

Integrity Commissioner

Report to Council on an Inquiry Respecting the Conduct of Councillor Harder

June 17, 2021

THE COMPLAINT

- 01 A member of the public (the “Complainant”) filed a formal complaint alleging that Councillor Harder (the “Respondent”) contravened Section 4 (General Integrity) of the Code of Conduct for Members of Council (the “Code of Conduct”).
- 02 The Complainant alleged a “triangular” relationship between the following three individuals that gave rise to a real or apparent conflict of interest:
1. Councillor Harder (Ward 3, Barrhaven), who also serves as the Chair of the Planning Committee;
 2. Jack Stirling, a planning and development professional in the City of Ottawa and President of The Stirling Group; and
 3. Alison Clarke (née Stirling), daughter of Jack Stirling, who served on Councillor Harder’s staff as a Councillor’s Assistant.¹
- 03 The formal complaint alleged that Councillor Harder entered into an inappropriate employment relationship with Alison Clarke which provided an advantage to Jack Stirling and The Stirling Group.

SUMMARY AND FINDINGS

- 04 For the reasons set out in this report, I find that the Respondent has contravened the following sections of the Code of Conduct:
- Section 4 (General Integrity): The employment and contract relationships detailed in this report gave rise to a non-pecuniary, apparent conflict of interest.
- Section 13 (Gifts, Benefits and Hospitality): The Stirling Group provided services to the Respondent over several months while between contracts with the Respondent. The Stirling Group was not remunerated for those services. The unpaid work is a benefit under Section 13 of the Code of Conduct. The Respondent did not disclose this benefit on the public, online Gifts Registry, as required under Section 13 of the Code of Conduct.
- 05 In broad terms, my findings on the nature of the employment and contract affiliations detailed herein speak to a necessity for transparency in the

¹ The formal complaint refers to this individual as Alison Stirling. Ms. Stirling was married in 2019 and now uses the surname Clarke. In this report, I refer to her as Alison Clarke and Ms. Clarke.

relationship between elected municipal public office holders and professionals in the planning and development business in the City of Ottawa.

- 06 This inquiry began on October 7, 2020. Due to the current pandemic, interviews of the complainant, respondent, witnesses and a subject matter expert were conducted using virtual meeting technology. An independent Investigator retained by my Office reviewed hundreds of electronic records, including e-mail correspondence and documents pertaining to related planning applications filed with the City of Ottawa.
- 07 Pursuant to Section 11(2) of the Complaint Protocol, following the completion of the investigation, I provided the Respondent and her legal counsel with a copy of the draft report. The Respondent and her legal counsel provided a letter in response (attached to this report as Appendix C). Information on the response they provided, and how I took it into consideration, follow in the “Investigation and Reporting” section of this report.
- 08 My recommendations with respect to sanctions and other corrective actions are set out at the end of this report.

FACTUAL BACKGROUND TO THE INQUIRY

The Respondent’s relationship to Mr. Stirling and Ms. Clarke

- 09 In a fact-based report provided to me (the “Investigator’s report”), the Investigator provides the following information on the relationship between the Respondent, Jack Stirling (hereafter referred to as Mr. Stirling) and Alison Clarke (hereafter referred to as Ms. Clarke):

“Cllr. Harder was the Councillor for the City of Nepean from 1997 to 2000; and, since January 2001 she has been the City Councillor for Ward 3 - Barrhaven.”

. . .

“Cllr. Harder was the Vice Chair [of the Planning Committee, City of Ottawa] for the 2010 to 2014 term; and has been the Chair since December 2014.”

. . .

“Mr. Stirling indicated that he met Cllr. Harder in the late 1990’s while they were both working for the City of Nepean. He was the Planning Commissioner and Ms. Harder was a Councillor. Mr. Stirling further advised that he and Cllr.

Harder have known each other for over 20 years and he considers her a friend. He indicated that Cllr. Harder probably met [his daughter] Ms. Clarke at a very young age.

Cllr. Harder indicated that she has known Mr. Stirling for 23 years and considers him a mentor with respect to planning matters and a friend. She also indicated that prior to Ms. Clarke commencing to work for her in 2017, she only knew Ms. Clarke through information provided by Mr. Stirling, in normal conversation about mutual families. In the summer of 2017, Cllr. Harder met Ms. Clarke while Ms. Clarke and her father were present together at the City Hall's cafeteria. Cllr. Harder confirmed attending Ms. Clarke's wedding in 2019."

Ms. Clarke's Employment with The Stirling Group and the Respondent's Office as both Employee and Contractor

10 The Investigator's report provides information on three phases of Ms. Clarke's employment history:

1. An initial period of employment with The Stirling Group;
2. Employment in the Respondent's Office; and
3. A subsequent return to employment with The Stirling Group.

11 After Ms. Clarke's return to The Stirling Group, the Respondent retained The Stirling Group under two separate contracts. [See Appendix B: "Timeline of Key Events"]

12 References below to TSG indicate "The Stirling Group". Reference to "PC" indicates the City of Ottawa's Planning Committee:

"During her interview [with the Investigator], Ms. Clarke indicated that in May 2017, she joined TSG as an employee. TSG was expanding and this would be a good opportunity for her to work with her father, Mr. Stirling, and eventually take over the family business.

In early summer of 2017, Ms. Clarke and Mr. Stirling were at City Hall for a meeting. By coincidence, Ms. Clarke met Cllr. Harder at the cafeteria, unrelated to the purpose of her meeting at City Hall. Cllr. Harder indicated to Ms. Clarke that she had an opening in her office, specifically as a planning assistant. Ms. Clarke indicated that she [then] spoke about the opportunity with Mr. Stirling,

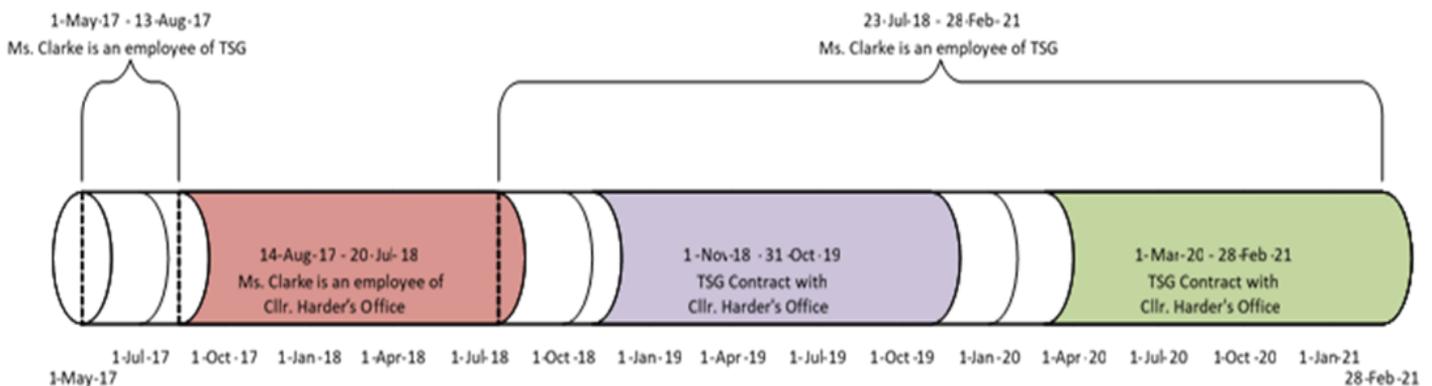
and that while she had just recently joined TSG, this was a good opportunity to gain further experience in urban development and planning. Ms. Clarke [subsequently] provided her resume to Cllr. Harder and discussed the position. Cllr. Harder indicated to Ms. Clarke that she was the Chair of the PC and that she was looking for a planning assistant to keep track and brief her on all [planning] applications submitted. Ms. Clarke also indicated that it was her responsibility to coordinate and answer questions from Ward 3 constituents.

From August 14, 2017 to July 20, 2018, Ms. Clarke worked for the Office of Cllr. Harder [as a Councillor’s Assistant]. Both Ms. Clarke and Cllr Harder confirmed the period of employment during their interviews.”

13 The Investigator’s report noted that between August 14, 2017 and February 28, 2021:

“Ms. Clarke worked for the Office of Cllr. Harder as an employee and as a contractor, through her employment with TSG . . . Ms. Clarke’s professional relationship with the Office of Cllr. Harder is as follows:

- August 14, 2017 to July 20, 2018 - as an employee;
- November 1, 2018 to October 31, 2019 - contracted through TSG; and
- March 1, 2020 to February 28, 2021 – contracted through TSG.”



14 Several months after Ms. Clarke’s employment in the Respondent’s Office ended, the Respondent entered into the first of the above-noted two contracts with The Stirling Group. The Investigator’s report provides the following information about services provided under the two contracts:

“The Office of Cllr. Harder retained the services of TSG under two separate contracts. Details of each contract are as follows:

- **Contract 1** is for the period from November 1, 2018 to October 31, 2019. The contract is dated November 27, 2018 and was signed by Cllr. Harder on December 3, 2018. The contract specifically states that services are for a one-year period, at a monthly rate of \$3,000 (plus HST), for a total of \$36,000 (plus HST). TSG provided monthly invoices for the months of November 2018 to October 2019. Based on the contract and the invoices, the contract period appears to be from November 1, 2018 to October 31, 2019, even though the contract was signed on [December 3, 2018].
- **Contract 2** is for the period from March 1, 2020 to February 28, 2021. The contract is dated March 31, 2020 and was signed by Cllr. Harder on June 22, 2020, approximately 3.5 months later. The contract specifically states that services are for a one-year period, at a monthly rate of \$3,000 (plus HST), for a total of \$36,000 (plus HST). TSG provided monthly invoices for the months of March 2020 to February 2021. Based on the contract and the invoices, the contract period appears to be from March 1, 2020 to February 28, 2021, even though the contract was signed on June 22, 2020.”

...

“The Scope of Work of TSG, as per the contracts, is as follows:

The Stirling Group (TSG) is available to assist Councillor Harder in several areas including:

1. Briefing notes on all planning files for use during Committee / Council.
2. Ongoing work with the Councillor and the Barrhaven Business Improvement Association with the goal of improving planning and transportation practices in the Ward.
3. Assisting/ advising Councillor Harder in any Industry / City issues that could impact her Ward or nearby areas.
4. Any other activity / opportunity where Councillor Harder requires the services of The Stirling Group.”

- 15 The Stirling Group also entered into a third contract with the Respondent. The contract is dated March 18, 2021, and is for a one-year period. The Respondent signed the contract on March 30, 2021. The monthly rate is \$3,000 (plus HST), for a total of \$36,000 (plus HST).
- 16 At the time of writing of this report, The Stirling Group has invoiced for the months of March and April 2021. The Scope of Work is the same as that set out in Contract 1 and Contract 2, as stated above.
- 17 The investigation was coming to an end when the Respondent signed the third contract with The Stirling Group at the end of March, 2021. For that reason, the factual report the Investigator provided to me does not include information about the third contract.
- 18 The Investigator's report includes the following description of The Stirling Group's business, as well as Ms. Clarke's role at the company:

"Mr. Stirling indicated that TSG was started in January 2015, after he left the Minto Group. The purpose of TSG is to assist landowners, developers, individuals and City staff manage planning and development issues. TSG offers assistance with site plan applications, zoning applications, minor variances, severances and pre-consultation services. In some instances, applications are filed by TSG on behalf of their client with PIED [Planning, Infrastructure and Economic Development] staff [of the City of Ottawa]."

...

"Ms. Clarke indicated that she returned to work for TSG after her employment with the Office of Cllr. Harder ended. Ms. Clarke has been an employee of TSG from May 2017 to August 11, 2017 and from July 23, 2018 to present. Ms. Clarke is currently a project manager with TSG. Her role includes:

- working with developers in the Ottawa area;
- working with consultants to support studies required by the City planning staff for applications;
- supporting developers with planning file applications; and
- assisting developers with minor variance applications, zoning applications and site plan applications.

Ms. Clarke indicated that TSG only had two employees, Mr. Stirling and herself.”

Mr. Stirling’s position on the Planning Advisory Committee of the City of Ottawa

19 Mr. Stirling served on the City’s Planning Advisory Committee (PAC) from his appointment on March 28, 2018, to his resignation from the PAC on January 27, 2021.

20 The Planning Advisory Committee is responsible for providing advice to Ottawa City Council on issues pertaining to:

- The annual work plan of the Planning, Infrastructure and Economic Development department (PIED), as it relates to planning matters
- Such other planning matters as may be referred by the Planning Committee, Agriculture and Rural Affairs Committee (ARAC) or Council to the PAC

The PAC consists of 15 members, including:

- Three Members of Council:
 - Chair of Planning Committee
 - Chair of the Built Heritage Sub-Committee
 - Chair of Agriculture and Rural Affairs Committee
- Twelve public member appointments, including the position that Mr. Stirling held: A practicing professional planner and member of the Ontario Professional Planners Institute.

All members are appointed by Council.

The PAC reports through the Planning Committee and ARAC to Council. It may also report to other standing committees where appropriate, depending on the issue. The PAC meets twice per year:

- Once to present the PIED annual work plan for comment; and
- Once to review the progress against the annual work plan.

OVERVIEW OF THE POSITION OF THE PARTIES

The Complainant

- 21 On April 21, 2020, the Complainant filed a formal complaint alleging that Councillor Harder contravened Section 2(b) of the *Municipal Conflict of Interest Act* (MCIA) as well as Section 4 (General Integrity) and Section 12 (Conduct Respecting Lobbying) of the Code of Conduct.
- 22 On July 2, 2020, the Complainant filed the required affidavit in accordance with Part II (Formal Complaint Procedure) of the Complaint Protocol. The Complainant attributed the delay in obtaining the affidavit to challenges regarding in-person interaction during the pandemic.
- 23 The Complainant provided the following information in the formal complaint:

“Alison Stirling is the daughter of Jack Stirling; Jack Stirling is a well known developer in the City of Ottawa: his daughter Alison was a member of Councillor Harder’s staff as a ‘Councillor’s Assistant’.

The Councillor is the Chair of the City’s Planning Committee; she leads the way on most planning decisions that rise to full Council. By virtue of his daughter’s position on the Chair of the Planning Committee’s staff, she was an obvious ‘go-between’ for her father’s private and commercial interests as a developer.

[Several publicly-available documents that the Complainant submitted with the formal complaint] speak for themselves; they attest to the working but close ‘triangular’ - relationship that existed between the three individuals, in particular a developer naturally acting in his own interests with special but permanent access on a day to day basis with the key person responsible for deciding on planning matters at full Council, and leading up to those decisions at full Council, at Planning Committee itself.

This seems to demonstrate what the Code of Conduct variously refers to as “... serve ... and be seen to serve the interests of their constituents and the City ... ” and that “a reasonably well informed person would conclude that preferential treatment such as (even offering) employment to Alison Stirling, the daughter of Jack Stirling was solely for the purpose of advancing a private or personal interest.” [The] Councillor did not have to hire someone who is connected in that way to fill the position of Councillor’s Assistant.

In this case it is alleged that there was a mutual and long standing relationship between Councillor Harder and the developer long before his daughter ever came on the scene . . . having Jack Stirling’s daughter on her staff even if only for a few years, crosses the line . . . into ‘conflict of interest’ . . . “for a reasonably well informed person” . . . by creating a triangular bond of personal and commercial interests between these three individuals. Such relationships can easily be perceived as a conflict [of] these same interests when viewed from the perspective of the ordinary citizen and the expected non-partisan management of City affairs.”

- 24 The Complainant attached to the formal complaint digital copies of several publicly-available documents as evidence:
1. Minutes of the April 17, 2018 meeting of the Salvation Army Site Plan Review and Programming Advisory Committee. The document lists, among other attendees, “Jan Harder, Chair of Planning Committee” and “Alison Stirling, Councillor’s Assistant”.
 2. Ottawa.ca “Advisory committees” webpage listing matters such as the membership, mandate and responsibilities of the Planning Advisory Committee (PAC). The copy is dated March 30, 2020. It lists Jan Harder among the Councillors on the PAC, and Jack Stirling as “Professional planner member” of the PAC.
 3. Alison Stirling’s LinkedIn profile which includes experience as Project Manager, The Stirling Group.
 4. Two slides from what appears to be a presentation on the Heron Gate Master Plan. The first slide includes the text “Public Open House February 11, 2019, and, at the bottom of the slide, “The Stirling Group Development Initiatives”.
 5. An undated document containing information on the Timbercreek Asset Management plan to build the Heron Gate residential complex in Ottawa. The document includes the following:
 - “Stirling Group has been appointed as planner”
 - “August 2016 – Stirling Group submitted a site plan control application to the Ottawa City Council.”

- 25 During the Complainant's interview with the Investigator, the Complainant recalled becoming aware of the matter that gave rise to the allegations by reading an article in the independent Ottawa newspaper *The Leveller* (Vol. 11, No. 6, Spring 2019) entitled "Below Grade" with the subheading: "Herongate residents contend with broken heating, broken pipes and a rent increase, while Councilor (sic) Jan Harder and Development Consultant Jack Stirling keep it in the family".
- 26 The article makes reference to Ms. Clarke (then Stirling) "working as an aid (sic) for Harder", while at the same time her LinkedIn page listed her then-current job as "a project manager for the Stirling Group". The author of the article also speculates about her connection to Mr. Stirling: "Alison is presumably Jack's daughter – but ironclad verification proved elusive."²
- 27 Also during the Investigator's interview with the Complainant, the Complainant provided further information related to the allegations. The Investigator's report summarizes that information:
- "The Complainant is aware of the business relationship between Cllr. Harder and Mr. Stirling;
 - The Complainant is aware that Cllr. Harder and Mr. Stirling's business relationship dated back to the pre-amalgamation of the City, specifically when the City of Nepean was in existence; and
 - Since Ms. Clarke began working for Cllr. Harder, it was the Complainant's position that there was a perceived conflict of interest."

The Respondent

- 28 Pursuant to Section 9 of the Complaint Protocol (Appendix A of By-law 2018-400, the Code of Conduct) (the "Complaint Protocol"), I provided the complaint and supporting material to Councillor Harder and requested that a written response to the allegation be provided. The Councillor provided the following written response to the formal complaint:

"Thank you for the request to respond to your inquiry.

