CITY OF HAMILTON

CORPORATE SERVICES DEPARTMENT / CITY MANAGER’S OFFICE
City Clerk’s Division / Legal Services

Report to: Mayor and Members Committee of the Whole

Submitted by: Joseph L. Rinaldo
General Manager
Finance and Corporate Services

Kevin C. Christenson
City Clerk

Peter A. Barkwell
City Solicitor

Date: March 19, 2007

Prepared by: K. Christenson, x2728
P. Barkwell, x 4636

SUBJECT: Establishment of City Integrity Commissioner Office
(FCS07047/CL07003/LS07004) (City Wide)

RECOMMENDATION:

a) That Report FCS07047/CL07003/LS07004 be received.

b) That an Accountability and Transparency Sub-Committee, composed of the Mayor and 4 members of City Council, be established to review the Municipal Act, as amended, respecting Accountability and Transparency and make recommendations to Council on policies, procedures and/or by-laws that will enhance the accountability and transparency of the operation of the City.

c) That the Terms of Reference for the sub-committee attached hereto as Appendix “A” to Report FCS07047/CL07003/LS07004 be approved.

____________________________________________________
Joseph L. Rinaldo
General Manager
Finance and Corporate Services

____________________________________________________
Kevin C. Christenson
City Clerk

____________________________________________________
Peter A. Barkwell
City Solicitor
SUBJECT: Establishment of City Integrity Commissioner Office
(FCS07047/CL07003/LS07004) (City Wide) - Page 2 of 7

EXECUTIVE SUMMARY:

Part V.1 of the Municipal Act, 2001, as amended through Bill 130, reflects new legislation for municipalities respecting Accountability and Transparency. In order to address accountability and transparency, the new Act includes the authority for a municipality to:

- Establish a code of conduct for Council
- Appoint an Integrity Commissioner
- Appoint an Investigator with respect to complaints regarding closed meetings
- Appoint an Auditor General
- Appoint an Ombudsman, and
- Establish a Lobbyist Registry and appoint a Lobbyist Registrar

It is recommended that Council establish a sub-committee composed of members of Council to conduct this review that would include the Terms of Reference attached hereto as Appendix “A” to Report FCS07047/CL07003/LS07004.

Staff resources to assist the sub-committee can be allocated from the offices of the City Manager and General Manager of Corporate Services, the City Solicitor, City Clerk and Internal Auditor.

BACKGROUND:

City Council, at its meeting held February 28, 2007 directed the City Clerk, City Solicitor and General Manager of Finance and Corporate Services to review and report back with respect to establishing an Office of the Integrity Commissioner for the City of Hamilton, using the model adopted by the City of Toronto. The report was to outline a suggested mandate, financial implications and implementation plan to enable operation of the office within three months.

Upon review of Council’s motion, it became evident that an examination of the city’s current policies and practices should be reviewed, and recommendations made in conjunction with the new accountability and transparency legislation in the Municipal Act.

ANALYSIS/RATIONALE:

CODE OF CONDUCT
The City of Hamilton already has a Code of Conduct for members of Council which is incorporated as part of the Procedural By-law.

Section 223.2 has recently been added to the Municipal Act, and while it was likely unnecessary, it does make explicit the power of a municipality to establish a Code of Conduct, both for members of Council and for members of local boards.
If Council decides to create the position of Integrity Commissioner, Council may wish to review the current Code of Conduct to ensure it meets current needs. One aspect which Council may wish to consider is the inclusion in the Code of Conduct of matters such as the obligation for Councillors to comply with other City policies as, for example, the Harassment and Discrimination Prevention Policy, the Personal Harassment Prevention Policy, Violence in the Workplace Policy.

While provincial legislation is already in place regarding pecuniary conflict of interest (Municipal Conflict of Interest Act) and election campaign finances (Municipal Elections Act) there may be scope for a municipality to deal with non-pecuniary conflict of interest issues, sometimes referred to as “apparent” or “potential” conflict of interest, in a Code of Conduct.

Council may therefore wish to embark upon a review of the current Code of Conduct. That might be done directly, for example, by a sub-committee of Council, or indirectly, for example, by requesting that an Integrity Commissioner, if appointed, report to Council with recommendations regarding revisions to the Code of Conduct.

