not necessarily reflect a unanimous decision of Council and although I am not permitted to reveal my vote I support a living wage."

Fourth, the Respondent said she acted in good faith in reliance on advice from City staff, including the Department, whose advice supported her understanding that she could say how she voted. She noted that reliance by a Councillor on advice, even potentially mistaken advice, could support a defence of good faith on the part of the Councillor: *Orchiston v Formosa*, 2014 BCSC 1080, at para 55. In the Respondent's view, the City's legal advice to her was correct and she was entitled to make the disclosure of her own vote; however, if the Integrity Commissioner found she was not, then she was entitled to rely on her good faith and diligence.

In response to the City's reliance on its Legislative Operations Manual and *In Camera* Memo, the Respondent admitted she received the *In Camera* Memo but said she did not remember its contents. She also noted that while it said Councillors should not share their own vote made *in camera*, this instruction was not included in the Legislative Operations Manual, the applicable legislation or any City By-Law. Further, the Respondent said when she asked for advice on this issue from City staff, no one mentioned the *In Camera* Memo or said she could not say how she voted.

Issue

The issue I must decide is whether Cllr. Boyle contravened section 3.5 the Code of Conduct when she disclosed publicly how she voted during an *in camera* Council meeting.

Assessment of Credibility

The material facts are not in dispute. The sole question is whether the Respondent's disclosure of how she voted during the January Meeting contravened the Code of Conduct because it was a prohibited disclosure of confidential information.

Analysis

Section 3.5 of the Code of Conduct says a member must:

- a) not disclose or release any confidential information acquired by virtue of their office, except as authorized by Council, or required by law;*
- b) not use confidential information with the intention to cause harm or detriment to Council, the city or any other person or body;*
- c) protect confidential information from inadvertent disclosure;*
- d) use confidential information only for the purpose for which it is intended to be used;*
- e) take reasonable care to prevent the examination of confidential information by unauthorized individuals; and*
- f) not take advantage of, or obtain private benefit from, confidential information acquired by virtue of their office.*

There is no common law or statutory rule about whether one can discuss how one votes at an *in camera* Council meeting and the City's Procedural By-Law is silent on this issue.

However, section 3.5 of the Code of Conduct applies to confidential information. Thus, the first issue is whether how the Respondent voted *in camera* was confidential information.

Section 1.2 of the Code of Conduct defines 'confidential information' as follows:

1.2 "confidential information" means information that is not publicly available and is treated as confidential by the city and includes information that may or must be considered by Council in a closed meeting pursuant to section 165.2 of the Vancouver Charter including:

- a. decisions, resolutions or report contents forming part of the agenda for or from a closed meeting of Council until a Council decision has been made for the information to become public or otherwise released ...*

(Emphasis added.)

According to section 1.2, if how the Respondent voted was not publicly available information and was treated as confidential by the City, then it was confidential information.

As the City did not disclose the voting record, only the decision made about the Living Wage Program, how she voted was information that was not publicly available.

The question remains, was the information treated as confidential by the City? To determine this, I have examined City By-Laws, City internal memoranda and the Legislative Operations Manual given to Councillors. I also reviewed communications between the Respondent and City staff and evidence provided by Cllr. Boyle and City staff. For the reasons below, on balance, I find City did not treat the information as confidential.

The Legislative Operations Manual explains Council's discretion to hold *in camera* meetings. It also says confidential matters addressed *in camera* must not be discussed or communicated outside of the closed meeting and Councillors cannot disclose or release any confidential information, except as authorized by Council or as required by law. There is nothing in this document that says Councillors cannot disclose how they vote in closed sessions.

The Communication Plan asked Mayor and Council not to comment on the decision on the Living Wage Program until the decision was made public on March 2, 2023. The Memorandum said once the *in camera* decision was released, Councillors could indicate their view of the decision if they did "not disclose anything said or voted by the other Councillors during the *in camera* meeting." Nothing in this Memorandum indicated the City considered how Cllr. Boyle voted was confidential information that she could not disclose after the decision was made public.

However, the *In Camera* Memo states:

Even where a report or information has been released from in camera (i.e. made public), the details of the discussion, which Councillors were for or against the matter, and the actual vote, are not released. All that would be revealed about the vote would be that a matter was approved by Council, by the appropriate majority. This is to preserve the confidentiality of items that have been duly considered in camera, and Council members' entitlement to take part in freely in debate and vote on the matter. In speaking about an in camera matter that has become public, Council members may indicate their position on any publicly released in camera decision provided they do not state how they voted or release the voting record of other Council members. [Emphasis added.]

The *In Camera* Memo provided in the fall of 2022 was the only information ever given to Cllr. Boyle that she should not disclose how she voted at *in camera* meetings after a decision had been made public.

The *In Camera* Memo was contradicted by the Communication Plan, which specifically addressed the release of Council's decision on the Living Wage Program.

The information in the *In Camera* Memo was also contradicted by the advice given to Cllr. Boyle by City staff. Cllr. Boyle repeatedly asked City staff whether she could say how she voted, and they never said she could not do this or the City considered the information about how she voted confidential information.

Further, both the Communication Plan and the *In Camera* Memo stated Councillors could tell the public their position on an issue voted on *in camera*. A Councillor who says they are for or against a certain issue after a vote has been held on that issue would generally be understood by the public to have voted in a way consistent with their position on the issue. Thus, even the *In Camera* Memo supports my finding that the City did not treat the Respondent's disclosure of how she voted a disclosure of confidential information.

Finally, the *Vancouver Charter* does not support a broad interpretation of confidential information. The *Vancouver Charter* presumes Council meetings are open to the public: *Vancouver Charter*, sections 165.1-165.8; see also BC Ombudsperson, “Open Meetings: Best Practices Guide for Local Governments,” Special Report No. 34 to the Legislative Assembly of BC (September 2012) at p 5.

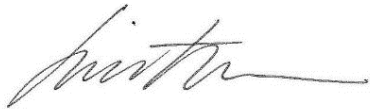
In summary, given the circumstances in this case, I find the Respondent did not violate section 3.5 of the Code of Conduct by disclosing how she voted at the January Meeting.

Conclusion

I find that Cllr. Boyle did not breach section 3.5 of the Code of Conduct when she disclosed publicly how she voted during an *in camera* Council meeting.

My investigation has shown the City has been unclear and inconsistent in its position about whether how a Councillor votes *in camera* can be disclosed by that Councillor after the City makes the decision public. Thus, I recommend the City adopt a clear policy that clarifies expectations for Council about how, if ever, a Councillor can say how they voted in an *in camera* meeting.

All of which is respectfully submitted.



Lisa Southern*, Barrister & Solicitor
Integrity Commissioner for the City of Vancouver

Dated: September 29, 2023

*Law Corporation