² Neal Rockwell, "Below Grade: Herongate Residents Contend with Broken Heating, Broken Pipes and a Rent Increase, while Councilor (sic) Jan Harder and Development Consultant Jack Stirling Keep it in the Family" *The Leveller* Vol. 11, no 6, (Spring 2019), p. 3.

Let me begin by making a general statement. The City of Ottawa does not, and should not, inquire into the employment of a job applicant's parents when considering the applicant for employment. Additionally, the professional activities of an employee's parents or other family should not be held against our employees, nor lead to an assumption that something untoward has taken place. I can tell you that in her time with my office, I always ensured that Alison Stirling not only had no input on applications with which her father Jack was associated, but that she simply didn't see them. Her employment was always made known to the public, and was fully transparent.

Indeed, my association with Jack Stirling has always been a matter of public record. I was elected in 1997 to the former City of Nepean council, when Jack Stirling was Commissioner of Planning. I have known him since at least that time. I would also point out that after amalgamation, Jack Stirling was one of two final candidates for the position of Deputy City Manager for Planning at the City of Ottawa. He has a fine record of working in both the public and private sector in multiple cities. That will bear on my remarks below . . .

I have reviewed the redacted complaint, and respond as follows (subsection numbers relate to subsections of section 4):

1. Subsection 1 – As I said previously, I always ensured that Alison Stirling not only had no input on applications with which her father Jack was associated, but that she simply didn't see them. The assertion in the complaint that Alison was a "go-between" between Jack and me is simply untrue. The documents attached to the complaint bear out nothing of the sort:

a. The [copy of the minutes of the] Salvation Army site plan committee [meeting] shows Alison as a Councillor's assistant, which she was. Her LinkedIn profile suggests she was working with the Stirling Group at the time. We do not prohibit our employees from working in more than one place. The City regularly contracts out work to the private sector to lawyers, planners and a host of other contractors. There are law firms and planners that regularly act against the City that also work for it;

b. The Planning Advisory Committee is a separate matter altogether, and is unrelated. Jack Stirling is a member. So were other professionals, and community members. Jack is a professional planner, with experience in the public and private sectors. He is obviously highly qualified for the role;

c. The complaint then attaches Alison's current Linked-in profile, showing that she works with Stirling Group. Her employment with the City ended, and she went to work with her father. We do not control where City employees go to work after leaving the City. I note that [several named former employees] and a host of other former City employees all work in the private sector now. At least three members of the City's legal department formerly worked with law firms active in the development industry;

d. It is important to note that the complaint, though provided in an affidavit, relies entirely on publicly available information to create an innuendo. Because all of this is public, that itself makes it clear that all of this was transparent; and,

e. Finally, the complaint attaches a document showing that Jack Stirling does work as a planner for private sector clients;

2. Subsection 2 – at all times, I complied with all applicable legislation, by-laws and policies. The complaint does not suggest otherwise;

3. Subsection 3 – My remarks in item (1) speak to transparency. That the complaint so easily finds documents showing the positions and activities of Alison and Jack demonstrate that;

4. Subsection 4 – I have worked very hard for my constituents and the City since 1997. No-one could suggest otherwise;

5. Subsection 5 – There is no allegation of, and I would resent such an allegation, that I ever used influence improperly. There is no conflict of interest, and I have always made certain to avoid them. This complaint is, in essence, that a child of someone in the private sector cannot work for the City or a Councillor. Years ago, an excellent young lawyer was driven from the City of Ottawa's legal department due to such unfounded allegations. [Name of the individual] was condemned publicly because she was related by family to a development company. We lost her, and she has gone on to great success working for municipalities in the GTA. It is simply unfounded and unfair;

6. Subsection 6 – there is no such allegation, nor have I ever done so; and,

7. Subsection 7 – this is all I have ever done. I have worked for decades for my

constituents and the City.

Employing Alison was never wrong. She is an intelligent, qualified young woman. To attack her and me because her family is in the private sector development world, and to do so by innuendo and connecting dots that do not connect is unfair to me, her, her family and the City. I welcome any further questions you may have.”

COMPLAINT INTAKE ANALYSIS

MCIA Does Not Apply

- 29 The Complainant alleged the Respondent contravened Section 2(b) of the MCIA, which is concerned with indirect pecuniary interest (emphasis added):

Indirect pecuniary interest

2. For the purposes of this Act, a member has an indirect pecuniary interest in any matter in which the council or local board, as the case may be, is concerned, if,

(a) the member or his or her nominee,

(i) is a shareholder in, or a director or senior officer of, a corporation that does not offer its securities to the public,

(ii) has a controlling interest in or is a director or senior officer of, a corporation that offers its securities to the public, or

(iii) is a member of a body,

that has a pecuniary interest in the matter; or

(b) the member is a partner of a person or is in the employment of a person or body that has a pecuniary interest in the matter. R.S.O. 1990, c. M.50, s. 2.

- 30 Following a thorough intake analysis of the complaint and supporting documentation, and after receiving opinion from external counsel, I concluded that the MCIA did not apply to the situation, employment relationship or allegations set out in the complaint.

- 31 Specifically, there was no evidence of any financial interest or potential for financial gain or loss on the part of the Respondent. In addition, Ms. Clarke is not a family member of the Respondent that the MCIA applies to and, as such, there was no basis for considering an MCIA breach.
- 32 Additionally, on May 28, 2020, the Complainant e-mailed a report to my Office. The report, published by a municipal-focused grassroots organization, was on the subject of campaign contributions to candidates in Ottawa's 2018 municipal election made by those with connections to the development industry. The Complainant commented that the report served as another piece of information showing that the Respondent, as Chair of the Planning Committee, was in a conflict of interest position.
- 33 Case law does not support the claim that campaign contributions made in compliance with the *Municipal Elections Act* can form the basis for a direct, indirect or deemed pecuniary conflict of interest when the recipient remains or becomes a Member of Council following the election, unless there is clear evidence of an intended and expressed *quid pro quo*.
- 34 On June 15, 2020, I advised the Complainant that the MCIA did not apply to the situation, employment relationship or allegations set out in the complaint, and that I was in the process of evaluating the aspects of the complaint that alleged potential non-pecuniary conflict of interest under the Code of Conduct.

Intake Analysis of Code of Conduct Allegations

- 35 The Complaint Protocol sets out the framework for receiving complaints, conducting investigations and reporting to Council.
- 36 Following an intake analysis of the complaint and supporting documentation, I concluded that the complaint was not frivolous or vexatious and that there were sufficient grounds for a formal investigation into the alleged breach of Section 4 (General Integrity) of the Code of Conduct.
- 37 I found at that point in time that the complaint did not provide sufficient evidence to establish a *prima facie* breach of Section 12 (Conduct Respecting Lobbying) of the Code of Conduct. Correspondingly, I narrowed the parameters of the inquiry to that of alleged contraventions of Section 4 (General Integrity) of the Code of Conduct.

Notice of Inquiry

- 38 In conformity with the Complaint Protocol, I provided notice of the inquiry to the Complainant and the Respondent on August 5, 2020. The notice confirmed that I had narrowed the scope of the inquiry to that of the alleged contravention of Section 4 of the Code of Conduct. I also provided the Respondent with a copy of the formal complaint.
- 39 The Respondent provided written response on August 17, 2020, and I provided her response to the Complainant on the same day. The Complainant submitted a subsequent response to my Office on August 27, 2020.

Confidentiality

- 40 The *Municipal Act, 2001* stipulates:

Duty of Confidentiality

223.5 (1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part. 2006, c. 32, Sched. A, s. 98.

- 41 In addition, Section 16 (Public Disclosure) of the Complaint Protocol provides:
- (1) The Integrity Commissioner and every person acting under his or her jurisdiction shall preserve confidentiality where appropriate and where this does not interfere with the course of any investigation, except as required by law and as required by this complaint protocol.
- 42 I have also taken into consideration comment from the Divisional Court decision *Michael Di Biase v. City of Vaughan*, a decision of the Divisional Court arising from a report of the Integrity Commissioner for the City of Vaughan:

“The statutory scheme provides the Integrity Commissioner with significant autonomy regarding the disclosure of her investigation. Specifically, section 223.6(2) of the *Municipal Act* provides as follows:

223.6 (2) If the Commissioner reports to the municipality or to a local board his or her opinion about whether a member of council or of the local board has contravened the applicable code of conduct, the Commissioner may

disclose in the report such matters as in the Commissioner's opinion are necessary for the purposes of the report. 2006, c. 32, Sched. A, s. 98.

This section recognizes that when deciding how much information must be disclosed, the Integrity Commissioner may take into account specific local concerns associated with such disclosure that require confidentiality or protection of informants' identities."³

- 43 The Complainant is a member of the public. I am of the opinion that the Complainant's identity is not a relevant factor to the inquiry. Disclosure of the Complainant's identity is not, in my opinion, necessary for the purposes of this report. Accordingly, the name of the Complainant was not disclosed to the Respondent and is not disclosed in this report.

INVESTIGATION AND REPORTING

Delegation of Investigative Powers

- 44 The formal investigation began on October 7, 2020. I retained the services of an independent Investigator to complete the investigation.
- 45 The Investigator was delegated the responsibility for the investigation in accordance with Section 223.3 of the *Municipal Act, 2001*:

Delegation

223.3 (3) The Commissioner may delegate in writing to any person, other than a member of council, any of the Commissioner's powers and duties under this Part. 2006, c. 32, Sched. A, s. 98.

Same

223.3 (4) The Commissioner may continue to exercise the delegated powers and duties, despite the delegation. 2006, c. 32, Sched. A, s. 98.

- 46 The Investigator was tasked with gathering evidence, conducting interviews under oath or affirmation pursuant to Section 33(16) of the *Public Inquiries Act, 2009*, and, at the conclusion of the investigation, providing a detailed analysis of the relevant facts in a fact-based investigation report.

³ *Michael Di Biase v. City of Vaughan; Integrity Commissioner of the City of Vaughan*, 2016 ONSC 5620 at para. 120-121.

- 47 Over the approximately seven-month period of the investigation, the Investigator reviewed hundreds of pieces of documentary evidence, including e-mail correspondence, documents pertaining to planning applications filed with the City of Ottawa, and minutes of various meetings of Ottawa City Council and several committees.
- 48 The Investigator conducted interviews using virtual meeting technology with the Complainant, a City of Ottawa staff member who is a subject matter expert, Ms. Clarke, Mr. Stirling, and the Respondent.
- 49 The Investigator interviewed a City of Ottawa staff member to gain an understanding of the approval process for various planning applications. The Investigator did not provide the staff member with any information on the investigation, including the subject matter of the investigation or the identity of the Respondent.
- 50 All individuals accepted the Investigator's invitation to be interviewed without summons being issued. The Complainant, Ms. Clarke, Mr. Stirling and the Respondent consented to the recording of the interview. The Complainant, Ms. Clarke and Mr. Stirling agreed to make a solemn affirmation that the information they were about to provide was true.
- 51 The Respondent's legal counsel also attended, and participated in, the Investigator's interview of the Respondent. The Respondent's legal counsel objected to his client taking an oath or making a solemn affirmation that the information she was about to provide was true. The Respondent did not take the oath or make a solemn affirmation. Nevertheless, the investigator proceeded with the interview.
- 52 The Investigator subsequently held one follow-up interview with Ms. Clarke and sent follow-up questions for clarification of certain matters to Ms. Clarke and Mr. Stirling.
- 53 The Investigator also sent supplementary written questions to the Respondent through her legal counsel on January 28, 2021 and her legal counsel provided a written response, without prejudice, on February 4, 2021.
- 54 The Investigator provided additional written questions to the Respondent through her legal counsel on March 21, 2021 and legal counsel provided a partial written

response on March 26, 2021. On the same day, the Investigator requested the Respondent's legal counsel to provide a response to the outstanding questions.

55 On April 15, 2021, the Respondent's legal counsel provided the Investigator with a response to the outstanding questions.

56 The Complainant and the Respondent were each provided with a opportunity to confirm factual statements they made during their interviews. The Investigator's report noted clarifications the Complainant and Respondent made subsequent to their interviews.

Reporting

57 Pursuant to Section 11 of the Complaint Protocol, on January 11, 2021, I provided the Complainant and the Respondent, through her legal counsel, an update that the investigation would exceed 90 days.

58 On March 15, 2021, the Investigator submitted an interim investigation report and on May 26, 2021, submitted the final investigation report.

59 I reviewed the investigation report, along with the testimony and evidence gathered by the Investigator. Based on the testimony, the analysis of facts and the Investigator's conclusions, I prepared my draft report to City Council with my draft findings.

60 Pursuant to Section 11(2) of the Complaint Protocol, following the completion of the investigation, I provided the Respondent and her legal counsel with a copy of the draft Integrity Commissioner report on May 27, 2021.

61 On June 10, 2021, the Respondent's legal counsel replied by letter which listed comments on the report and included a section titled: "the Councillor's own words". The Respondent's legal counsel requested that the letter be provided to Council. The letter is attached to this report as Appendix C. Also attached as Appendix D is my external legal counsel's reply to the points of law raised by the Respondent's legal counsel.

62 I have considered all of the arguments and comments in the letter from the Respondent and her legal counsel and have revised the final report as deemed necessary.

- 63 Specifically, in response to the objection raised about the relevance of the material, I have removed a section from this report about applications to the Committee of Adjustment with which The Stirling Group was involved during Ms. Clarke's period of employment in the Respondent's Office, as well as during the period between Contract 1 and Contract 2, and during the period of Contract 2 itself. The facts of The Stirling Group's involvement with applications to the Committee of Adjustment, while established, are not relevant to the conduct of the Respondent, are not essential to my analysis, and are not material to my findings.
- 64 The "Analysis" section of this report contains brief response to two additional comments included in the letter from the Respondent and her legal counsel. While I did consider them carefully, I do not accept any of the other arguments advanced in the letter.
- 65 I gave notice of my intention to report to Council to the City Clerk on June 4, 2021 and filed my final report with the City Clerk on June 17, 2021.

EVIDENCE AND FINDINGS OF FACT

- 66 The Investigator's report provided a thorough analysis of the available evidence and the facts gathered. I have grouped the evidence in the following categories:
- Ms. Clarke's employment as a Councillor's Assistant in the Respondent's Office
 - Employee responsibilities and access
 - Application for Zoning By-law Amendment during the period of Ms. Clarke's employment
 - Management of potential, real and apparent conflicts of interest
 - The Respondent's contracts with The Stirling Group
 - Contractor responsibilities
 - Applications for Zoning By-law Amendment while under contract with the Respondent
 - Management of potential, real and apparent conflicts of interest
 - Evidence of a benefit from The Stirling Group to the Respondent

- Mr. Stirling’s role on the Planning Advisory Committee
- Evidence that the appearance of a conflict of interest was known to the Respondent

Ms. Clarke’s Employment as a Councillor’s Assistant in the Respondent’s Office

Employee Responsibilities and Access

67 In her interview with the Investigator, Ms. Clarke stated that the Respondent, as Chair of the Planning Committee, “needs to have an idea of pretty well every active development application within the City that is going to rise to her Committee at some point.” Ms. Clarke explained that her responsibility as “Planning Assistant” was to:

“ . . . keep track of all development applications within this City in terms of, you know, which ones are going to become controversial, which ones are we getting e-mails about already from residents that she needs to be aware of, briefing her on those applications, and then, specific to Ward three . . . answering any residents’ questions about the development, organizing public meetings, and getting questions answered from City staff, and providing – probably my biggest role I would say, or duty – would be to provide briefing notes for her.”

68 The Investigator’s report provides the following summary of Ms. Clarke’s role while working in Councillor Harder’s Office:

“As planning assistant, Ms. Clarke indicated that her most important responsibility was to provide briefing notes to Cllr. Harder for agenda items to be presented at the PC meetings. Each agenda item would consist of a report, prepared by the PIED staff (“PIED staff”), which [contained] recommendations on applications for the PC’s consideration. The briefing notes consisted of a one to two-page summary of the PIED staff report (“PIED reports”). The summaries were excerpts from the complete report.

During her employment, Ms. Clarke indicated that she had access to all information related to planning, such as: the PIED reports to be presented at PC, PC minutes and planning related issues/information discussed during meetings with Cllr. Harder. Ms. Clarke indicated that while she was working for the Office of Cllr. Harder, she worked from City Hall. Ms. Clarke summarized and reported on her work activities on a weekly basis to Cllr. Harder via email.”

69 In written reply to the Investigator, the Respondent confirmed that Ms. Clarke and four other Councillors' Assistants in her Office had access to the Respondent's e-mails and had the capability to respond during the period of August 1, 2017 to September 20, 2020.

70 That period of time covers Ms. Clarke's employment as Councillor's Assistant. It also covers most of the period that the Respondent retained The Stirling Group on contract, a matter which will be addressed in the section of this report titled "The Respondent's Contracts with The Stirling Group."

71 Ms. Clarke's employment contract contained the following clause on confidential information:

"The Employee acknowledges that, as an Assistant to a City Councillor, the Employee will acquire information about certain matters and things which are confidential to the Employer or Councillor, and which information is the exclusive property of the Employer or Councillor. Furthermore, the Employee acknowledges that the Employer is an institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act*. Accordingly, the Employee undertakes not to disclose such information except as may be necessary in the proper discharge of the Employee's employment pursuant to the terms of this Agreement and the *Municipal Freedom of Information and Protection of Privacy Act*. This provision shall survive the termination of this Agreement."

72 The Councillors' Office Manual also includes the following section on the confidentiality and non-disclosure condition within the Councillor's Assistant Employment Contract:⁴

"3.1.14 Confidentiality & Non-Disclosure

As a Councillor's Assistant, the employee will acquire information which is confidential to the employer and/or Councillor and this information is the exclusive property of the employer or Councillor.

The employer is an institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. As a condition within the Employment Contract, the employee agrees not to disclose any information

⁴ Council approved the most recent version of the Councillors' Office Manual on December 9, 2020, as part of the 2018-2022 Mid-term Governance Review.

except what may be necessary under MFIPPA guidelines. This provision survives the termination of the Employment Contract.”