INTEGRITY COMMISSIONER
While it was already possible for a municipality to appoint an Integrity Commissioner, it is only with the recent amendments to the Municipal Act, that it is now possible to impose a penalty upon a Councillor found to have contravened a Code of Conduct.

Further, the recent amendments to the Municipal Act mean that an Integrity Commissioner conducting an inquiry may:

1. have access to all municipal records (including electronic records, such as email) and property for the purposes of the inquiry; and

2. exercise powers under the Public Inquires Act to compel the attendance of witness, and to examine them under oath.

The amendments to the Act also contain protections requiring the Integrity Commissioner to preserve secrecy with respect to any matters that come to his or her knowledge during the discharge of his or her duties.

The initial scheme of the Act is that the Integrity Commissioner will report to Council following an investigation and that where a contravention of the Code of Conduct has been found, Council may impose a penalty on the Councillor who has committed the contravention.

The penalties provided for are either:

a) a reprimand; or

b) a suspension of the Councillor’s pay for up to ninety (90) days.
DELEGATION
The recent amendments to the Municipal Act contain specific provisions regarding the delegation by Council of quasi-judicial functions (S. 23.1, 23.2, 23.3. and 23.4).

It is our opinion that these powers are sufficient to enable Council to delegate to an Integrity Commissioner the power to select and impose a penalty where a contravention of the Code of Conduct has been found.

Council should therefore determine whether it wishes to retain the power to determine any penalty, or whether it wishes to delegate that power to an Integrity Commissioner.

APPEALS
Determinations of a contravention of the Code of Conduct by an Integrity Commissioner, and of a penalty by Council, have no built in statutory appeal mechanism. However, either, or both, decisions could be the subject of a Judicial Review Application.

If Council were to delegate the power to impose a penalty to an Integrity Commissioner, another new section of the Municipal Act (S. 284.1) would permit Council to create an appeal mechanism from decisions of the Integrity Commissioner.

Such appeals could go either to Council, or to a special appeal body to be designated by Council. If appeals are to be permitted, rules and procedures to govern those appeals would have to be drafted and enacted by Council.

QUALIFICATIONS OF AN INTEGRITY COMMISSIONER
Before embarking upon the hiring of an Integrity Commissioner, Council will need to approve qualifications for the individual who would fill the positions.

Attached hereto as Appendix “B” to Report FCS07047/CL07003/LS07004 is an excerpt from the City of Toronto’s report setting out the qualifications which Toronto has chosen to use.

Note that an Integrity Commissioner is not required to be an employee of the municipality, but does have reporting requirements directly to the municipal council.

COMPLAINTS PROCEDURE
If an Integrity Commissioner is created for the City of Hamilton, Council will need to approve the complaints and investigation procedures to be used by the Integrity Commissioner.

Attached hereto as Appendix “C” to Report FCS07047/CL07003/LS07004 is an excerpt from the City of Toronto’s complaints procedure as recommended in 2004, these procedures have not yet been reviewed with respect to their applicability to the new sections in the Municipal Act and are included by way of example.

The City of Toronto Act requires the City to appoint an Integrity Commissioner who reports to City Council and grants powers and imposes duties upon the Integrity
SUBJECT: Establishment of City Integrity Commissioner Office
(FCS07047/CL07003/LS07004) (City Wide) - Page 5 of 7

Commissioner. The Integrity Commissioner is responsible for performing in an
independent manner the functions assigned by Council regarding the conduct of
Members of Council and local boards.

The mandate for the City of Toronto Integrity Commissioner is as follows:

Advisory – providing written and oral advice to individual members of council, about their
own situation respecting the Code of Conduct and other by-laws and policies governing
the ethical behaviour of members, including general interpretation of the Municipal
Conflict of Interest Act; and providing the full Council with specific and general opinions
and advice respecting compliance by elected officials with the provisions of governing
Acts, and other conduct policies

Complaint Investigation - Having the power to assess and investigate complaints against
elected officials from members of the public, City staff, and Councillors or on reference
from the whole Council

Complaint Adjudication – Determining whether a member of Council has violated a City
protocol, by-law or policy governing their ethical behaviour except that (as in the
provincial model) Council makes the final decision on whether any penalty (limited under
present City authority) recommended by the Commissioner is imposed on the member
found in contravention.

