

Memorandum

To: Mayor and Council
C: Faisal Anwar, Chief Administrative Officer
From: Councillor Douglas W. Judson
Date: November 8, 2021
Re: **Leaked Privileged and Confidential Materials**

1. Background

On October 27, 2021, the *Fort Frances Times* published an article by staff writer Merna Emara entitled "Council legal opinion did not consider possible 2017 license audit: report". The article describes a privileged and confidential document of the Town of Fort Frances ["**Town**"] which was provided to the newspaper without Council's authorization. Ms. Emara describes this document as follows:

The 12-page opinion, provided to the Times by a source who requested anonymity because they are not authorized to speak to it, was a draft document produced by Gowling WLG (Canada) LLP on Jan. 28, 2019, and emailed to Tannis Drysdale, economic development officer.

This "leak" constitutes a serious breach of confidentiality and disrespect for our privilege.

In an email to Council on October 28, 2021, Chief Administrative Officer ["**CAO**"] Faisal Anwar indicated that administration is looking into records to determine who had access to this document. From my own records, I am aware of 3 occasions when myself and other members of Council received copies of this legal opinion:

- On January 29, 2019, a lawyer from Gowling WLG (Canada) LLP emailed a copy of this document to me and Economic Development Officer Tannis Drysdale;
- On February 2, 2019, the email we received attaching the opinion was forwarded by Ms. Drysdale to CAO Doug Brown, Mayor June Caul, Councillor Andrew Hallikas, and Councillor John McTaggart; and
- On February 18, 2021, Mr. Brown forwarded Ms. Drysdale's February 2, 2019 email to me, Mayor Caul, Councillor Behan, and Councillor McTaggart.

2. Governing Law

Corporate policies govern staff conduct in relation to confidential materials. However, Mr. Anwar has advised Council that administration has no such authority over members of Council. The obligations of members of Council over privileged and confidential information of the Town are governed by the *Code of Conduct* and the *Procedural By-Law*, which have their own processes.

A. Code of Conduct

Section 10 of the *Code of Conduct* prohibits members of Council from sharing confidential information and specifies that doing so is a breach of the *Code of Conduct*. The *Code of Conduct* defines confidential information as follows:

“Confidential Information” means any information in the possession of, or received in confidence by, the Municipality that the Municipality is prohibited from disclosing, or has decided to refuse to disclose, under the *Municipal Freedom of Information and Protection of Privacy Act* or any other law. Confidential Information also includes ... information that is subject to solicitor-client privilege; information that concerns any confidential matters pertaining to ... litigation [or] property acquisition ...; and any other information lawfully determined by the Council to be confidential, or required to remain or be kept confidential by legislation or order.¹

The material sections of the *Code of Conduct* governing confidential information state as follows:

10.1 No Member shall disclose, release, sell or publish by any means directly or indirectly, to any person or to the public, any Confidential Information acquired by virtue of his or her office, in any form including, but not limited to, written notes, reports, oral and video recording, pictures, electronic correspondence, and any form of social media except when required or authorized by Council or otherwise by law to do so.

10.2 No Member shall use Confidential Information for personal or private gain or benefit, or to disadvantage any other person or body.

10.3 Unless required by law, no Member shall disclose the substance of deliberations of meetings held in-camera and that are authorized to be held in-camera under the *Municipal Act, 2001* or any other legislation unless or until Council discloses such information at a meeting that is open to the public or otherwise releases such information to the public.

10.4 Without limiting the generality of the foregoing, no Member shall, without lawful authority, disclose or make personal use of any of the following types of Confidential Information:

- a) Information concerning litigation, negotiation or personnel or labour matters;
- b) Information the publication of which may infringe on the rights of any person ...
; ...
- e) Any other information or statistical data required by law not to be released.²

B. Procedural By-Law

Section 4.11 of the *Procedural By-Law* specifies that:

4.11 Members are to ensure that confidential matters disclosed to them during meetings closed to the public, are kept confidential. No member, officer or employee of the Corporation shall disclose the content of the matter or substance of the deliberations of a

¹ *Code of Conduct* at s. 3.1(d).

² *Code of Conduct* at ss. 10.1 to 10.4 (some emphasis from original omitted).

Closed Meeting, unless expressly authorized to do so by Council as required by law or to respond or make disclosures to the extent necessary in respect of any legal proceeding or requirement. Any Member, who contravenes the confidentiality clause, may be subject to penalties in accordance with the previously adopted “Code of Conduct” by-law.³

Of note, the *Code of Conduct* incorporates by reference the sections of the *Procedural By-Law* that “govern the conduct of Members”.⁴

3. Recommendation

It is crucial that closed sessions of Council and the Town’s privileged and confidential information be sedulously protected by the elected officials who are privy to these confidences. It is also critical to the candour and trust of closed session proceedings that leaks be probed, as a matter of deterrence. Whether or not members feel that the materials in question *should* be made public is beside the point – the point is that it is prejudicial to Council and the Town, and highly inappropriate, to have individual members making these judgment calls on our behalf.

While Mr. Anwar correctly points out that an inquiry into a confidentiality breach by a member of Council may be within the domain of the Integrity Commissioner, the Commissioner’s process requires that a specific member be named as a respondent to a complaint or request in order to initiate that process. It is unknown whether a member is at fault without some investigation or technological diligence.

Accordingly, I seek Council support for the following resolution:

WHEREAS the *Fort Frances Times* published an article on October 27, 2021 which referred to privileged and confidential materials of the Town of Fort Frances [“**Town**”] which it had obtained and which was not authorized for release by Council;

AND WHEREAS members of Council are responsible for safeguarding privileged and confidential information and matters discussed in closed session under the *Code of Conduct* and the *Procedural By-Law*;

AND WHEREAS only Council can give legal direction for the Town, authorize the release of privileged and confidential information, and waive privilege over privileged material on behalf of the Town;

AND WHEREAS Council did not waive privilege or authorize the release of the material obtained by the *Fort Frances Times*;

NOW THEREFORE IT IS RESOLVED THAT Council directs administration to refer this matter to the Integrity Commissioner, who shall conduct a technological investigation of the source of the leak of the memorandum described in the October 27, 2021 issue of the *Fort Frances Times* to any unauthorized parties, employing such technological and forensic techniques as necessary, and that the results of his investigation shall be reported to Council along with any policy recommendations which he deems advisable.

END OF DOCUMENT

³ *Procedural By-Law* at s. 4.11.

⁴ *Code of Conduct* at s. 16.2.