73 The Investigator found that Ms. Clarke had access to confidential material in the course of her employment. Specifically, the Investigator found that Ms. Clarke had access to a hard copy of a 2018 Ottawa Community Lands Development Corporation (OCLDC) report recommending criteria for the marketing and evaluating of offers for three properties:

“During the course of our investigation, we noted that Ms. Clarke frequently forwarded emails received in her City email account to herself (from alison.stirling@ottawa.ca to alison.stirling@ottawa.ca). In response to why she forwarded emails to herself, Ms. Clarke indicated the following:

- She often sent emails from her account to herself to create a ‘draft’ copy to continue to work on or mark up.
- She sent emails to herself to bring the email to the top of her inbox, as a reminder to complete a task or to discuss with Cllr. Harder.

Based on our review of emails, we noted that on June 5, 2018, an email from alison.stirling@ottawa.ca was sent to alison.stirling@ottawa.ca with no subject or no text in the body of email. The email contains 7 pictures of a report from the Ottawa Community Lands Development Corporation (“OCLDC”). When asked to explain why she took pictures of the report and emailed the report to herself, Ms. Clarke indicated the following:

- The report is printed on pink paper. City documents printed on pink paper indicates that the report is confidential and it only exists as a hard copy and it is not sent by email;
- This was the first time she had seen a report on pink paper;
- She believes the report came through internal mail;
- In her role as Cllr. Harder’s assistant, she [checked] for mail in the Councillors’ mailbox each day;
- She recalls receiving the report at City Hall while Cllr. Harder was working away from City Hall;

- Cllr. Harder is a Board Member of OCLDC;
- She informed Cllr. Harder that she had received an OCLDC Report and Cllr. Harder would have instructed Ms. Clarke to open the report “*and send her photos of the report as she was not at City Hall where the hard copy existed, and she needed the report info asap*”;
- She took the photos of the report with her phone, sent the photos to her City of Ottawa email from her phone, and retrieved them from her City of Ottawa email on her desktop. She noted that reports printed on coloured paper do not photocopy or scan and pages would be completely blank;
- She formatted the email and sent the pictures of the report to Cllr. Harder; and
- She indicated that TSG was not involved with the properties related to this report or retained by any clients that were involved with this report.

Additional questions were posed to Cllr. Harder in relation to Ms. Clarke’s statement. . . . Cllr. Harder’s legal counsel provided the following response:

- Councillor Harder “recalls this report, as she does specifically with items in her Ward;
- She cannot specifically recall the instructions given to Ms. Clarke, but advises that the procedure in her office are as follows:
 - a. OCLDC reports do not come via email, they are hand delivered to the Board Members only and they are marked confidential;
 - b. The lead person in the Councillor’s office (Alison) would have done exactly what she says she did. The Councillor was not in the office;
 - c. After she photographed the document she would have likely sent to the Councillor’s private email account, not the City account but may have sent it to the Councillor by text. She would not send it to ottawa.ca. This is as a result of the fact that the OCLDC does not use the City network nor does it operate under the *Municipal Act*;
 - d. She would have shredded the document after having taken the picture; and,

- e. She was following the office procedure;
- She recalls reading the report, but not the method of delivery. As indicated above, the matter was in the Councillor's ward, and was therefore important to her and Ms. Clarke. Alison was the Councillor's lead planning staff as well as lead in the office. Given this report as mentioned is in the Councillor's ward, she would want to be reminded of the criteria/standards she was looking to achieve as the development started to firm up. Alison would have known this and the Councillor doesn't know whether she kept it for her own follow up but given her role and the plan to develop this property, it would have been prudent for her to do so."

74 The Investigator's report continues:

"As Ms. Clarke and Cllr. Harder indicated, the OCLDC document is a confidential document, intended to exist in hard copy only and is not to be sent by email. Upon further review of both Ms. Clarke and Cllr. Harder's emails, we found no evidence that Ms. Clarke sent the report/pictures via email to Cllr. Harder or that Cllr. Harder received the report/pictures.

It appears, based on the information provided by Ms. Clarke, that the OCLDC reports were not intended to be circulated via email, and [that] a violation to this protocol may have occurred. It also appears that Ms. Clarke had access to sensitive or confidential information while Cllr. Harder was not in the office, increasing the risk that Ms. Clarke could have access to sensitive information possibly [to the benefit of] TSG."

Application for Zoning By-law Amendment during the period of Ms. Clarke's employment

- 75 The Investigator found that The Stirling Group was involved with a number of planning applications between August 14, 2017 and February 28, 2021. Many of the applications, such as those for Site Plan Control, fell under the delegated authority of PIED staff.
- 76 Applications for Zoning By-law Amendment, however, are considered by Planning Committee or the Agriculture and Rural Affairs Committee (ARAC). Applications for Zoning By-law Amendment are initially filed with PIED staff. The application undergoes a period of consultation, after which staff prepare a report

to Planning Committee or ARAC and Council with a recommendation with respect to the application.

- 77 Mr. Stirling was the co-applicant on an application for a Zoning By-law Amendment [Application A] that was submitted during the period of Ms. Clarke’s employment as Councillor’s Assistant in the Respondent’s Office.⁵

Application A	
Co-applicant	Mr. Stirling
Location	The property is not in the Respondent’s Ward
Date submitted	March 28, 2018
Planning Committee approval	December 12, 2019
Council approval	January 29, 2020
<p>Mr. Stirling appeared as a delegation at the Planning Committee meeting of December 12, 2019.</p> <p>Committee and Council consideration of the Zoning By-law Amendment occurred during a four-month period between the Respondent’s two contracts with The Stirling Group.</p>	

- 78 Although The Stirling Group was in between service contracts with the Respondent during Planning Committee and Council consideration of Application A, the Investigator found that during that same period The Stirling Group provided Ms. Clarke’s services to the Respondent free of charge. For example, Ms. Clarke created a briefing note for the Respondent for the Planning Committee meeting of December 12, 2019, which included a summary of Application A.
- 79 The Investigator’s report also states: “A review of Cllr. Harder’s City of Ottawa email account [indicates] that Mr. Stirling continued to provide written opinions to Cllr. Harder during the Gap Period.”
- 80 The “Gap Period” refers to the period between The Stirling Group’s first and second contract with the Respondent. The matter of services provided to the

⁵ For privacy reasons, the municipal addresses of planning applications have not been included in this report.

Respondent free of charge and outside of a contract is discussed in detail in the section below: “Evidence of a Benefit from The Stirling Group to the Respondent.”

Management of potential, real and apparent conflicts of interest

- 81 The Investigator’s report includes information Ms. Clarke provided on her training for the position of Councillor’s Assistant, including on the subject of conflict of interest:

“As part of her employment onboarding, Ms. Clarke indicated that she did receive on-the-job training from Cllr. Harder’s previous planning assistant with respect to her role and responsibility. Ms. Clarke also met with the City PC coordinator to understand when the PIED reports were released and how the PC operated. She also did a tour of Ward 3 and met with Cllr. Harder to discuss ongoing files and expectations.

With respect to the City’s Code of Conduct (“COC”) for Employees, policies and procedures, Ms. Clarke indicated that she met with an individual from human resources to review her salary and benefits and sign her contract. She does not recall reviewing specific policies and procedures or receiving specific training on the employee CoC; however, she is aware that the City has an employee CoC. She does not recall any specific provisions on Conflicts of Interest (“COI”).”

- 82 The Investigator’s report provides information on how the Respondent and Ms. Clarke managed potential and real conflicts of interest while Ms. Clarke was employed as a Councillor’s Assistant in the Respondent’s Office:

“During her interview, Ms. Clarke stated that:

- She never formally reported any COIs;
- She did recall one instance where she was on a phone call with Cllr. Harder and a developer to discuss an application when she realised that the individual had been a client of TSG. During the phone call, Ms. Clarke advised Cllr. Harder of the potential conflict by text and Cllr. Harder advised her to leave the call. This is the only instance of a COI she could recall; and

- She discussed the possibility of COI with Mr. Stirling between her and TSG and [they] both acknowledged the possibility considering they were working in the same industry.”

83 The Investigator’s report includes a summary of Mr. Stirling’s replies to the Investigator’s questions about conflict of interest while Ms. Clarke was employed as a Councillor’s Assistant in the Respondent’s Office:

“During his interview, Mr. Stirling stated that:

- At no time did he think there was a COI with Ms. Clarke working for Cllr. Harder;
- Ms. Clarke would not have had access to information otherwise not accessible to him;
- He was not aware of what Ms. Clarke was working on;
- Ms. Clarke lives in Kingston and he lives in Nepean. She did not have access to his office, and he did not have access to her office; and
- Most of the work he does with the PIED staff does not reach the PC for approval.”

The Respondent’s contracts with The Stirling Group

Contractor Responsibilities

84 The Respondent has retained the services of The Stirling Group under three separate contracts. Contract 1 was for the period of November 1, 2018 to October 31, 2019. Contract 2 was for the period of March 1, 2020 to February 28, 2021. Contract 3 is dated March 18, 2021, and is for the period of one year. At the time of writing of this report, The Stirling Group has invoiced for the months of March and April 2021.

85 The scope of work, as set out in the contracts, is as follows:

“The Stirling Group (TSG) is available to assist Councillor Harder in several areas including:

1. Briefing notes on all planning files for use during Committee / Council.
2. Ongoing work with the Councillor and the Barrhaven Business Improvement Association with the goal of improving planning and transportation practices in the Ward.
3. Assisting/ advising Councillor Harder in any Industry / City issues that could impact her Ward or nearby areas.
4. Any other activity / opportunity where Councillor Harder requires the services of The Stirling Group.”

86 As noted above, the investigation was coming to an end when the Respondent signed the third contract on March 30, 2021. As a result, the factual report the Investigator provided to me does not include information about the third contract. Nevertheless, the existence of a third contract is material to this report.

87 The Investigator’s report provides a summary of work undertaken by Ms. Clarke and Mr. Stirling under Contract 1 and Contract 2:

“Based on interviews with Ms. Clarke and Mr. Stirling, we note the following:

- Services for item 1 above was only provided by Ms. Clarke. The briefing notes were prepared for Cllr. Harder and no other PC members. [Note: A sample of briefing notes reviewed indicated that the briefing notes were excerpts from the City planning staff reports and did not include any opinion from Ms. Clarke. This is consistent with what Ms. Clarke indicated during her interview.]
- The briefing notes Ms. Clarke prepared were mostly for the PC [meetings]; however, Ms. Clarke did prepare briefing notes for other committee meetings if Cllr. Harder asked her to. [Note: Ms. Clarke provided briefing notes for a report prepared for ARAC on May 3, 2018, during her employment period with Cllr. Harder. She also prepared briefing notes for Cllr. Harder relating to the BHSC and the Finance and Economic Development Committee.]

- Ms. Clarke indicated that she only had access to planning files that were publicly available.
- Ms. Clarke indicated that she had interactions with PIED staff in the course of her duties, but if TSG was involved with [a] PIED report, Ms. Clarke would not interact with them.
- Mr. Stirling was responsible for services for items 2 to 4 of the TSG Scope of Work. [Note: A review of email correspondence between Cllr. Harder and Mr. Stirling demonstrates that Cllr. Harder regularly sought his advice on planning matters related to Ward 3 or the PC.]”

88 The Investigator’s report provides the following information on Ms. Clarke’s departure from employment in the Respondent’s office, and on Ms. Clarke’s role while employed by The Stirling Group under contract to the Respondent:

“According to Ms. Clarke, Cllr. Harder did not replace her after her departure [as Councillor’s Assistant]. Cllr. Harder indicated in her interview that after Ms. Clarke’s departure as an employee from her office, there was no intentional plan to retain Ms. Clarke through TSG. Cllr. Harder did retain TSG approximately four months after Ms. Clarke’s departure to continue to provide briefing notes on the PIED reports. According to Ms. Clarke, she accessed the reports approximately ten days before the PC meeting. At the time Ms. Clarke accesses the PIED reports, they are publicly available.”

Applications for Zoning By-law Amendment while under contract with the Respondent

- 89 As noted above, while The Stirling Group was involved with a number of planning applications between August 14, 2017 and February 28, 2021. Many of those fell under the delegated authority of PIED staff.
- 90 Application for Zoning By-law Amendment, however, is a matter that rises to Standing Committee and Council.
- 91 The Stirling Group was involved with two applications for Zoning By-law Amendment during the time the company was retained on Contract 1 with the Respondent.

	<u>Application B</u>	<u>Application C</u>
Date application submitted	October 16, 2018 *	May 29, 2019
Applicant	Client of The Stirling Group**	Ms. Clarke
Planning Committee approval	September 26, 2019	January 23, 2020
Council approval	October 9, 2019	January 29 2020
	Committee and Council consideration occurred during the period of the Respondent's first contract with The Stirling Group	Committee and Council consideration occurred during a four-month period between the Respondent's two contracts with The Stirling Group
Location	Neither property is in the Respondent's Ward	
<p>* The Development Applications Search tool lists this as the Date Received.</p> <p>** Applicant is an individual not employed by The Stirling Group. In a review of e-mail documentation, the Investigator found that in a briefing note Ms. Clarke prepared for the Respondent for the Planning Committee meeting of September 26, 2019, Ms. Clarke disclosed to the respondent that The Stirling Group had been hired by the applicant.</p>		

92 The Investigator raised the matter of Application C during the interview with the Respondent. The Investigator described that, on May 29th, 2019 (the date the application was submitted), Ms. Clarke was under contract with the Respondent's Office through The Stirling Group. The Investigator asked the Respondent if, at the Planning Committee meeting at which the item was considered, it was disclosed that Ms. Clarke was the applicant and at the same time contracted to the Respondent's Office.

93 In reply, the Respondent's legal counsel stated the following on behalf of his client:

Respondent's legal counsel:

"I'm gonna ask again, what does the nature of the relationships have to do with anything? The report by staff is done on a professional planning basis. It was

recommended by staff. Should that report be discounted based on existing relationships?”

Investigator:

“Well, the relationship at that time, Alison Stirling was working in her office.”⁶

Respondent’s legal counsel:

“So what?”

Investigator:

“OK, so if that's your position, that's fine. OK, duly noted. Thank you.”

- 94 The Stirling Group was involved with three applications for Zoning By-law Amendment during the time the company was retained on Contract 2 with the Respondent:

	<u>Application D</u>	<u>Application E</u>	<u>Application F</u>
Date application received	February 24, 2010	May 5, 2020	September 4, 2020
Applicant	The Stirling Group	The Stirling Group, attn. Alison Stirling	The Stirling Group, attn. Jack Stirling
Standing Committee approval	ARAC June 4, 2020	Planning Committee February 11, 2021	Planning Committee January 14, 2021
Council approval	June 10, 2020	February 24, 2021	January 27, 2021
	Committee and Council consideration occurred during the period of the Respondent’s second contract with The Stirling Group.		
Location	The properties are not in the Respondent’s Ward		

Management of potential, real and apparent conflicts of interest

- 95 The Councillors’ Office Manual sets out the requirement that contracted vendors sign a non-disclosure agreement with the Councillor’s Office (emphasis added):

⁶ At the time, Ms. Clarke was not working in the Councillor’s Office. She was working for The Stirling Group under contract to the Respondent’s Office.

“3.2 Contracted Vendors

As directed by the Member Services Committee at its meeting February 5, 2001, service agreements can be entered into whereby contractors invoice the Councillor’s office directly for services rendered. It is the responsibility of the Councillor to ensure that such agreements do not result in the creation of an “employer-employee” relationship involving the City. The costs of such services can be borne by the Councillor’s Constituency Services Budget. It is recommended that contracts be awarded in compliance with the City’s Procurement By-law.

It is recommended that contracted vendors are hired to carry out duties that are non-routine in the office and require a specific focus such as marketing, social media or graphic design services, etc.

Once services are retained, contracted vendors must sign a Non-Disclosure Agreement with the Councillors Office. This agreement is to be completed and submitted to Council Support Services.

Invoices for a contracted vendors services can be submitted to Council Support Services following the procedure detailed in section 5.5 (Accounting Procedures) . . .

Council Support Services can assist the Councillors Office in coordinating any work requirements for a Contracted Vendor such as a contractor employee badge and network access.”

- 96 The Investigator found no evidence that a non-disclosure agreement (NDA) or confidentiality clause was in place during either of the Respondent’s two contracts with The Stirling Group:

“On August 14, 2019, during the Contract 1 period, the Program Manager of Council Support Services emailed an NDA to Cllr. Harder’s executive assistant. The email stated:

“I have attached a non-disclosure agreement. This can be signed by Alison if your contract with Sterling [sic] does not have a clause in it about non-disclosure. I am unable to verify if there is such a clause because the contract is with the Councillor and my office does not have a copy.”

The same day, Cllr. Harder's executive assistant forwarded the email to Ms. Clarke's Hotmail email address with no additional instructions.

Ms. Clarke indicated that she did not recall receiving the email and confirmed that she did not sign the NDA for either of the two contracts between the Office of Cllr. Harder and TSG. She added that it was possible the email went to the spam folder, as her Hotmail account is mostly used for email subscriptions.

Contract 1 and Contract 2 do not include a clause about non-disclosure."

97 City staff have confirmed that there is no Non-Disclosure agreement on file associated with Contract 3.

98 The Investigator asked the Respondent if, to her knowledge, contractors are required to sign an NDA. The Respondent replied:

"No, I don't know and I wouldn't know."

99 As noted above, in written reply to the Investigator, the Respondent confirmed that Ms. Clarke had access to the Respondent's e-mails and had the capability to respond during the period of August 1, 2017 to September 20, 2020. This period of time covers Ms. Clarke's period of employment as Councillor's Assistant. It also covers the period of Contract 1, the "Gap Period" between the two contracts, and approximately seven months of Contract 2.