Educational – Publishing an annual report on findings in typical advice and complaint
cases; providing outreach programs to members of Council and staff on legislation,
protocols, and office procedures emphasizing the importance of ethics for public
confidence in municipal government; and disseminating information available to the
public on the City’s website.

IMPLEMENTATION PLAN
An implementation plan to enable operation of an Integrity Commissioner’s office should
take into consideration the following:

- Council should determine whether the Integrity Commissioner will make
  recommendations to Council where contraventions are found, or if Council will
delegate the authority to assess penalties to the Integrity Commissioner.
- If Council decides on delegation, Council should determine whether to create an
  appeal mechanism.
- Council should develop and approve procedures for the making of complaints to
  the Integrity Commissioner.
- Council should consider whether updates are required to the Code of Conduct
  and, if updating is required, develop a process to complete the updating.
- List of qualifications required
- Recruitment process – engage the services of an independent search firm
- Selection process – establish sub-committee of Council to make recommendation
- Development of employment contract – part-time; retainer service
- Location of office
SUBJECT: Establishment of City Integrity Commissioner Office
(FCS07047/CL07003/LS07004) (City Wide) - Page 6 of 7

- Requirements for operation of the Office – Administrative Assistant; expenses
- Budget for use of outside Counsel advice

It would be possible for a recruitment effort to proceed in parallel with development of procedures, and updating of the Code of Conduct.

**ALTERNATIVES FOR CONSIDERATION:**

Council has the discretion to appoint an Integrity Commissioner, Auditor General, Ombudsman, Lobbyist Registrar, or Investigator for purposes of investigating complaints regarding closed meetings. These Officers are discretionary, rather than mandatory.

There is no consequence if Council elects not to appoint an Integrity Commissioner, Auditor General, Ombudsman, or Lobbyist Registrar.

However, if the municipality does not appoint an Investigator for the purposes of investigating complaints regarding whether the council has complied with the provisions of the legislation respecting closed meetings, then such complaints will be dealt with by the provincial Ombudsman.

**FINANCIAL/STAFFING/LEGAL IMPLICATIONS:**

As an example, the City of Toronto has allocated $200,000. on an annual basis since 2004, to the Office of the City Integrity Commissioner. This allocation includes the part-time compensation for the Commissioner, part-time administrative assistance and allowance for external legal expenses. Currently the Integrity Commissioner is located in a city facility and does not incur rental expenses. Additional support, not included in the funding is provided by the City Clerk’s office, Corporate Communications and Legal Services.

Subject to the model that is recommended for the City of Hamilton, a program enhancement can be added to the 2007 and/or 2008 operating budget should Council wish to proceed with the establishment of an Integrity Commissioner office. Based on the City of Toronto model, a yearly allocation of $200,000 would be required to operate the office of a part-time Integrity Commissioner.

Should the services of an external search firm be recommended, a one-time funding to cover this expenditure would also be required.
Policies Affecting Proposal:

The *Municipal Act, 2001*, as amended through Bill 130 is the governing legislation used for discussion purposes in this report. In particular, an Integrity Commissioner is given authority under section 223.3 of the *Municipal Act, 2001*, as amended, to perform in an independent manner, the functions assigned by city council with respect to the application of the code of conduct for members of city council, and local board members, and with respect to the application of any other city by-laws and policies governing the ethical behaviours of members of council, or local board members.

The requirement for investigations of complaints that Council has not complied with section 239 of the *Municipal Act*, or the city’s Procedural By-law for open meeting requirements as contained in section 239 has not yet been proclaimed.

Relevant Consultation:

City Manager  
General Manager of Finance & Corporate Services  
City Solicitor  
City Clerk

City Strategic Commitment:

By evaluating the “*Triple Bottom Line*”, (community, environment, economic implications) we can make choices that create value across all three bottom lines, moving us closer to our vision for a sustainable community, and Provincial interests.

Community Well-Being is enhanced.  
☐ Yes  ☐ No

Environmental Well-Being is enhanced.  
☐ Yes  ☐ No

Economic Well-Being is enhanced.  
☐ Yes  ☐ No

Does the option you are recommending create value across all three bottom lines?  
☐ Yes  ☐ No

Do the options you are recommending make Hamilton a City of choice for high performance public servants?  
☐ Yes  ☐ No
APPENDIX A

TERMS OF REFERENCE

- Review Part V.1 of the Municipal Act
- Review current policies/practices and by-laws of the City pertaining to Code of Conduct, Confidentiality, Accountability and Transparency and to include the Procedural By-law
- Review current policies and practices of other municipalities on this matter
- Review current Code of Conduct for Council and Staff
- Review the current Human Resource policies
- Receive and review public input regarding the manner in which the City should ensure that the City is accountable to the public for its actions and that its actions are transparent to the public
- Make recommendations to Council regarding the contents of a City policy on accountability and transparency
- Make recommendations to Council regarding whether the City’s current Codes of Conduct for Members of Council and Staff should be amended, and if so, make recommendations regarding the appropriate amendments
- Make recommendations to Council regarding the appointment of an Integrity Commissioner, including:
  - Recommendations regarding the duties to be assigned to an Integrity Commissioner
  - Recommendations regarding the qualifications of an Integrity Commissioner
  - Recommendations regarding whether the Integrity Commissioner should be a City employee, or not, and if yes, whether the Integrity Commissioner should be a full-time, or part-time employee
  - Recommendations regarding the recruitment process for an Integrity Commissioner
  - Recommendations regarding the organization and budget for an Office of the Integrity Commissioner
  - Recommendations regarding process and procedures for the filing, and processing, of complaints to the Integrity Commissioner
  - Recommendations regarding any other relevant considerations for the proper functioning of an Integrity Commissioner
- Make recommendations to Council regarding the appointment of an Investigator to deal with complaints regarding closed meetings, including:
  - Recommendations regarding the duties to be assigned to an Investigator
  - Recommendations regarding the qualifications of an Investigator
  - Recommendations regarding whether the Investigator should be a City employee, or not, and if yes, whether the Investigator should be a full-time, or part-time employee
• Make recommendations to Council regarding the appointment of an Auditor General, including:
  ➢ Recommendations regarding the duties to be assigned to an Auditor General
  ➢ Recommendations regarding the qualifications of an Auditor General
  ➢ Recommendations regarding whether the Auditor General should be a City employee, or not, and if yes, whether the Investigator should be a full-time, or part-time employee
  ➢ Recommendations regarding the recruitment process for an Auditor General
  ➢ Recommendations regarding the organization and budget for an Office of the Auditor General
  ➢ Recommendations regarding any other relevant considerations for the proper functioning of an Auditor General

• Make recommendations to Council regarding the appointment of an Ombudsman, including:
  ➢ Recommendations regarding the duties to be assigned to an Ombudsman
  ➢ Recommendations regarding the qualifications of an Ombudsman
  ➢ Recommendations regarding whether the Ombudsman should be a City employee, or not, and if yes, whether the Ombudsman should be a full-time, or part-time employee
  ➢ Recommendations regarding the recruitment process for an Ombudsman
  ➢ Recommendations regarding the organization and budget for an Office of the Ombudsman
  ➢ Recommendations regarding process and procedures for the filing, and processing, of complaints to the Ombudsman
  ➢ Recommendations regarding any other relevant considerations for the proper functioning of an Ombudsman

• Make recommendations to City Council regarding whether the City should establish a Lobbyist Registry, and if a Registry is recommended, make recommendations regarding:
  ➢ How “lobby” should be defined by the City of Hamilton
  ➢ Who should be required to register ie. who should be regarded as a “lobbyist”
What information and returns should be required of “lobbyists”
Whether former public officials should be prohibited from lobbying current public officials, and, if so, for what period of time
All other criteria for a lobby registry as set out in the Municipal Act

- Make recommendations to Council regarding the appointment of a Lobbyist Registrar, including:
  - Recommendations regarding the duties to be assigned to a Lobbyist Registrar
  - Recommendations regarding the qualifications of a Lobbyist Registrar
  - Recommendations regarding whether the Lobbyist Registrar should be a City employee, or not, and if yes, whether the Lobbyist Registrar should be a full-time, or part-time employee
  - Recommendations regarding the recruitment process for a Lobbyist Registrar
  - Recommendations regarding the organization and budget for an Office of the Lobbyist Registrar
  - Recommendations regarding process and procedures for the filing, and processing, of complaints to the Lobbyist Registrar
  - Recommendations regarding any other relevant considerations for the proper functioning of a Lobbyist Registrar