100 In a review of e-mail documentation, the Investigator found that Ms. Clarke disclosed two of The Stirling Group's existing business relationships to the Respondent:

"During the course of the Investigation, we identified two briefing notes reflecting the disclosure of TSG's business relationship with the applicant. The September 26, 2019 and December 12, 2019 briefing notes for the Respondent for a PC agenda item prepared by Ms. Clarke contained the following:

On September 26, 2019: *"**WE, THE STIRLING GROUP, HAVE BEEN HIRED BY THE APPLICANT OF (address removed) ***

On December 12, 2019: *"**WE, THE STIRLING GROUP, FORM PART OF THE APPLICANT TEAM FOR THIS APPLICATION**"*

During our interview with Ms. Clarke, she confirmed writing the message at the top of the briefing notes, stating that she thought it was

best to declare such relationship. She reiterated that the briefing notes were excerpts from the PIED report and that she did not change any information or provide any opinion from the PIED report.

In relation to the disclosure statement at the top of the briefing notes, Cllr. Harder indicated that:

- It demonstrates that Ms. Clarke is being honest and transparent;
- It was always their agreement that Ms. Clarke disclose any files she was involved with in the briefing notes;
- The briefing notes do not include an opinion;
- She reads the briefing notes as well as the whole report afterwards; and
- She did not disclose a COI in relation to Ms. Clarke working for the applicant and working as a consultant for her Office. It is her position that the reports provided to the PC are prepared by the PIED staff on a professional basis and therefore there is no COI.”

101 The Investigator’s report provides the following summary of the Respondent’s replies to questions about conflict of interest during Ms. Clarke’s employment as Councillor’s Assistant, and during the Respondent’s two contracts with The Stirling Group.

“During her interview, Cllr. Harder stated that:

- Ms. Clarke, at no time, had access to information that might have caused a COI with TSG or Mr. Stirling;
- Ms. Clarke did not have access to files involving developments proposed by TSG or Mr. Stirling;
- Ms. Clarke had access to PIED reports once they became public. These reports were accessed through a publicly available City web portal (such as DEVAPPS or SIRE), 10 days prior to PC meetings;
- Receiving services from the private sector is not a COI according to the Municipal Conflict of Interest Act (“MCIA”); and
- She is not aware if consultants are required to sign an NDA.”

102 The Investigator’s report provides the following summary of the information the Respondent, Mr. Stirling and Ms. Clarke provided during their interviews with respect to conflict of interest:

“Throughout the interviews, Cllr. Harder, Ms. Clarke and Mr. Stirling maintain that there was no COI, real or perceived, throughout Ms. Clarke’s employment with the Office of Cllr. Harder (both as an employee and contractors), in accordance with the [Code of Conduct] for Members of Council and the [Code of Conduct] for Employees.”

Evidence of a benefit from The Stirling Group to the Respondent

“Gap Period” between the Respondent’s first two contracts with The Stirling Group

103 The Investigator’s report provided the following evidence of a benefit provided by The Stirling Group to the Respondent:

“We note that there was a four-month period between Contract 1 and Contract 2, November 2019 to February 2020 (the “Gap Period”), where TSG was not under contract with the Office of Cllr. Harder.”

. . .

“Four months of service without a contract

Ms. Clarke indicated that under Contract 1 and Contract 2, she was responsible for preparing briefing notes for Cllr. Harder . . . During our review of the briefing notes prepared by Ms. Clarke, we identified that she prepared briefing notes for Cllr. Harder for the following PC meetings [during the “Gap Period”]:

1. November 28, 2019;
2. December 12, 2019⁷, and
3. February 27, 2020.”

⁷ Ms. Clarke’s briefing note for the December 12, 2019 Planning Committee meeting contained a summary of Application A, an application for Zoning By-law Amendment submitted during the period when Ms. Clarke was employed in the Respondent’s Office. Mr. Stirling was the co-applicant. Application A received Planning Committee approval on December 12, 2019, and Council approval on January 29, 2020. This matter is addressed on page 26 of this report.

104 A review of the email exchanges between the Respondent and Mr. Stirling by the Investigator found that TSG continued to provide written opinions on planning matters to the Respondent during the Gap Period on the following dates:

1. November 9, 2019;
2. December 30, 2019; and
3. February 18, 2020.

105 The Investigator asked the Respondent about the “Gap Period”:

“In response to follow-up questions with respect to the Gap Period, Cllr. Harder provided the following additional information:

- There were conversations with respect to establishing a new contract immediately following the expiration of Contract 1.
- Cllr. Harder intended to speak with TSG over the Christmas holiday period and believes that they just lost track of it. . . .

Cllr. Harder also indicated during her interview that she never sought direction or guidance from the OIC [Office of the Integrity Commissioner] as to whether or not there was a potential or perceived conflict of interest between TSG and her Office.”

106 The Investigator also asked Ms. Clarke about the “Gap Period”:

“During our interview and written correspondence with Ms. Clarke, she confirmed that:

- Even though Contract 1 was expired, she continued to provide briefing notes to Cllr. Harder;
- She was responsible for TSG contracting with the Office of Cllr. Harder and the gap between the two contracts was an administrative issue on her part;
- She prepared all the invoices for TSG contract with the Office of Cllr. Harder. If there was not [a] contract in place for the Gap Period she did not invoice for the services provided during those months;

- TSG, Mr. Stirling or herself did not get remunerated for any services provided during the Gap Period.”

The Stirling Group provided unpaid work for the Respondent

107 The Investigator’s report includes the following with respect to unpaid services TSG provided during the Gap Period:

“A review of the payments made by the Office of Cllr. Harder to TSG confirms that TSG was not issued any payments for services rendered during the Gap Period.

At the calculated rate of \$3,000 per month (in accordance with the financial terms reflected in Contract 1 and 2), TSG appears to have provided services to the Office of Cllr. Harder valued at \$12,000 at no charge.”

108 The Investigator asked the Respondent about the finding that she received a benefit in the form of unpaid work from The Stirling Group during the Gap Period. The Respondent replied:

“I get free service from Jack, and a few others, anytime I want. This is the thing. It formalizes the relationship having that contract, it’s important to me to have the quality of the briefing notes that I have from Alison, but that’s the extent that Alison’s role is. Jack, just like [name of other individual removed], I’ve called him on some pretty significant issues and he has – because we have a relationship and he’s so right about the, the size of the, the fish swimming around in the planning pool, really in City, OK?”

109 The Investigator’s report states:

“Subsequent to the interview, Cllr. Harder clarified that the statement should be reflected as: *“She would at times call on Jack and a few other experts, whom she had a friendship with, to obtain their opinion and knowledge free of charge.”*

110 The Investigator’s report includes the following exchange between the Investigator and the Respondent’s legal counsel on the matter of the Respondent’s receipt of a benefit:

“On January 28, 2021, the following written question was posed to Cllr. Harder, via her legal counsel:

“We are writing to seek your client, Councillor Harder’s, cooperation in providing us with a response to the following:

1. Has Councillor Harder and/or any of her family members received any gifts, benefits, hospitality, or favours directly or indirectly from Alison Clarke/Stirling, Jack Stirling or The Stirling Group; and
2. In the event that the response to # 1 is yes, kindly provide us with full particulars.”

On February 4, 2021, Cllr. Harder’s legal counsel responded as follows:

“ . . . I am instructed by the Councillor to advise you that the answer to your question 1 below is “no”. As such, there is no answer to your question 2.””

111 In response to subsequent written questions the Investigator sent to the Respondent’s legal counsel, on March 26, 2021, legal counsel replied to the Investigator on the Respondent’s behalf:

1. “In that time period, Ms. Clarke produced exactly 6 briefing notes, one each on November 8 (2019), December 9 (2019), December 12 (2019), January 23 (2020), February 13 (2020), and February 7 (2020);⁸
2. Conversations were had regarding getting a new Contract in place immediately following the expiration of the first contract. My Assistant at the time was going to speak with me about this and through the Holidays, and we believe it just got lost;
3. Ms. Clarke continued doing the work nonetheless, on the assumption that a new contract would in fact be signed;

⁸ The e-mail from the Respondent’s legal counsel stated Ms. Clarke produced six briefing notes during the Gap Period. The Investigator’s report states that, other than three briefing notes produced for Planning Committee meetings of November 28, 2019, December 12, 2019 and February 27, 2020, the Investigator was not able to locate the additional briefing notes in either the Respondent’s or Ms. Clarke’s e-mail records.

4. TSG was paid for the period starting in March, and as an ongoing business relationship, apparently didn't feel it was necessary to circle back for the "Contract Gap" period;
5. This work does not fall under section 12 of the Code of Conduct, since Ms. Clarke is not a lobbyist; and
6. This work is not a benefit. In fact, given the slowdown in the work for Ms. Clarke, it would seem that paying \$12,000 for 6 briefing notes would be seen by most as excessive pay for this amount of work. We note that the prohibition is with respect to "gifts that would, to a reasonable member of the public, appear to be in gratitude for influence, to induce influence, or otherwise to go beyond the necessary and appropriate public functions involved." This happened in the normal course of a working relationship, and with the interruption in contract period combined with the small amount of work done, not unusual in the business world."

112 The Investigator's report includes a summary of information from Ms. Clarke's interview on the subject of gifts or donations:

"During our interview with Ms. Clarke, she was asked the following questions:

- Did you ever provide gifts or donations directly/indirectly to Cllr. Harder?
- Have you ever witnessed Cllr. Harder receive or accept gifts or donations directly/indirectly?
- Have you ever witnessed Cllr. Harder receive or accept gifts or donations directly/indirectly from TSG?

Ms. Clarke answered no to all of the three above noted questions, other than a candy basket that was delivered to Cllr. Harder's Office."

113 The Investigators submitted additional questions to Mr. Stirling regarding the work completed by The Stirling Group during the Gap Period. Mr. Stirling advised that he was seeking legal advice and would likely not provide answers to the questions. As of the date of the Investigator's final report, Mr. Stirling did not provide answers to the written questions.

Mr. Stirling's Role on the Planning Advisory Committee

- 114 The Planning Advisory Committee (PAC) is a mandatory advisory committee required under the *Planning Act*. Under Section 8 of the *Planning Act*, the members of the committee “shall be chosen by the council and shall include at least one resident of the municipality who is neither a member of a municipal council nor an employee of the municipality.” The *Planning Act* does not set out any other requirements with respect to the Committee’s structure or mandate.
- 115 In November 2016, the City of Ottawa’s 2014-2018 Mid-term Governance Review report proposed the establishment of a Planning Advisory Committee for the City of Ottawa, including a recommended composition, mandate and Terms of Reference.⁹ During its consideration of the 2014-2018 Mid-term Governance Review report, however, Council deferred the establishment of a PAC in order to solicit additional feedback from community and industry stakeholders.
- 116 Council established a working group, comprised of the Respondent as Chair of the Planning Committee, as well as the Chairs of ARAC and the Built Heritage Sub-Committee to work with the General Manager of PIED to bring forward recommendations on the PAC’s proposed composition, mandate and Terms of Reference.
- 117 On December 13, 2017, Council approved the establishment of the PAC, including the Committee’s Terms of Reference and general composition, as follows:
- Three Members of Council including:
 - Chair of the Planning Committee;
 - Chair of the Agriculture and Rural Affairs Committee; and
 - Chair of the Built Heritage Sub-Committee;
 - Two residents residing in the Rural Area of Ottawa;
 - Two residents residing inside the Greenbelt;
 - Two residents residing with the Urban Area but outside the Greenbelt;

⁹ Information in this section on the legislative history of the PAC is from the staff report “2018-2022 Council Governance Review”. Considered by Ottawa City Council on December 5, 2018.

- A representative nominated by the Federation of Citizens' Associations of Ottawa (FCA);
- A representative nominated by the Greater Ottawa Homebuilders' Association (GOHBA);
- A representative nominated by the Building Owners and Managers Association (BOMA);
- A practicing architect and member of the Ontario Association of Architects (OAA);
- A practicing landscape architect and member of the Ontario Association of Landscape Architects (OALA); and
- A practicing professional planner and member of the Ontario Professional Planners Institute (OPPI).

118 Shortly after Council approved establishing the PAC, and in accordance with the Council-approved Appointment Policy for Citizen Members of City Advisory Committees, Boards, Commissions, Task Forces and Authorities, the Office of the City Clerk and Solicitor undertook a campaign to recruit candidates for the 12 public member positions on the PAC.

119 The Selection Panel for the Planning Advisory Committee was comprised of the Respondent, Councillors Nussbaum and Moffatt, and Mayor Watson (or designate).

120 The Selection Panel's recommended candidates were brought forward for Council consideration on March 28, 2018. Council considered the staff report "Appointments – Planning Advisory Committee" and approved the appointment of the 12 public members of the PAC for the remainder of the 2014-2018 Term of Council, including Jack Stirling.

121 Mr. Stirling was appointed as Professional planner member. Council also approved the recommendation, set out in the report "Appointments – Planning Advisory Committee", to:

"waive the requirement in the PAC Terms of Reference that the Professional Planner member be a practicing member of the Ontario Professional Planners Institute as described in this report"

122 The staff report includes the following explanation:

“The Selection Panel is further asking that Council waive the requirement in the PAC Terms of Reference that the Professional Planner be a practicing member of the Ontario Professional Planners Institute. The recommended candidate for this position is not currently a practicing member, though his experience would enable him to contribute significant planning and industry expertise to the PAC. The waiver would be effective until the candidate’s current term of office ends.”

123 During consideration of the 2018-2022 Council Governance Review report, Council approved the renewal of the PAC public member appointments for the 2018-2022 Term of Council.

124 The Respondent has served as one of three Members of Council on the PAC from its establishment on December 13, 2017.

125 The Investigator asked the Respondent if she is on the PAC. The Respondent replied: “I don’t actively attend, but I am on it.”

126 Mr. Stirling served on the PAC from his appointment on March 28, 2018, to his resignation from the PAC on January 27, 2021. The position was voluntary and unpaid.

127 My Office received confirmation that Mr. Stirling resigned from the PAC on January 27, 2021, with the resignation to take effect immediately upon the provision of his notice.

128 During the period of recruitment for the public members of the PAC, Ms. Clarke was employed as a Councillor’s Assistant in the Respondent’s Office.¹⁰

129 Since its establishment, the PAC has met five times:

- Twice during the period of the Respondent’s first contract with The Stirling Group

¹⁰ Ms. Clarke was employed as Councillor’s Assistant in the Respondent’s Office August 14, 2017 to July 20, 2018. As set out in the report “Appointments – Planning Advisory Committee”, the Clerk’s Office advertised for the public member positions on the PAC in January 2018, with an application deadline of January 31st 2018. Council approved the Selection Panel’s recommended candidates on March 28, 2018.

- March 18, 2019 – the minutes record Mr. Stirling as present, and the Respondent present as Presiding Officer
- September 25, 2019 – the minutes record Mr. Stirling as present and the Respondent as absent
- Once during the “Gap Period” between the Respondent’s two contracts with The Stirling Group (February 5, 2020)
- Twice during the period of the Respondent’s second contract with The Stirling Group
 - October 7, 2020 – the minutes record Mr. Stirling as present and the Respondent as absent
 - February 3, 2021 – the draft minutes record the Respondent as absent. Mr. Stirling resigned from the PAC before this meeting took place.

130 The Investigator asked Mr. Stirling and the Respondent about the circumstances of Mr. Stirling’s appointment. The Investigator’s report includes the following:

“Mr. Stirling Interview

- He applied to the PAC after seeing an add in the paper, looking for volunteers to join the committee;
- At the time of the application, he applied for a rural position, given where he lives;
- He does not know why he was proposed for the professional planner member position as opposed to the rural member position;
- The PAC is a volunteer committee, mandated by the *Planning Act*, with no real decision power. The PAC listens to PIED budget presentations and work programs;
- The committee does not discuss matters related to the PC; and
- He is not a practicing member of the Ontario Professional Planners Institute.

Cllr. Harder Interview

- The selection panel are the only ones who got the applicants' resumes. They looked for certain talent to fill the committee;
- Applicants did not know who else is applying;
- She did not have any discussions with Mr. Stirling regarding the PAC;
- She does not recall the discussions within the selection panel regarding the Professional Planner position;
- She does not recall why the recommendation to waive the requirement in the PAC's Terms of Reference that the Professional Planner member be a practicing member of the Ontario Professional Planners Institute was made;
- She does not recall if the other members of the selection panel agreed on waiving the requirement that the Professional Planner member be a practicing member of the Ontario Professional Planners Institute;
- In response to why another applicant for the Professional Planner who had all the qualifications did not get chosen, it is Cllr. Harder's position that Mr. Stirling was a better applicant and is one of the best planners in the City."¹¹

131 It is important to note that members of the PAC received regular in-depth briefings from PIED staff such as presentations on:

- Planning, Infrastructure and Economic Development Department (PIED) 2018 year in review;
- The draft 2019 work plan for PIED; and
- The draft 2020 work plan for PIED.

132 By way of example, the Minutes of the PAC meeting for February 5 2020 report the following:

¹¹ Statement made by Cllr. Harder's legal counsel during the interview. Cllr. Harder agreed to adopt legal counsel's position with respect to information provided.

“The Committee asked questions of staff related to the following topics:

- Planning application fees and cost recovery
- Timing of the Urban Design Guidelines
- Mapping 15-minute neighbourhoods
- Social infrastructure
- Public spaces, parks and payment in lieu of parks
- Community Improvement Plans
- Cannabis production facilities and retail
- Timing of the review of aggregate resource policies following the establishment of the New Official Plan

Actions:

- Planning, Infrastructure and Economic Development Department (PIED) will consider options for briefing Public Members (such as a briefing note to be distributed with the Agenda, briefings for public members, hyperlinks to information already available on the website) and propose a format to Councillor Members.
- PIED will provide information to Members on the timing of the Community Improvement Plan review; PIED will consult stakeholders”

133 The public members of the PAC are subject to the Advisory Committee Members’ Code of Conduct. The Integrity Commissioner does not have oversight of the Advisory Committee Members’ Code of Conduct. Members of the PAC who are also Members of Council are governed by the Code of Conduct for Members of Council.

134 Under Section 3 of the Advisory Committee Members’ Code of Conduct, Members are prohibited from certain activity, including:

- Engaging in any business or transaction or have financial or personal interest that is incompatible with the discharge of his or her official duties;

- Placing themselves in a position where they could derive any direct or indirect benefit or interest from any matter about which they can influence decisions; and
- Benefitting from the use of information acquired during the course of their official duties which is not generally available to the public.