- Make recommendations to Council regarding whether some of the positions recommended to be established, if any, should be combined

- Make recommendations to Council regarding any necessary consequential amendments to the City’s Procedural By-law or other existing City Policies

- The Subcommittee be at liberty to make interim reports to Council, including the making of recommendations that action be taken in one or more areas of their mandate while work continues on the other areas.
APPENDIX B

Accordingly, it is recommended that the following qualifications be considered in the recruitment process for the proposed City Integrity Commissioner:

(i) membership in the Law Society of Upper Canada;
(ii) municipal or other administrative law experience;
(iii) municipal law adjudication experience;
(iv) proven impartiality and neutrality such as that of a judge;
(v) able to provide services on a part-time, flexible, and as-needed basis, without competing employment demands;
(vi) having no other dealings or employment with the City;
(vii) having no involvement in political campaigning/endorsements, or related conflict-of-interest;
(viii) having no financial interest in the work undertaken by the City;
(ix) initial appointment term not to exceed one year;
(x) term renewal/extension not to exceed a total of five years;
APPENDIX C

Council Code of Conduct Complaint Protocol for a City Integrity Commissioner

Part A: Informal Complaint Procedure: Individuals (for example, City employees, members of the public or members of Council) or organizations who have identified or witnessed behaviour or an activity by a member of Council that they believe is in contravention of the Code of Conduct for Members of Council (the "Code of Conduct") may wish to address the prohibited behaviour or activity themselves as follows:

1. advise the member of Council that the behaviour or activity contravenes the Code of Conduct;

2. encourage the member of Council to stop the prohibited behaviour or activity;

3. keep a written record of the incidents including dates, times, locations, other persons present, and any other relevant information;

4. tell someone else (for example, a senior staff member or an officer of the organization) about your concerns, your comments to the member of Council and the response of the member of Council;

5. if applicable, confirm to the member of Council your satisfaction with the response of the member of Council; or, if applicable, advise the member of Council of your dissatisfaction with the response; and

6. consider the need to pursue the matter in accordance with the formal complaint procedure outlined in Part B, or in accordance with an applicable judicial or quasi-judicial process.

Individuals and organizations are encouraged to initially pursue this informal complaint procedure as a means of stopping and remedying a behaviour or activity that is prohibited by the Code of Conduct. However, it is not a precondition or a prerequisite that they pursue the informal complaint procedure prior to pursuing the formal complaint procedure in Part B.
Part B: Formal Complaint Procedure: Integrity Commissioner:

Requests for Inquiries s.1

Review request

1.(1) A member or non-member of Council, who has reasonable and probable grounds to believe that a member of Council has contravened the Code of Conduct for Members of Council (the “Code of Conduct”), may request that the matter (the “complaint”) be reviewed.

Complaint

(2) The request shall be in writing and shall set out the grounds for the belief and the contravention alleged.

(3) All complaints shall be signed by an identifiable individual (which includes the authorized signing officer of an organization.)

(4) A complaint shall set out the grounds for the belief and the contravention alleged and include a supporting affidavit that sets out the evidence in support of the complaint.

For example, facts should include the name of the alleged violator, the provision allegedly contravened, facts constituting the alleged contravention, the names and contact information of witnesses, and contact information respecting the complainant during normal business hours.

(5) Staff of the City Clerk’s division, who are commissioners for taking affidavits, are authorized to take the supporting affidavit.

Initial Classification by Integrity Commissioner s.2

File with Clerk

2.(1) The request shall be filed with the City Clerk who shall forward the matter to the Integrity Commissioner for initial classification to determine if the matter is, on its face, a complaint with respect to non-compliance with the Code of Conduct and not covered by other legislation or other Council policies as described in subsection (3).