135 Sections 4 and 5 of the Advisory Committee Members' Code of Conduct provide the following:

4.

- (a) Section 3 does not apply to the interests of a Member by reason of the Member belonging to a particular body which Council has expressly provided a designated seat on the Advisory Committee.
- (b) In addition to Clause (a), it is understood that Members of the City's Planning Advisory Committee are intentionally comprised of citizens from professional groups who interact regularly with the City's planning process. Therefore, a Member's interest that is industry-wide in nature does not constitute a breach of Section 3.

5. A Member of an Advisory Committee shall disclose to the City Clerk or persons designated, immediately that s/he could be involved in either a real or perceived conflict of interest as prohibited by the Code and shall abide by any decision made by the City Clerk, or the designated person, with respect to such conflict of interest without recourse.

136 Section 6 of the Advisory Committee Members' Code of Conduct lists steps an Advisory Committee Member is required to take when that Member believes, or has been advised, that the Member may have a conflict of interest in a particular matter. Those steps include disclosing the interest prior to any consideration of the matter, and leaving the room for the duration of time that the matter is being considered.

137 The first item on the PAC agendas is "Declarations of interest".

138 PAC minutes show that neither the Respondent nor Jack Stirling declared an apparent conflict of interest.¹² Mr. Stirling resigned from the PAC in advance of the PAC's fifth and most recent meeting on February 3, 2021.

139 A reasonable outside onlooker might well form the view that TSG was privy to insider information and that its principal benefited from privileged access by virtue of his membership on the PAC. But that would also be the case for other appointed members of the PAC.

140 The difference is that TSG was at the same time under contract with the Chair of the Planning Committee.

Evidence that the appearance of a conflict of interest was known to the Respondent

141 As noted above, during the Complainant's interview with the Investigator, the Complainant recalled becoming aware of the matter that gave rise to the allegations by reading an article in the Spring 2019 issue of the independent Ottawa newspaper *The Leveller*. Among other matters, the article identifies Ms. Clarke (then Stirling) as an employee of the Respondent, and speculates that she is Mr. Stirling's daughter.

142 The Investigator's report contained the following quotes from the article, as written in the voice of the article's author:

- *"In September [2018], I wrote about how Peter Hume was in business with Jack Stirling as [a] planning consultant who help[s] developers streamline development proposals through the city government."*
- *"Hume and Stirling are also connected to Barrhaven councillor Jan Harder, who is the current chair of the Planning Committee, as well as being a member of the Finance and Economic Development Committee and the Planning Advisory Committee."*
- *[RE Jan Harder Charity Golf Tournament]: "As reported in the CBC . . . the optics of this event became more unseemly once Harder was appointed chair of the Planning Committee. But rather than stopping the event, its*

¹² Draft minutes of the meeting of February 3, 2021 have not been confirmed and, as a result, are not publicly available at the time of writing.

name was simply changed to the Just Happy Golf Tournament and its organization was outsourced to Hume and Stirling.”

- *“Recently it has come to my attention that one Alison Sterling [sic] is currently working as an aid for Harder. At the same time Alison Stirling’s LinkedIn page lists her current job as a project manager for the Stirling Group – that is to say Jack Stirling’s consulting firm. The LinkedIn profile has no mention of her working for Harder.”*
- *“...I posed these two questions to Councillor Harder’s office:*
 - *Do you think there’s anything inappropriate about Jack Stirling’s daughter, Alison Stirling working both as an aide for you and at the same time working for her father’s consulting firm, The Stirling Group?*
 - *Do you think this gives the impression that developers have too much influence at City Hall?”*

143 During a review of documentary evidence, the Investigator found the March 12, 2019 e-mail from the author of the article to the Respondent in which the author poses the above-stated questions. The Investigator found that, on the same day, the Respondent forwarded the e-mail to Mr. Stirling with no message or comments. Mr. Stirling replied, to which the Respondent replied:

“I am not responding. Have no idea who he is”

144 After Mr. Stirling’s subsequent reply, the Respondent replied:

“I am not responding”

145 The Investigator’s report states, with respect to this matter:

“Based on the email correspondence noted above, it appears that as of March 12, 2019, Cllr. Harder and Mr. Stirling were aware of the perceived conflict of interest with respect to Ms. Clarke.”

ANALYSIS

Apparent Conflict of Interest under the Code of Conduct

146 Members’ responsibilities with respect to pecuniary (financial) conflicts of interest are set out in the *Municipal Conflict of Interest Act* (MCIA).

- 147 Under the MCIA, if a member of a municipal council or of a local board in Ontario has a pecuniary interest in a matter that is before their council or local board at a meeting, the member is required to take steps such as disclosing the interest before the matter is considered at the meeting, not taking part in discussion of or vote on the matter, and not attempting to influence the vote on the matter. If a judge determines that the member contravened the MCIA, possible penalties include reprimand, suspension of pay, and removal from office.¹³
- 148 In her interview with the Investigator, the Respondent confirmed she is aware of the process to disclose a pecuniary conflict of interest. The Respondent has declared a conflict on budgets and special levies for Business Improvement Areas when those items have been considered at Finance and Economic Development Committee and City Council because her daughter is the Executive Director of the Barrhaven Business Improvement Area.¹⁴
- 149 This report makes no finding regarding pecuniary conflict of interest under the MCIA. As set out above, during my intake analysis, I determined that the MCIA did not apply to the situation, employment relationship or allegations set out in the complaint. Ms. Clarke is not a family member of the Respondent that the MCIA applies to and, as such, there was no basis for considering an MCIA breach.
- 150 However, on consideration of the Investigator’s findings of fact and the evidence adduced, it is necessary to review the employment conditions and the relationships detailed in this report that gave rise to allegations of an apparent non-pecuniary conflict of interest.
- 151 Rules governing members’ duties with respect to apparent, non-pecuniary conflicts of interest are not set out in the MCIA. The responsibility of Members of Ottawa City Council to “avoid conflicts of interest, both apparent and real” is set out in Section 4 (General Integrity) of the Code of Conduct for Members of Council (By-law 2018-400).

¹³ The Ontario municipal councillor’s guide: Municipal Conflict of Interest Act matters
<https://www.ontario.ca/document/ontario-municipal-councillors-guide/2-accountability-and-transparency#section-4>

¹⁴ In accordance with Section 6 of the MCIA, the City of Ottawa has established an online registry of each declaration of interest made under the MCIA. To date of writing, the registry includes five declarations made by the Respondent in relation to her daughter over the 2018-2022 Term of Council
<https://ottawa.ca/en/city-hall/open-transparent-and-accountable-government/municipal-conflict-interest/public-registry-declarations-interest/2018-2022-term-council>

152 The matter of conflict of interest – real, potential, apparent, pecuniary and non-pecuniary – has been addressed in three municipal judicial inquiries in the Province of Ontario.

153 In his final report of the Mississauga Judicial Inquiry, the Honourable J. Douglas Cunningham writes that the MCIA:

“...does not constitute a complete codification of law governing conflicts of interest for members of municipal councils. The common law also applies. The MCIA is restricted to the pecuniary interests of members of council in the deliberative and legislative contexts, but the common law is much broader and recognizes conflicts of interest involving non-pecuniary interests . . . This broader approach to conflict of interest has also been recognized as the prevailing standard by previous commissions of inquiry, including those conducted by Commissioners Denise Bellamy and W.D. Parker. As identified in the Parker Commission, there are various manifestations of conflict of interest. A conflict of interest may be real or apparent.”¹⁵

154 In the recent Report of the Collingwood Judicial Inquiry, Associate Chief Justice Frank N. Marrocco includes similar comment on “all forms of conflicts of interest” and connects the matter to public trust:

“Despite its name, the *Municipal Conflict of Interest Act* does not provide a complete conflict of interest code for municipal actors. It addresses the pecuniary interests of a narrowly defined group of family members related to a Council member which are by virtue of the *Act* deemed to be pecuniary interests of the Council member. Council members are obligated to avoid all forms of conflicts of interest or, where that is not possible, to appropriately disclose and otherwise address those conflicts.

Like the head of Council, members of Council are trustees of the public interest. Council members must ensure that this trust governs all their actions and decisions.”¹⁶

155 Elected officials’ failure to uphold their responsibilities regarding real or apparent conflict of interest can erode public trust in government. The Honourable Justice

¹⁵ The Honourable Justice J. Douglas Cunningham, “Updating the Ethical Infrastructure: Report of the Mississauga Judicial Inquiry”, 3 October 2011, p. 146 – 148.

¹⁶ Associate Chief Justice Frank N. Marrocco: Transparency and the Public Trust: Report of the Collingwood Judicial Inquiry”, 2 November 2020, p. 21.

Denise E. Bellamy offers an explanation of this matter in her final report on the Toronto Computer Leasing Inquiry/ Toronto External Contracts Inquiry:

“An apparent conflict of interest exists when someone could reasonably conclude that a conflict of interest exists. In other words, it is a matter of public perception.

Public perceptions of the ethics of public servants are critically important. If the public perceives, even wrongly, that public servants are unethical, democratic institutions will suffer from the erosion of public confidence.

Circumstances can arise where a public servant has been behaving ethically, yet that person’s actions look unethical to someone else. The problem, though real, does not lie with the public servant. The appropriate response to such misinterpretation is to improve understanding, through communication and education, of what does and does not constitute unethical behaviour.

On the other hand, public servants should not dismiss the importance of apparent conflicts of interest just because they can arise even where there is no wrongdoing. By disregarding perception, the public servant runs the risk of eroding public confidence, not only in himself or herself but also in government generally.”¹⁷

156 In light of the Bellamy, Cunningham and Marrocco reports, and the facts reported by the Investigator, a series of questions needs to be answered.

157 *Would a reasonably well-informed person have the reasonable apprehension that Ms. Clarke’s employment in the Respondent’s Office, followed by a period in which the Respondent retained The Stirling Group on two contracts, could provide an advantage to The Stirling Group?*

158 As set out below, The Stirling Group’s business, Ms. Clarke’s access while employed as Councillor’s Assistant and Ms. Clarke and Mr. Stirling’s access while on contract with the Respondent’s Office could lead a reasonable person to formulate such an apprehension.

¹⁷ The Honourable Madame Justice Denise E. Bellamy, Report on the Toronto Computer Leasing Inquiry-Toronto External Contracts Inquiry, Volume 2, “Good Government”, 2005, Toronto, p. 39-40.

159 *Does the fact that the Respondent is Chair of the Planning Committee and that The Stirling Group's main activity is to pursue planning and development applications for clients create an apparent conflict of interest?*

160 Mr. Stirling told the Investigator that when Ms. Clarke was employed in the Respondent's Office he would not have had access to information otherwise not accessible to him.

161 Mr. Stirling and Ms. Clarke also told the Investigator that most of the applications with which they are involved are managed and executed at the City staff level, and do not have to rise to Standing Committee or Council.

162 Ms. Clarke told the Investigator:

"I can't even think of an application that Jack had that rose to Planning Committee while I was working there. A lot of what we do is staff-approved, is work through the Committee of Adjustment. We don't often go . . . to Planning committee . . . our Applications don't require committee approval. So I can't, off the top of my head, think of an application that Jack would have worked on while I worked for Councillor Harder as her planning assistant."

163 Mr. Stirling told the Investigator that "rarely anything I do actually for a client actually goes to Council." He explained:

"I deal with those people [City of Ottawa staff member name removed] on a daily basis at the City of Ottawa staff, and they're the ones that make the decisions on my applications, and they're usually the ones that either recommend it for approval if it's going to Committee, by the 5% that might go in committee, and the other 90% . . . I'm dealing with staff trying to get it approved . . ."

164 I am also aware that, under the process for submitting an application which requires Standing Committee and Council consideration, the applications would have been processed by staff and would have undergone a standard consultation process before staff prepared a report to Planning Committee.

165 While that is the case, the Investigation found that Mr. Stirling was the co-applicant on an application for a Zoning By-law amendment submitted during the period of Ms. Clarke's employment in the Respondent's Office as Councillor's Assistant. Mr. Stirling appeared as a delegation during Planning Committee consideration of the item.

- 166 The Investigation also found that The Stirling Group was involved with two applications for Zoning By-law Amendment during the time the company was retained on the first contract with the Respondent. Ms. Clarke was the applicant on one application. The Stirling Group had been hired by the applicant of the other.
- 167 The Investigation also found that The Stirling Group was involved with three applications for Zoning By-law Amendment during the time the company was retained on the second contract with the Respondent. The Stirling Group was the applicant on all three.
- 168 Taking these matters into consideration, a reasonably well-informed person could have the reasonable apprehension that Ms. Clarke and Mr. Stirling's involvement in the planning application process on behalf of their clients while Ms. Clarke was employed as a Councillor's Assistant and while The Stirling Group was retained on contract with the Respondent's Office creates an apparent conflict of interest.
- 169 The presence of a comprehensive conflict screen to prohibit The Stirling Group's access to information that had the potential to give them a business advantage could have mitigated that perception. As discussed below, the Investigation did not find evidence that the Respondent had put in place such a conflict screen or policy.
- 170 *Was there any preferential access as Councillor's Assistant?*
- 171 Ms. Clarke served as the Respondent's assistant on planning matters. As detailed above, she was responsible for providing briefing notes to the Respondent on Planning Committee agenda items.
- 172 The Respondent and Ms. Clarke told the Investigator that, in order to create those briefing notes, Ms. Clarke only accessed the PIED staff reports once they had been made public ten days before the Planning Committee meeting. The Respondent's legal counsel explained that the Respondent herself receives reports at the same time, and no earlier, and therefore there was no way Ms. Clarke could gain access to any reports ahead of time. The Respondent and Ms. Clarke also told the Investigator that the briefing notes Ms. Clarke prepared were summaries of the staff reports, and did not include Ms. Clarke's opinion or any recommendations.

173 As the Councillor's Assistant, however, Ms. Clarke had access to information, contacts and processes that others would not.

174 The Respondent confirmed the basic fact that Ms. Clarke had access to the Respondent's e-mails and had the capability to respond.

175 Additionally, in her interview with the Investigator, Ms. Clarke described her access to planning applications while employed in the Respondent's Office. Ms. Clarke explained that when an application is filed, it is posted on DevApps, the City of Ottawa's Development Application Search Tool. Ms. Clarke said that she would then see those planning applications "just like the rest of the public". Ms. Clarke continued:

"The only time I would have awareness that an application was coming in sooner would be if it was specific to Ward three . . . You know, the applicant might meet with Jan prior to filing the application to give her a heads up as a courtesy – 'we're filing this application in your Ward, we wanted you to be aware of it' – and at that point I would be aware of it prior to them filing. Today in my contract, I wouldn't be aware of that."

176 In another example, Ms. Clarke received the hard copy of a confidential report of the Ottawa Community Lands Development Corporation. On the Respondent's instruction, Ms. Clarke used her phone to take pictures of each page of the report. The subject of the confidential report was criteria for evaluating offers on the sale of three properties that City Council had transferred to the Ottawa Community Lands Development Corporation.

177 The Investigator found no evidence that Ms. Clarke sent the Respondent the pictures of the report from her network e-mail, or that the Respondent received the pictures of the report in her network e-mail. The Respondent told the Investigator that it is likely Ms. Clarke sent the pictures "to the Councillor's private e-mail account, not to the City account but may have sent it to the Councillor by text."

178 The Investigator found no evidence that Ms. Clarke used the pictures of the confidential report to the private advantage of The Stirling Group or their clients. The fact remains, however, that as Councillor's Assistant, Ms. Clarke was in a position where she had access to confidential information about development matters. She had access to this information while she had past, ongoing and

future ties to The Stirling Group, a company which provides assistance to clients, including developers, in their planning applications with the City of Ottawa.

179 As Councillor's Assistant, Ms. Clarke also attended meetings with the Respondent and was in contact with PIED staff. For example, in her interview with the Investigator, Ms. Clarke recalled attending meetings with the Respondent and other Members of Council on planning-related matters:

“. . . say, there was a controversial application in Kanata, let's say, then the Ward Councillor for Kanata and [the Respondent] might have a meeting and she might ask me to sit in on the meeting just to take notes or be aware of, you, know, a potential application . . .”

180 In response to the Investigator's question about Ms. Clarke's responsibilities as Councillor's Assistant, the Respondent replied:

“She attended meetings with me where necessary, which was not all of them. And at no time did she ever sit with me or have access to a conversation where there might be a conflict with the Stirling Group.”

181 In her interview with the Investigator, the Respondent described that, as her employee, Ms. Clarke did not have special access to documents or systems:

Investigator:

“What did [Ms. Clarke] have access to in terms of files?”

Respondent:

“Well, I don't really keep files, so I have – “

Investigator:

“Or documents, systems? What did she have access to?”

Respondent:

“Well, nothing, nothing *in camera*. None of my staff have access to that.”

182 I do not accept this explanation. The investigation has established that Ms. Clarke had access to information, contacts and processes that others would not.

183 Ms. Clarke's access to the confidential Ottawa Community Lands Development Corporation report is exemplary of this fact. The report, which recommended

criteria for the marketing and evaluating of offers for three properties, contained commercially sensitive information. Ms. Clarke not only had access to the hard copy of the document, but also took pictures of it using her phone.

184 A reasonably well-informed person could have the reasonable apprehension that, as Councillor's Assistant to the Councillor for Ward 3 and Chair of the City's Planning Committee, Ms. Clarke would be privy to information and contacts that could benefit The Stirling Group. At a minimum, she was in a position to gain information about the preferences and institutional values of City staff and decision makers that would assist The Stirling Group's private business endeavours.

185 Ms. Clarke's connection to The Stirling Group, combined with the access to information, contacts and processes she had during her time as Councillor's Assistant, creates a perception, or could create a perception in the mind of a reasonable person, that she had access to decision makers and information not available to other professionals in the planning and development business in the City of Ottawa.

186 *Was there any preferential access for The Stirling Group as Contractor?*

187 The Respondent confirmed that Ms. Clarke had access to her e-mails, and had the capability to respond, during the period of August 1, 2017 to September 20, 2020. This period covers Ms. Clarke's employment in the Respondent's Office, as well as the Respondent's first contract with The Stirling Group, the "Gap Period" in between contracts, and a portion of the period of the Respondent's second contract with The Stirling Group.

188 The Investigation did not find evidence that Ms. Clarke used her access to the Respondent's e-mail to the direct business benefit of The Stirling Group. Such evidence is not needed, however, to establish that Ms. Clarke's ability to access the Respondent's e-mails creates a reasonable apprehension of preferential access.

189 During her interview with the Investigator, the Respondent also confirmed that Ms. Clarke had access and interactions with PIED staff during the period TSG was under contract with the Respondent's Office:

Investigator:

“Now in her role and the tasks that Alison would be performing, did she have any interaction or dealings with, with PIED in her capacity as consultant for your office?”

Respondent:

“Of course she did.”

Investigator:

“She did.”

Respondent:

“Of course she did.”

190 Other planning and development professionals in the City of Ottawa would also have interaction with PIED staff when filing planning applications. That Ms. Clarke interacted with PIED staff in her capacity as consultant for the Respondent’s Office, however, contributes to the reasonable apprehension of preferential access.

191 I have also considered the nature of Mr. Stirling’s access to the Respondent during the period of TSG’s contracts with the Respondent’s Office.

192 The Respondent explained to the Investigator that, under the contracts with The Stirling Group, she seeks advice from Mr. Stirling on large planning and development related issues. The Respondent explained why she seeks Mr. Stirling’s advice:

“He has a lot of experience with a lot of things that are relevant to the work that I do and his knowledge is invaluable, really for me it’s, it’s such a--it saves me so much time and I’ve never been steered wrong.”

. . .

“Again, Jack, because of his all his knowledge, as a municipal general manager, as Vice President of companies and his knowledge back in the early days of Kanata and back when they were deciding whether Barrhaven could be built or Orleans or Kanata that advice that he gives is invaluable.”

. . .

“He has that knowledge--that knowledge is extremely valuable to me, in all the things that I do, but certainly as the Chair of Planning.”

193 During the Contract 1 and Contract 2 periods, however, the Investigation found evidence of Mr. Stirling reaching out to the Respondent on his own business matters. For example, on August 6, 2019, during the second of The Stirling Group’s contracts with the Respondent, Ms. Clarke sent an e-mail on behalf of Mr. Stirling to the Respondent, cc’ing an individual from a planning firm with which he explains he is “working alongside”, with a request for meeting:

“Now that we’re nearing the end of ‘committee vacation’, I am hoping to book a time with you in the coming days to discuss a development that will be on the August 22nd Planning Committee Agenda.

I am working alongside [names of construction company and planning/ design firm] for a project located at [municipal addresses]. [The construction firm] has submitted a Zoning By-law Amendment to permit a 140 unit, 20 storey building at this location. The property is located [specific proximity to transit station] and future Light Rail station.

We’d like to come in to discuss this development with you and provide further details. Please let me know a few dates or times that might work for you. I’d be pleased to work with your Assistant to find a mutually beneficial time if that is easier.”

194 The Investigator showed the Respondent this e-mail and asked the following questions:

Investigator:

“So is it common practice for applicants or consultants to be e-mailing the Chair of the Planning Committee?”

Respondent:

“Yes.”

Investigator:

“How, how often?”

Respondent:

"They don't always do that, but . . . they do."

Investigator:

"OK, so how frequent did you get e-mails from applicants?"

Respondent:

"Usually I would get a phone call, maybe an e-mail."

. . .

Investigator:

"OK, so do you recall whether or not you had a meeting with . . . "

Respondent:

"No, I don't recall. But, but probably I did, why wouldn't I? . . . "

Investigator:

"Now, did the Planning Committee members . . . were they aware whenever there was a file coming through where the Stirling Group was acting, were they aware that you also had a contract with the Stirling Group in your office?"

Respondent:

"I have no idea. I'm not aware of what . . . who works for other people in their offices either."

Investigator:

"No, the question is did you disclose to the other planning committee members whenever the Stirling Group . . . "

Respondent:

"Why, why would I?"

Investigator:

"Well, I'm asking you, did . . . "

Respondent:

“The answer is no, because why would I? However, again, because [the Respondent’s legal counsel] has aptly described Jack, he's very well respected and very well known, and I know that some, many of my colleagues go to him and ask him, just like they'll call [name removed], but they'll go to Jack and say "can you help me out?" "can you give me some advice?" So . . . ”

Investigator:

“And you don't find . . . ”

Respondent:

“But I never, ever have, for one second, not been above board in who works for me and why they're there.”

Investigator:

“And you don't perceive this as a conflict of interest, in light of the fact that the Stirling Group is representing applicants to the planning committee and you have a contract with the Stirling Group.”

Respondent:

“No.”

195 The Investigator identified another similar e-mail request Mr. Stirling sent the Respondent on October 28, 2019, and the Respondent’s reply. This e-mail exchange was within the time period of The Stirling Group’s second contract with the Respondent:

“Councillor Harder,

I hope you’re having a great Fall.

I am hoping to book some time with you in the coming days to discuss a development that will be on the November 14th Planning Committee Agenda.

I am working alongside [a private company and a planning/ design firm] on a project located at [address and description]. [The private company] has submitted a Zoning By-law Amendment to rezone the property from [locations specified]. A mix of light industrial, office and retail uses surround the area.

We'd like to come in a [sic] discuss this development with you and provide further details. Please let me know a few dates or times that might work for you. I'd be pleased to work with your Assistant to find a mutually beneficial time if that is easier.

Thank you,"

196 The Investigator's report states the Respondent replied as follows:

"Oh Jack, you do not need to meet with me. I know all about it and why are you calling me Councilor Harder."

197 In the August 6, 2019 and October 28, 2019 e-mails quoted above, Mr. Stirling acts on behalf of his own business interests.

198 The Respondent described that it is common practice for applicants or consultants to phone or e-mail the chair of the Planning Committee with respect to their applications in such a manner. However, at the time of Mr. Stirling's requests for meetings with the Respondent on planning matters outside her Ward, The Stirling Group was engaged in its first contract with the Respondent. That is a significant element when evaluating the notion of preferential access.

199 I have also considered how Mr. Stirling's position on the City's Planning Advisory Committee (PAC) contributes, if at all, to the apparent conflict of interest.

200 The Respondent was on the Working Group which recommended to Council the Terms of Reference for the PAC. The Respondent was also on the Selection Panel for the members of the PAC. The Selection Panel recommended Council waive the requirement that the professional planner member of the PAC be a practicing member of the Ontario Professional Planners Institute, and also recommended that the Professional Planner member be Mr. Stirling.

201 As noted above, the staff report "Appointments – Planning Advisory Committee" explained the recommendation to waive the requirement as follows:

"The recommended candidate for this position is not currently a practicing member, though his experience would enable him to contribute significant planning and industry expertise to the PAC."

- 202 The Respondent did not recall why the recommendation was made to waive the qualification requirement. The Respondent's legal counsel said Mr. Stirling is the "best planner in the city", and the Respondent agreed.
- 203 Ms. Clarke was an employee in the Respondent's Office at the time of the Selection Panel's consideration of candidates.
- 204 The Respondent is a member of the PAC. Mr. Stirling also served on the PAC from his appointment on March 28, 2018 to his resignation from the Committee on January 27, 2021.
- 205 As a public member of the PAC, Mr. Stirling served on a volunteer basis. Mr. Stirling confirmed to the Investigator that the PAC has no real decision power. However, when considered alongside the circumstances of Ms. Clarke's employment in the Respondent's Office and The Stirling Group's contracts with the Respondent, Mr. Stirling's role on the PAC contributes to the reasonable apprehension of the Stirling Group's preferential access.
- 206 The Respondent is not only the Ward Councillor for a large and fast-growing suburb of the City of Ottawa, she is also the Chair of the City's Planning Committee. Could a reasonably well-informed person have the reasonable apprehension that The Stirling Group, retained on the two separate contracts with the Respondent's Office as described in this report, could benefit from preferential access to the Respondent that would not be available to others in the planning and development industry?
- 207 Considering the evidence described above, it is clear to me that a reasonably well-informed person could have the reasonable apprehension that The Stirling Group, as contractor, had preferential access to the Respondent.

The Respondent's Management of the Apparent Conflict of Interest

- 208 On the matter of the actions of a member of council when faced with an apparent conflict, Justice Bellamy writes:

"Having a conflict of interest is not in itself a sign of dishonesty. Honest people can and do find themselves in conflicts of interest . . . The individual's actions when faced with a conflict of interest are what matters."¹⁸

- 209 Justice Bellamy also writes:

¹⁸ Ibid, p. 39

“Experienced elected officials know all about public perception. They tend to have good antennae, and they apply the “newspaper test.” As Ontario’s integrity commissioner, the Honourable Coulter A. Osborne, put it during the Good Government hearings, “If you wake up tomorrow morning and see this matter explored on the front page of one of Toronto’s newspapers, how’s it going to affect you politically? How’s it going to look?” This is sound advice. Before they act, public servants should ask how their proposed action or inaction would look spread across page one.

In short, when in the slightest doubt, disclose. Disclosing unnecessarily has no adverse consequences. Failing to disclose when required can be disastrous.”¹⁹

210 I have considered two questions with respect to the Respondent’s actions in the face of the apparent conflict of interest:

- What conflict screens or other policies were in place in the Respondent’s Office to avoid conflicts and inadvertent sharing of confidential information?
- With confirmation of the perception, on the part of a member of the media, that her employment of Ms. Clarke and The Stirling Group formed an apparent conflict of interest, what actions did the Respondent take?

No formal conflict screen

211 The Respondent has made several statements in her unsworn testimony indicating that some mechanism was in place to keep Ms. Clarke at arm’s length from planning applications with which The Stirling Group was involved.

212 In her August 17, 2020 reply to the Notice of Inquiry, the Respondent wrote:

“I always ensured that Alison Stirling not only had no input on applications with which her father Jack was associated, but that she simply didn’t see them. Her employment was always made known to the public, and was fully transparent.”

213 During her interview with the Investigator, the Respondent stated:

“[Ms. Clarke] attended meetings with me where necessary, which was not all of them. And at no time did she ever sit with me or have access to a conversation where there might be a conflict with The Stirling Group.”

¹⁹ Ibid, p. 40

214 The Respondent recalled addressing Ms. Clarke's potential conflict in one or more meetings:

"So, for example, if at the time, somebody who's working for [name of developer] and somebody's working for somebody else and they're working on something together, they will come in and have a meeting with me, and actually I have said, is there any reason why Alison should not be in this meeting? And if there was . . . they absolutely would say, I think it's best if she's not--no problem, she wasn't. Or she would give me a heads up and say, Jan this is one I'm not going to attend because the Stirling Group is working on something that may or may not be connected."

215 During her interview, however, Ms. Clarke recalled one instance where she was on a phone call with the Respondent and, as they were on the call, Ms. Clarke realized the individual was a client of her father's:

"And while we're on the call, I realized this individual used to be – is no longer and wasn't at the time – a client of my dad's, and I texted Jan and said: "this individual is a client of my dad's" and she immediately said: "drop off the call" and I did."

216 In this instance, it appears that Ms. Clarke could have had access to a conversation where there might be a conflict with The Stirling Group. This example does not demonstrate that a formal conflict protocol was in place. It does illustrate that it was Ms. Clarke's action in the face of a potential conflict of interest, not the Respondent's, that mitigated the situation.

217 During her interview with the Investigator, the Respondent replied as follows in response to the question: "Did [Ms. Clarke] have access to files involving developments proposed by the Stirling Group or Jack Stirling?"

Respondent:

"No, of course not."

Investigator:

"And how do you know that?"

Respondent:

“Because I'm the Councillor and again for 23 years, I've known and worked with Jack and a bunch of other people that, I'm quite aware, but also, you know what I find it kind of interesting, just even on the subject of integrity. I have a high degree of integrity. Guess what, so does Jack Stirling. So do the other people that I've mentioned in this conversation and we never, ever crossed the line. We never would put each other in that kind of a position.”

218 The Respondent did not, however, provide evidence to the Investigator that any formal conflict screen, or any deliberate or consistently-applied policy or process with respect to managing the access to information, was in place during Ms. Clarke's employment as Councillor's Assistant or during the subsequent periods when the Respondent retained The Stirling Group on contract.

219 During the Respondent's interview, the Investigator asked the Respondent about the September, 2019 briefing note that Ms. Clarke had prepared for the Respondent which stated: “We, The Stirling Group, have been hired by the applicant of (address removed).” The Investigator asked the Respondent if she ever asked Ms. Clarke to disclose The Stirling Group's involvement in such a manner. The Respondent replied: “That was always our understanding from the beginning.” The Respondent explained that Ms. Clarke would know to disclose The Stirling Group's involvement.

220 Ms. Clarke recalled adding the declaration on top of the briefing note: “We, the Stirling Group have been hired by the applicant of (address removed).” Ms. Clarke described the reason that she added that piece of information as follows:

“I'd seen at the Planning Committee and at Council when Councillors will declare a conflict of interest, and they will say . . . I have a conflict of interest and so they, they declare it and so I felt that it was best to declare that.”

221 Ms. Clarke's additional replies further indicate the Respondent had not put in place a formal conflict screen:

Investigator:

“. . . did you and [the Respondent] discuss or have an agreement where you would disclose those, those applications where the Stirling Group was hired?”

Respondent:

“No, it was never discussed with her. I just felt like I should. And I continued to do it.”

- 222 On this last point there is a clear contradiction between the testimony of Ms. Clarke and that of the Respondent.
- 223 With respect to the content of the briefing notes Ms. Clarke produced, the Respondent stated in her interview with the Investigator that the briefing notes did include recommendations. While not developing a recommendation or offering an opinion in a briefing note, the person summarizing the PIED report can have considerable influence on the reader. What is taken out, what is left in, what is condensed and what is emphasized can lead the reader to draw certain conclusions. It would have been more judicious for Ms. Clarke to have declined to draft briefing notes on The Stirling Group client applications.
- 224 When the Investigator asked if the Respondent ever sought directions or guidance as to whether there was a potential or perceived conflict of interest with The Stirling Group and her Office, the Respondent replied:
- “I didn't need to do that. Again, I go back to ethics and integrity and the people that I work closely with, whether it's [the Respondent's legal counsel] or Jack Stirling, or any number of people, understand what my ethical measure is and my integrity as I do theirs. And it would never be necessary for that to happen.”
- 225 In addition to this fact, the Investigator found no evidence of a non-disclosure agreement in place during either of the Respondent's first two contracts with The Stirling Group.
- 226 As discussed above, there is a confidentiality clause in the employment contract for Councillors' Assistants. But there is also a supplementary requirement, set out in the Councillors' Office Manual, that contracted vendors must sign a non-disclosure agreement with the Councillor's Office once services are retained.

The Respondent's Action when faced with the claim of Apparent Conflict

- 227 This investigation has found that the Respondent, when made aware that the appearance of a conflict of interest existed, took no action to address the matter.
- 228 As set out above, in Spring 2019, *The Leveller* published the article: “Below Grade: Herongate residents contend with broken heating, broken pipes and a rent increase, while Councilor (sic) Jan Harder and Development Consultant

Jack Stirling keep it in the family”. On March 12, 2019, the author of the article had e-mailed the Respondent directly, asking:

“Do you think there’s anything inappropriate about Jack Stirling’s daughter, Alison Stirling working both as an aide for you and at the same time working for her father’s consulting firm, The Stirling Group?”

“Do you think this gives the impression that developers have too much influence at City Hall?”

229 After receiving that e-mail, the Respondent e-mailed Mr. Stirling twice to state that she did not plan to respond.

230 In March 2019, the Respondent was serving as Chair of the City’s Planning Committee. Mr. Stirling was serving as the Professional Planner member of the City’s Planning Advisory Committee. The Respondent’s direct employment of Ms. Clarke as Councillor’s Assistant had ended approximately eight months earlier. Mr. Stirling and Ms. Clarke were engaged with the Respondent under the first of two contracts with The Stirling Group. The Respondent would retain The Stirling Group under the second contract one year later. [See Appendix B: “Timeline of Key Events”]

231 Faced with the suggestion in March 2019 that she was in the position of an apparent conflict of interest, the Respondent refused to take the opportunity to clarify or explain to the reporter the apparent conflict. The investigation did not find any evidence that, once aware of the allegation, the Respondent took concrete measures in her Office to minimize any real or perceived conflict of interest, or to undertake her duties in a different manner.

232 The issue had become public and the Respondent had an occasion to deal with the matter; however, the Respondent made the deliberate choice not to do so.

233 In response to point #6 in the letter from the Respondent and her legal counsel (attached as Appendix C), I note that the analysis and conclusions regarding apparent conflict of interest in this report are not “based on *The Leveller* article.” Further, neither the political leanings of the publication nor the content of its articles has any bearing on my analysis and findings. For the purposes of this inquiry the article stands as only one piece of evidence that a reasonable member of the public might consider. It is the journalist’s questions to the Respondent, and the Respondent’s lack of response to them, which are relevant.

Together, they provide public and published evidence that the Respondent was made aware that an apparent conflict existed.

The Respondent's Duty

234 Under Subsection 4(5) of the Code of Conduct for Members of Council, the Respondent has a duty to “avoid conflicts of interest, both apparent and real.”

235 With respect to the significance of the appearance of conflict of interest, former City of Toronto Integrity Commissioner Valerie Jepson writes that “(i)n the field of public sector ethics, it has long been established that avoiding the appearance of impropriety can be as important as avoiding the actual impropriety itself.”²⁰

236 Jepson notes the “most-often cited source for this principle” is found in Justice Parker’s report on the inquiry into allegations of conflict of interest concerning Federal Cabinet Minister Sinclair Stevens:

“The concern about appearance of conflict as an important ethical postulate of modern government is one that is well founded. The reasons are obvious. Trust and confidence in government can be maintained and enhanced only if the occasions for apparent conflict are kept to a minimum. Public perception is important. Indeed the perception that government business is being conducted in an impartial and even-handed manner goes a long way to enhancing public confidence in the overall integrity of government.”²¹

237 From the beginning of her employment of Ms. Clarke and through the two contracts with The Stirling Group, the investigation did not find any evidence that the Respondent made any effort to introduce measures that might have acknowledged and mitigated the appearance of conflict of interest, such as a robust conflict screen or firewall. When given the opportunity to publicly acknowledge and explain the employment situation, the Respondent neither replied, nor did she make any change to the arrangement when confronted with the knowledge that, from an outside perspective, it appeared that there was a real or apparent conflict of interest.