Deferral

(2) If the complaint does not include a supporting affidavit, the Integrity Commissioner may defer the classification until an affidavit is received.
(3) If the complaint, including any supporting affidavit, is not, on its face, a complaint with respect to non-compliance with the Code of Conduct or the complaint is covered by other legislation or a complaint procedure under another Council policy, the Integrity Commissioner shall instruct the City Clerk to advise the complainant in writing as follows:

(a) if the complaint on its face is an allegation of a criminal nature consistent with the Criminal Code of Canada, the complainant shall be advised that if the complainant wishes to pursue any such allegation, the complainant must pursue it with the City of Toronto Police Service;

(b) if the complaint on its face is with respect to non-compliance with the Municipal Conflict of Interest Act, the complainant shall be advised to review the matter with the complainant’s own legal counsel;

(c) if the complaint on its face is with respect to non-compliance with the Municipal Freedom of Information and Protection of Privacy Act, the complainant shall be advised that the matter will be referred to the Director of the Corporate Access and Privacy Office for review;

(d) if the complaint on its face is with respect to non-compliance with a more specific Council policy with a separate complaint procedure, the complainant shall be advised that the matter will be processed under that procedure; and

(e) in other cases, the complainant shall be advised that the matter, or part of the matter, is not within the jurisdiction of the Integrity Commissioner to process, with any additional reasons and referrals as the Integrity Commissioner considers appropriate.

Reports

(4) The Integrity Commissioner may report to Council on a complaint not within the jurisdiction of the Integrity Commissioner.

(5) The Integrity Commissioner shall report annually to Council on complaints not within the jurisdiction of the Integrity Commissioner, but shall not disclose information that could identify a person concerned.
Integrity Commissioner Investigation ss. 3-7

Investigation

3.(1) If a complaint has been classified as being within the Integrity Commissioner’s jurisdiction, the Commissioner shall investigate and may attempt to settle the complaint.

(2) The Integrity Commissioner will proceed as follows:

(a) serve the complaint and supporting material upon the member whose conduct is in question with a request that a written response to the allegation be filed within ten days; and

(b) serve a copy of the response provided upon the complainant with a request for a written reply within ten days.

(3) If necessary, after reviewing the written materials, the Integrity Commissioner may speak to anyone relevant to the complaint, examine any other documents relevant to the complaint and may enter any City work location relevant to the complaint for the purposes of investigation and settlement.

(4) The Integrity Commissioner may make interim reports to Council as required to address any instances of interference, obstruction or retaliation encountered during the investigation.

Final report

(5) The Integrity Commissioner shall submit a final report on the complaint to Council, no later than 90 days after the making of the complaint, outlining the findings, the terms of any settlement, or recommended corrective action.

Lawful recommendations

(6) Any recommended corrective action must be permitted in law and shall be designed to ensure that the inappropriate behaviour or activity does not continue.

Refusal to conduct inquiry

1. If the Integrity Commissioner is of the opinion that the referral of a matter to him or her is frivolous, vexatious or not made in good faith, or that there are no grounds or insufficient grounds for an inquiry, the Integrity
Commissioner shall not conduct an inquiry and shall state the reasons for not doing so in the report.

Member not blameworthy

2. If the Integrity Commissioner determines that there has been no contravention of the Code of Conduct or that a contravention occurred although the member took all reasonable measures to prevent it, or that a contravention occurred that was trivial or committed through inadvertence or an error of judgment made in good faith, the Integrity Commissioner shall so state in the report and shall recommend that no penalty be imposed.

Copies

3. The City Clerk shall give a copy of the report to the complainant and the member whose conduct is concerned.

Report to Council

4. The City Clerk shall process the report to the next meeting of Council.

Council Review ss. 8-9

Duty of Council

5. Council shall consider and respond to the report within 90 days after the day the report is laid before it.

Payment of costs

9.(1) A complainant and a member of Council who are parties to a complaint under this procedure shall each be reimbursed for actual and reasonable legal and related expenses up to $5,000.00.

(2) Council may consider the reimbursement of costs above the limit in subsection 9(1) on a case by case basis.

(3) Costs shall only be reimbursed under this section to the complainant, if the Integrity Commissioner concludes that the complaint is not frivolous, vexatious or made in bad faith.

(4) Costs shall only be reimbursed under this section to the member of Council, if the Integrity Commissioner concludes that that there has been no contravention of the Code of Conduct by the member of Council.