²⁰ City of Toronto Integrity Commissioner Valerie Jepson: “Investigation Report Regarding Conduct of Mayor John Tory”, Tory (Re), OMMIC 1 [2016-01-28]

²¹ Commissioner the Honourable W.D. Parker, Commission of Inquiry into Allegations of Conflict of Interests Concerning The Honourable Sinclair M. Stevens, 1987, Ottawa, p. 31. As cited in Jepson, “Investigation Report Regarding Conduct of Mayor John Tory”.

238 In my opinion, such measures could have reduced or eliminated the risk that a balanced onlooker might conclude that the Respondent's actions were based in private interest, as expressed by the Complainant:

“In this case it is alleged that there was a mutual and long standing relationship between Councillor Harder and the developer long before his daughter ever came on the scene . . . having Jack Stirling's daughter on her staff even if only for a few years, crosses the line ...into 'conflict of interest'...”for a reasonably well informed person”...by creating a triangular bond of personal and commercial interests between these three individuals.”

239 The Respondent has firmly maintained her view that there is no real or apparent conflict of interest.

240 With respect I cannot accept her argument or her explanation. There are contradictions in her testimony and her written reply to the Investigator's questions as to Ms. Clarke's access to confidential information.

241 The Complainant is a reasonably well-informed person. The Complainant is a member of the public with no connection to the Respondent, Ms. Clarke, Mr. Stirling or the details of this investigation. Upon reading an article that raised questions about the relationship between the three individuals, the Complainant viewed Ms. Clarke's profile on LinkedIn and formed the reasonable apprehension that a conflict of interest existed.

242 The circumstances and conditions that led to the complaint themselves corroborate that an apparent conflict of interest and preferential access still subsist at the time of writing of this report.

243 The facts reported by the Investigator fully substantiate this conclusion.

Benefit from The Stirling Group to the Respondent

244 The investigator found that there was a four-month “Gap Period” between the Respondent's two contracts with The Stirling Group. The Respondent did not have a contract in place with The Stirling Group for November 2019, December 2019, January 2020 or February 2020.

245 Despite the absence of a contract, the Investigator found Ms. Clarke continued providing briefing notes to the Respondent during the Gap Period.

246 In written reply to written questions from the Investigator, the Respondent's legal counsel, on behalf of the Respondent, stated that the work completed in the Gap Period is not a benefit. The reply included:

“This happened in the normal course of a working relationship, and with the interruption in contract period combined with the small amount of work done, not unusual in the business world.”

247 I do not accept this explanation or argument. A councillor's mandate is a public trust. Councillors are not in business nor are their offices run as small businesses. Likewise, the Chair of the Planning Committee is not in “business”. The Planning Committee is charged by Council with the oversight mandate for all development and planning.

248 In the “business world”, free services and loss leader strategies are common. While legal they are not universally viewed as sound ethical practices. There is always an expected return for free or discounted services, or a perception by a reasonably well-informed observer that some benefit is likely.

249 The Investigator calculated the value of the services provided during the Gap Period at \$12,000 in accordance with the \$3,000/month payments reflected in Contract 1 and Contract 2.

250 The Respondent explained that she had intended to speak with The Stirling Group following the end of Contract 1, but “just lost track of it”. In her interview with the Investigator, the Respondent stated she did not know if Ms. Clarke got paid for providing briefing notes outside of the contract.

251 It may be true that The Stirling Group's provision of unpaid work during the Gap Period was due to an oversight or maladministration. Nonetheless, it is clear that the \$12,000 worth of unpaid work that The Stirling Group provided to the Respondent over a four-month period is a benefit. It actually underwrote the Respondent's operating budget.

252 Members of Council are elected to make impartial and objective decisions. The clauses in the Code of Conduct relating to gifts and benefits are intended to address the negative perception that a Member's acceptance of a gift from an external source could influence, or be perceived to influence, that Member's decisions. As an expert panelist at the Mississauga Judicial Inquiry, then Dean

Lorne Sossin (now a justice of the Court of Appeal for Ontario) described what he considers inappropriate in relation to gifts as:

“gifts that would to a reasonable member of the public appear to either be in gratitude for influence, to induce influence, or otherwise to go beyond the necessary and appropriate public functions involved.”²²

- 253 Considering the employment and contract relationships detailed in this report, it is clear that the benefit received by the Respondent in this case could, to a reasonable member of the public, appear to put the Respondent in a position of choosing between conflicting and divided loyalties.
- 254 The letter from the Respondent and her legal counsel (Appendix C), at point #1, argues that no benefit exists, and focusses on savings realized for the City against no personal financial benefit to the Respondent.
- 255 I do not find this argument to be compelling. While the Code of Conduct does not define “benefit”, to equate it to a “saving” for the City is an unreasonable contention.
- 256 The “benefit” is akin to a subsidy. This is not foreign to the “political world”. For example, in a municipal election campaign, if a professional who would normally charge for a service gives a candidate a service for free, the value of the service (i.e. what an average person would pay for it) is considered to be a mandatory reportable campaign contribution.
- 257 I am of the opinion that a reasonable member of the public – even if that individual was aware that the Respondent used a corporate budget allotment to pay The Stirling Group – would consider the provision of unpaid services to an elected public office holder a benefit that could create an expectation of favourable treatment in the future, or be perceived as creating some influence.
- 258 Under section 13(3) of the Code of Conduct, Members of Council are required to file a quarterly disclosure of all gifts and benefits which individually exceed \$100 from one source in a calendar year. The disclosure statements are added to the public, online Gifts Registry.
- 259 The benefit the Respondent received from The Stirling Group was not disclosed. Obviously, it was not disclosed as a benefit because the Respondent did not

²² Mississauga Judicial Inquiry Transcripts (December 15, 2010); 5608-5609.

accept it as such. Nevertheless, to enhance transparency with respect to the Respondent's receipt of this benefit, the Gifts Registry should be updated to include the benefit in the value of \$12,000.

Analysis of Credibility, Reliability, Inconsistencies and Collusion

260 Credibility and reliability are fundamental principles when evaluating testimony. "Credibility refers to the witness's sincerity and willingness to speak the truth as he or she believes the truth to be. Reliability relates to the witness's ability to accurately observe, recall and recount the events at issue."²³ I appreciate that "an honest witness can still be mistaken and, consequently, his or her evidence while sincerely given, may be unreliable."²⁴

261 In assessing credibility and reliability, I looked at the totality of the evidence and considered whether there were any inconsistencies in the testimony (and if so, the impact of those inconsistencies).

262 No summonses for appearance were required as all witnesses came forward willingly.

The Complainant's testimony

263 The Complainant's sworn testimony simply elaborated on the affidavit he submitted with his formal complaint. He supplied publicly available documentation supporting his perception which demonstrated that he had done some due diligence before raising his concerns. From that, I conclude that the Complainant is a reasonable person acting in the public interest out of concern for possible bias and preferential access in the City of Ottawa approval process of planning applications.

264 In making this conclusion, I did specifically address the possibilities of political or nefarious motives and found none. Overall, I find that the complainant was credible, honest, and open.

Ms. Clarke's testimony

265 Ms. Clarke testified having made a solemn affirmation. She participated twice in virtual interviews and answered the Investigator's questions without hesitation. She also responded to the requested written questions in a timely fashion. With

²³ *Ontario (College of Physicians and Surgeons of Ontario) v. Phipps*, 2018 ONCPSD 48

²⁴ *Ibid*

her written reply on February 23, 2021, however, Ms. Clarke advised the Investigator that her participation in the investigation had concluded, thus ending her co-operation in providing the Investigator with additional information.

- 266 While there are some inconsistencies between her sworn testimony and that of the Respondent's, it is my impression that she recalled events to the best of her ability.
- 267 Notably, her recollection of the facts surrounding the delayed contract renewal and duties performed during the "Gap period" correspond with the Respondent's explanation as to why the contract was not renewed in a timely fashion.
- 268 Her proactive disclosures to the Respondent about applications relating to TSG clients is a positive element in the performance of her duties.
- 269 I find no reason to believe that Ms. Clarke was not truthful. There is no evidence that points to possible collusion with Mr. Stirling or the Respondent during the investigation.

Mr. Stirling's testimony

- 270 Mr. Stirling also testified having made a solemn affirmation. He answered the Investigator's queries in a forthright manner. His only interview was on December 2, 2020.
- 271 The Investigator's report includes the following information on follow-up questions the Investigator sent Mr. Stirling after the interview:
- "On March 22, 2021, we submitted additional questions to Mr. Stirling in relation to the potential undeclared benefit relating to the work completed by TSG/Ms. Clarke during the Gap Period. On April 22, 2021, Mr. Stirling advised us that he was seeking legal advice and that he would likely not provide answers to these questions. We note Mr. Stirling did not respond to our response deadline of April 15, 2021. As of the date of this report, Mr. Stirling has not provided a response."
- 272 It is regrettable that Mr. Stirling declined to provide further information about his contracts with the Respondent.

273 Mr. Stirling did confirm that he briefly spoke to the Respondent about the Complaint “some months ago” prior to the interview. However, a review of his testimony reveals no tangible evidence of collusion with the other witnesses.

The Respondent’s testimony

274 At the beginning of the Investigator’s interview with the Respondent, the Respondent’s legal counsel objected to his client taking an oath or making a solemn affirmation that the information she was about to provide was true. The Respondent did not take the oath or make a solemn affirmation.

275 Additionally, there were inconsistencies between the testimony of the Respondent and that of Ms. Clarke. For example, the Respondent said during her testimony that Ms. Clarke never had access to a conversation where there might be a conflict with The Stirling Group. Ms. Clarke, however, recalled an instance when she was on the phone with the Respondent and one of her father’s clients. Ms. Clarke recalled alerting the Respondent to the situation, who, in turn, told Ms. Clarke to drop off the call.

276 The example indicates that, but for her own action, Ms. Clarke could have had access to a conversation where there might be a conflict with The Stirling Group.

277 Similarly, referring to Ms. Clarke’s disclosure on a briefing note of The Stirling Group’s relationship with the applicant on a planning application, the Respondent said that she and Ms. Clarke always had an understanding that Ms. Clarke would disclose The Stirling Group’s involvement in that way. During her testimony, however, Ms. Clarke said she never discussed the matter with the Respondent, and that she disclosed those relationships because she felt as if she should.

278 Those inconsistencies and the fact that Respondent refused to testify under oath weakens the Respondent’s credibility and reliability with respect to this inquiry.

FINDINGS

On the conduct of Ms. Clarke

279 This report makes no findings on the conduct of Ms. Clarke.

280 Ms. Clarke did not apply for the job of Councillor’s Assistant. She was recruited directly by the Respondent. She had no experience in municipal planning and

viewed it as a learning experience for when she would return to TSG. She was acting under the Respondent's instructions.

281 While not well-versed in the Employee Code of Conduct, she did feel a responsibility to proactively disclose to the Respondent when she was tasked with summarizing a planning report involving a TSG client file.

282 The Employee Code of Conduct is not within my jurisdiction; therefore, I make no finding in relation thereto. But there are serious questions that need to be addressed as to the status of Councillors' Assistants in relation to the Code of Conduct for Members of Council. *Those questions are raised in the Guidance section that follows this report with my supplementary recommendations.*

On the conduct of TSG

283 This report also makes no findings on the conduct of Mr. Stirling. However, it is important to note, as is mentioned earlier, Mr. Stirling is a registered lobbyist and consequently bound by the Lobbyist Code of Conduct.

284 His conduct as lobbyist is a matter for the Lobbyist Registrar. It will be up to the Office of the Lobbyist Registrar to review the facts outlined in this report and to determine if any follow up action is required pursuant to the *Lobbyist Registry By-law (By-law No. 2012-309)* and Section 223.12 of the *Municipal Act 2001*.

285 There are also issues that require serious consideration relating to the hiring by Members of Council of consultants who are registered lobbyists, from the terms and conditions of non-disclosure agreements to the requirement for transparency in the disclosure of relationships between public office holders, lobbyists and their clients.

286 I believe that a concurrent review of the Code of Conduct for Members of Council and the Lobbyist Code of Conduct is warranted. *This matter is addressed in the Guidance section that follows this report.*

On the conduct of the Respondent

287 My findings relate strictly to the conduct of the Respondent as required by the Code of Conduct for Members of Council (By-law No. 2018-400), based on the following:

1. Balance of Probabilities

288 The standard of proof in making a determination of findings for Ontario Integrity Commissioners is the balance of probabilities.

“The question in all civil cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established.”²⁵

289 This requires that the Integrity Commissioner “*scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.*”²⁶ The findings in this Report have been arrived at through a balance of probabilities analysis.

2. Proof for determining conflict of interest

290 While findings are made on the balance of probabilities, it is important to note that the Divisional Court of Ontario in *Cox v. College of Optometrists of Ontario, 1988*, stated that proof of an actual conflict is not a necessity:

“Conflict of interest in this context means a personal interest so connected with professional duty that it might reasonably be apprehended to give rise to a danger of actually influencing the exercise of the professional duty...

...Conflict of interest does not require proof of actual influence by the personal interest upon the professional duty any more than it requires proof of actual receipt of a benefit...

...The test is this: can it be said that no reasonable person could conclude that the prohibited private interest could influence the optometrist's professional conduct?”

291 The Notice of Inquiry sent to the Respondent referred to Section 4 of the Code of Conduct. At the intake analysis I excluded Section 12 relating to *Conduct Respecting Lobbying*.

292 However, the investigator reported evidence that points to a possible breach of Section 12(4):

4. *Unless pre-approved by the Integrity Commissioner, the acceptance of any gift, benefit, or hospitality from lobbyists with active lobbying registrations or*

²⁵ F.H. v. McDougall, [2008] 3 S.C.R. 41, 2008 SCC 53

²⁶ F.H. v. McDougall, [2008] 3 SCR 41, 61; 2008 SCC 53 (SCC) 61

from their registered clients or their employees by Members of Council or their staff is prohibited.

293 Mr. Stirling is a registered lobbyist with an active application in the City of Ottawa's Lobbyist Registry. The evidence indicates that Mr. Stirling provided a benefit, in the form of approximately four months of unpaid work, to the Respondent. The activity on the lobbying file pre-dates the period of unpaid work.

294 I make no finding on the possible breach of Section 12 in this report. The matter will be referred to the Lobbyist Registrar for consideration.

295 Subsection 9(e) of the Lobbyist Registry By-law states that the Integrity Commissioner is responsible for the enforcement of the By-law, while subsection 9(c) of the By-law provides that the Integrity Commissioner is responsible for:

“conducting, in private, investigations or inquiries to determine whether contraventions of this by-law have occurred, as permitted under section 223.12 of the Municipal Act, 2001.”

296 Facts uncovered in the investigation also brought Sections 13 (1), (2), and (3) into consideration of a possible contravention:

Section 13 - Gifts, Benefits and Hospitality

- 1. Members of Council are expected to represent the public and the interests of the municipality and to do so with both impartiality and objectivity. The acceptance of a gift, benefit or hospitality can imply favouritism, bias or influence on the part of the Member. At times, the acceptance of a gift, benefit or hospitality occurs as part of the social protocol or community events linked to the duties of an elected official and their role in representing the municipality.*
- 2. Members of Council shall not accept gifts that would, to a reasonable member of the public, appear to be in gratitude for influence, to induce influence, or otherwise to go beyond the necessary and appropriate public functions involved. For these purposes, a gift, benefit or hospitality provided with the Member's knowledge to a Member's spouse, child, or parent, or to a Member's staff that is connected directly or indirectly to the performance of the Member's duties is deemed to be a gift to that Member.*

3. *To enhance transparency and accountability with respect to gifts, benefits and hospitality, Members of Council will file a quarterly disclosure statement that will be added to a public Gifts Registry. Members of Council are required to disclose all gifts, benefits, hospitality and sponsored travel received which individually exceed \$100 from one source in a calendar year.*

On Section 4 (1):

“Members of Council are committed to performing their functions with integrity, accountability and transparency”

297 The evidence demonstrates that the Respondent had an opportunity to deal with the apparent conflict of interest when the reporter from *The Leveller* contacted her office.

298 She chose to ignore his questions and query. An opportunity for transparency was lost.

299 Furthermore, the Respondent had several occasions at Committee and Council to disclose the relationship between her, Ms. Clarke and The Stirling Group.

300 Those opportunities to enhance transparency were also lost.

301 In my view the Respondent demonstrated a lack of commitment to transparency.

302 I find that the Respondent breached Section 4(1) of the Code of Conduct.

On Section 4(3):

“Members of Council recognize that the public has a right to open government and transparent decision-making.”

303 There is no evidence in the Investigator’s report that the Respondent does not appreciate the public’s right to open government. While she was not proactive in disclosing her affiliation with TSG there is no evidence that she actually tried to hide the relationship. In her testimony the Respondent stated that she believed that she acted in an open and transparent manner at all time and she judges that there was no reason to disclose that affiliation. While I cannot accept her judgement relating to disclosure, I do not equate that with a denial of a public right.

304 I find that the Respondent did not breach Section 4(3) of the Code of Conduct.

On Section 4(4):

“Members of Council shall at all times serve and be seen to serve the interests of their constituents and the City in a conscientious and diligent manner and shall approach decision-making with an open mind.”

305 The investigation revealed no evidence to support the notion that the Respondent deliberately set out to make a biased decision in favour of a private interest. While a reasonable person might so conclude, I am unable to determine so.

306 I find that the Respondent did not breach Section 4(4).

On Section 4(5):

“Members shall avoid the improper use of the influence of their office and shall avoid conflicts of interest, both apparent and real.”

307 To summarize the facts in the Investigator’s report, the Respondent recruited the daughter of a friend with a longstanding personal and professional relationship. Then, when that employment ended, she rehired her and her father by way of two sole-sourced service contracts with no confidentiality clauses or non-disclosure agreements.

308 When the first contract ended, TSG continued to provide services to the Respondent without charge for several months (the “Gap period”) before the second contract was signed. During the contract periods and the “Gap period” the Respondent received services from TSG relating to their own clients’ files, some of which rose for decision to Committee and Council. The Respondent did not disclose any of this when faced with approving the said files. For the entire period, the Respondent was the Chair of the Planning Committee and both she and Mr. Stirling sat concurrently as members of the Planning Advisory Committee

309 If the test outlined in *Cox v. College of Optometrists of Ontario (Ont. Div. Ct.)*²⁷ is to be applied, then the question is: can it be said that no reasonable person could

²⁷ *Cox v. College of Optometrists of Ontario* (Ontario Divisional Court 1988) [1988] O.J. No. 1347 (Ont. Div. Ct.)

conclude that the prohibited private interest could influence the councillor's professional conduct?

- 310 There is no proof of improper use of influence nor that the relationship actually influenced the Respondent's decision on the files before her committee or council.
- 311 But then, as stated by the Divisional Court of Ontario mentioned above²⁸, proof is not required.
- 312 It is all about perception.
- 313 Many codes of conduct are silent on apparent conflicts of interest. The Code of Conduct for Members of Council of the City of Ottawa is not. It expressly uses the words "shall avoid" and the word "apparent".
- 314 The Respondent was made aware of the perception of a conflict of interest as far back as March 2019. So was Mr. Stirling. Neither acted to avoid the perception.
- 315 TSG services continued to the end of first contract, through the "Gap period" and the second contract was signed in full knowledge that the perception was circulating in the community.
- 316 There is no doubt in my view that the Complainant, as a reasonable person, justifiably formed the apprehension of a conflict of interest in this case.
- 317 I find that the Respondent has breached Section 4(5).

On Section 4(6):

"Members of Council shall not extend in the discharge of their official duties preferential treatment to any individual or organization if a reasonably well-informed person would conclude that the preferential treatment was solely for the purpose of advancing a private or personal interest."

- 318 This section of the Code of Conduct uses the words "preferential treatment" and "solely" when referring to "advancing a private interest".
- 319 Was there preferential treatment in granting contracts to TSG? Sole sourcing to a friend, however qualified, is essentially a preferential choice. In my view, the facts summarized in the findings of Section 4(5) above apply to this section. However,

²⁸ Ibid

the use of the words “*solely for the purpose of advancing a private or personal interest*” are significant. While the Respondent could have taken measures to minimize the apparent conflict of interest, the evidence and the testimony does not support that her intent in contracting with TSG was only and uniquely for the purpose of advancing a private interest. There was clearly a benefit for both parties, but I cannot conclude that maladministration and insouciance about perceptions equates to intentional municipal corruption.

320 I find that the Respondent has not breached Section 4(6).

On Section 13

321 Section 13(2) and (3) reads as follows:

(2) Members of Council shall not accept gifts that would, to a reasonable member of the public, appear to be in gratitude for influence, to induce influence, or otherwise to go beyond the necessary and appropriate public functions involved. For these purposes, a gift, benefit or hospitality provided with the Member’s knowledge to a Member’s spouse, child, or parent, or to a Member’s staff that is connected directly or indirectly to the performance of the Member’s duties is deemed to be a gift to that Member.

(3) To enhance transparency and accountability with respect to gifts, benefits and hospitality, Members of Council will file a quarterly disclosure statement that will be added to a public Gifts Registry. Members of Council are required to disclose all gifts, benefits, hospitality and sponsored travel received which individually exceed \$100 from one source in a calendar year.

322 When queried in writing by the Investigator, the Respondent denied receiving a benefit and TSG denied offering one. Both the Respondent and TSG may sincerely believe there was not benefit offered or accepted by provision of free services in the “Gap period” between the two service contracts. But the facts beg a different interpretation.

323 Fact: TSG provided continuing services during the 4 month “Gap period” that were neither invoiced nor paid.

324 Fact: The Respondent continued to task Ms. Clarke and accepted her services.

325 Fact: The value of the monthly retainer agreement in both contracts is the same: \$3,000.

326 4 times 3 equals 12. There is no other way of calculating the value of the benefit received by the Respondent from TSG.

327 \$12,000 is not a trivial sum.

328 The value of the monthly benefit exceeds the \$100 threshold which requires quarterly disclosure of such benefits in the public Gift Registry. The benefit was not disclosed. Possibly it was not disclosed because of maladministration or nonchalance. Regardless, the public has a right to know that their councillor is not under the influence of contractors offering favours.

329 I find that the Respondent has breached Sections 13(2) and 13(3).

RECOMMENDATIONS

Contract No. 3

330 The current contract with TSG signed in March 2021 is non-compliant with City policy particularly on non-disclosure. It would be wise for the Respondent to work with the Clerk's office to correct any inadequacies.

331 It would also be wise for Mr. Stirling to seek advice from the Lobbyist Registrar as to his status and responsibilities relating to the *Lobbying By-law*.

Reimbursement of legal fees by the Respondent

332 Section 9 (2)(a) of the Complaint Protocol appended to the Code of Conduct provides for the following:

“The Member who is the subject of the investigation may consult with a lawyer and charge this to their office budget. If the complaint is determined to have merit, the Integrity Commissioner may require the Member to reimburse these expenses to the City...”

333 As the Respondent has retained legal counsel, been found in breach of the Code of Conduct, and the complaint has been found to have merit, I recommend below that any legal fees related to the investigation which may have been charged to the Respondent's office budget be reimbursed to the City.

334 As provided for in both s. 223.4(5) of *Municipal Act, 2001* and Section 15 the Code of Conduct for Members of Council, the Integrity Commissioner may make recommendations to City Council with respect to sanctions and other corrective actions when a contravention of the Code of Conduct has been determined.

335 Section 15 of the Code of Conduct reads as follows:

(1) Members of Council are expected to adhere to the provisions of the Code of Conduct. The Municipal Act, 2001 authorizes Council, where it has received a report by its Integrity Commissioner that, in his or her opinion, there has been a violation of the Code of Conduct, to impose one of the following sanctions:

- (a) A reprimand; and
- (b) Suspension of the remuneration paid to the member in respect of his or her services as a member of Council or a local board, as the case may be, for a period of up to 90 days.

(2) The Integrity Commissioner may also recommend that Council impose one of the following sanctions:

- (a) Written or verbal public apology;
- (b) Return of property or reimbursement of its value or of monies spent;
- (c) Removal from membership of a committee; and
- (d) Removal as chair of a committee.

(3) The Integrity Commissioner has the final authority to recommend any of the sanctions above or other remedial action at his or her discretion.

336 It is therefore my responsibility to recommend sanctions when findings, following proper investigation, establish that provisions of the Code of Conduct have been breached.

337 The most serious sanction is the suspension of up to 90 days of the Councillor's remuneration. As I said in earlier reports to Council this sanction should normally be used in a progressive way, such as 30/60/and 90 days, depending on the experience of the Councillor, how flagrant the behaviour and whether acknowledgment of misbehaviour, remorse or regret are expressed. It should be

reserved for serious breaches of Code of Conduct. It should also only apply when there are no adequate avenues for reparation or no mitigating circumstances that could in part explain the offending behaviour.

338 It should be noted that pursuant to s. 5(2.1) of the *Municipal Conflict of Interest Act, 1990*, the Respondent will have an opportunity to respond to this report by participating in the debate when Council considers my recommendations:

(2.1) The following rules apply if the matter under consideration at a meeting or a part of a meeting is to consider whether to suspend the remuneration paid to the member under subsection 223.4 (5) or (6) of the Municipal Act, 2001 or under subsection 160 (5) or (6) of the City of Toronto Act, 2006:

- 1. Despite clauses (1) (b) and (c), the member may take part in the discussion of the matter, including making submissions to council or the local board, as the case may be, and may attempt to influence the voting on any question in respect of the matter, whether before, during or after the meeting. However, the member is not permitted to vote on any question in respect of the matter.*

339 Having considered the above-mentioned principles relating to sanctions and because the Respondent is an experienced senior member of Council and that her maladministration of the relationship with TSG has tainted the City's planning and development process, I have decided that strict sanctions are warranted in this case.

340 Therefore, I recommend that City Council:

1. Receive this report, including the finding that Councillor Harder has contravened Sections 4 and 13 of the Code of Conduct;
2. Reprimand Councillor Harder for the said contraventions;
3. Remove Councillor Harder from the Chair and membership of the Planning Committee, the Planning Advisory Committee and the Board of Directors of the Ottawa Community Lands Development Corporation for the remainder of the 2018-2022 Term of Council;
4. Suspend the remuneration paid to Councillor Harder in respect of her services as a member of Council for 15 days;

5. Direct the Integrity Commissioner to amend the Gift Registry disclosures for Councillor Harder for the years 2019 and 2020 to reflect the benefit provided to her by The Stirling Group;
6. Direct the City Clerk to seek reimbursement of any legal fees related to the investigation charged by Councillor Harder to her office budget; and
7. Adopt the Supplementary Recommendation in the Guidance section appended to this report.

341 This report is made pursuant to Part II, Section 11 of the Complaint Protocol.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert Marleau". The signature is written in a cursive style with a large initial "R".

Robert Marleau, C.M.
Integrity Commissioner

Appendix A: Guidance

Ethical framework for Members' staff

The Code of Conduct for Members of Council includes provisions relevant to issues at the core of this inquiry, such as apparent conflict of interest and Member's acceptance of benefits from lobbyists. The Employee Code of Conduct also sets out core values, such as transparency and impartiality, that employees are expected to use to inform their decisions and interactions.

The findings of this inquiry, however, have highlighted the need for a consolidated ethical framework to assist Members' employees manage practical matters at the intersection of the Members' Code and the Employee Code. The framework would also assist Members of Council in the management of staff over whom they have authority, and would enhance the Councillor's Office Manual in that regard.

For example, this investigation found that a Councillor's Assistant developed her own practice for making potential conflicts of interest known to the Member of Council to whom she reported. The investigation found discrepancies between that Member's recollection of an agreement with the employee on how to manage conflicts, and the employee's recollection of the same matter.

The Employee Code of Conduct provides examples of behaviour that embodies the values of transparency and impartiality, such as disclosing conflicts between personal interests and interests of the City. An ethical framework setting out responsibilities specific to the Member, the employee, and any other party involved, could complement the Employee Code by providing additional specific guidance on a range of matters, including managing apparent, real and potential conflicts of interest.

To serve as a practical resource for Members of Council and Councillors' Assistants, the ethical framework should:

- (a) Address key matters such as conflict of interest including disclosure of financial interest, confidentiality and non-disclosure, and engagement in outside business activities, including any activity with quasi-judicial panels, such as the Committee of Adjustment;
- (b) Set out clear roles and responsibilities of all parties with respect to those key matters, including Members of Council as managers of City employees under their authority, Councillors' Assistants, the City Clerk and Human Resources;

- (c) Confirm applicable Human Resources policy requirements for Members' staff;
and
- (d) Undergo review by the City Clerk, Integrity Commissioner, City Solicitor and City Manager as part of the regular governance cycle, in the same manner as the Councillor's Office Manual.

The ethical framework would supplement the policies and procedures related to the administration of Members' offices that are contained in the Councillor's Office Manual.

The ethical framework would also supplement the Council-endorsed recommendations of the report *Review of Recruitment and Hiring Processes for Councillors' Assistants*, including that the Integrity Commissioner and City staff provide mandatory training on inception, and ongoing training throughout a Term of Council, to Councillor's Assistants on the Employee Code of Conduct, the Code of Conduct for Members of Council and the Lobbyist Registry.

The City of Toronto's *Human Resources Management and Ethical Framework for Members' Staff* may serve as a useful model for the ethical framework. The document contains elements covered in the Councillor's Office Manual as recently amended during the 2018-2022 Mid-term Governance Review, such as the recruitment and hiring of Members' staff. However, it also outlines roles and responsibilities of Members, Members' Staff, the City Clerk's Office, and the City as employer. Additionally, it sets out responsibilities of Members' staff in relation to conflict of interest, and includes specific guidance on preferential treatment, gifts, the use or disclosure of confidential information, disclosure of financial interests, appearance before City committees and engaging in outside work or business activities.

Members' procurement of consultants

As described in this report, the Councillor's Office Manual requires that contracted vendors sign a non-disclosure agreement with the Councillor's Office once services are retained.

The investigation found no evidence that a non-disclosure agreement or confidentiality clause was in place during two contracts between a Member of Council and a consultant.

This results of this inquiry demonstrate a need for:

- (a) The development of criteria which, under the Code of Conduct for Members of Council, Members are required to consider before entering into a contract with a consultant; and
- (b) A review of the procedure for Members of Council procuring consultants. The review could include a focus on the content of a non-disclosure agreement for consultants, as well as the procedures for ensuring non-disclosure agreements are signed with each contract and before work commences under that agreement.

Concurrent review of the Code of Conduct for Members of Council and of the Lobbyist Code of Conduct

A Member of Council retained a registered lobbyist with an active file in the City of Ottawa's Lobbyist Registry as a consultant on three separate contracts, one of which, at the time of writing of this report, is current and ongoing. The activity on the lobbying file pre-dates the consultant's first contract with the Councillor.

I have determined that the consultant benefitted from preferential access to the Councillor during the term of the first two contracts. An examination of the nature of the Councillor-consultant relationship under the third contract was outside of the scope of the investigation.

This inquiry highlights the need to review the practice of Members of Council hiring consultants who are also registered lobbyists and may be continuing to lobby during and after the contract period.

I recommend a concurrent review of the Code of Conduct for Members of Council and the Lobbyist Code of Conduct. The review should include such matters as:

- (a) The terms and conditions of non-disclosure agreements for consultants who are registered lobbyists, including specific restrictions on lobbyists' use of information received from a public office holder;
- (b) Lobbyists' duty to disclose their lobbying activity, including the clients for whom they lobby, as part of any contract with a Member of Council;
- (c) Merits of a prohibition on lobbying while under a City consulting contract;
- (d) Merits of a "cooling off" period whereby a consultant would be required to refrain from lobbying for a set time after the contract ends; and

- (e) Considerations related to apparent, real and potential conflict of interest.

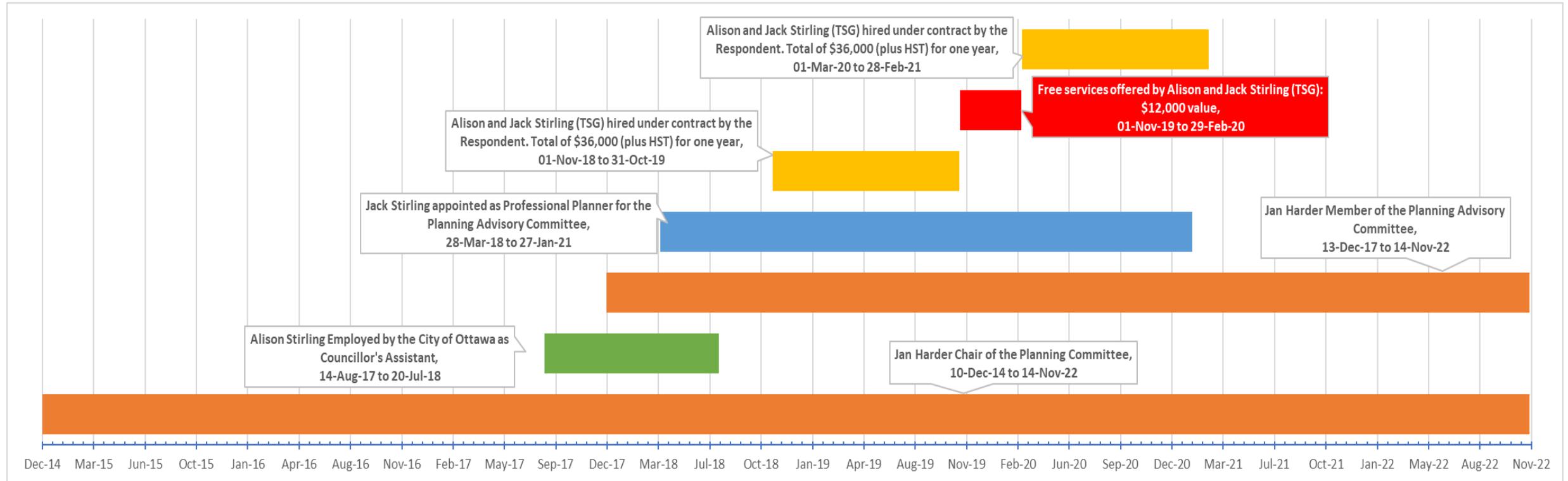
The Lobbyists' Code of Conduct developed by the Commissioner of Lobbying of Canada may serve as useful reference. Though the Office of the Commissioner of Lobbying is consulting on future changes to the Lobbyists' Code of Conduct, the current version contains provisions on lobbyists' use of information received from a public office holder, as well as conflict of interest and preferential access.

SUPPLEMENTARY RECOMMENDATION

That Council direct the City Clerk with the Integrity Commissioner, the City Solicitor and the City Manager to:

- (a) Develop an ethical framework for Members' staff as described in this Guidance;
- (b) Review and make recommendations for enhancing the procedure for the procurement of consultants by Members of Council, including developing criteria which Members are required to consider before entering into a contract with a consultant, and enforcing the requirement that consultants sign a non-disclosure agreement before work commences under each contract;
- (c) Undertake a concurrent review of the Code of Conduct for Members of Council and the Lobbyist Code of Conduct and make recommendations with respect to the practice of hiring consultants who are also registered lobbyists and the related issues as described in this Guidance; and
- (d) Report on the recommended ethical framework for Members' staff, enhanced procedure for Members' procurement of consultants, and the outcome of the concurrent review of the Code of Conduct for Members of Council and the Lobbyist Code of Conduct for Council's consideration as part of the 2022-2026 Council Governance Review.

Appendix B: Timeline of Key Events



Appendix C



June 10, 2021

Via E-Mail

Michael S. Polowin
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michael.polowin@gowlingwlg.com

City of Ottawa
110 Laurier Avenue West
Ottawa, ON K1P 1J1

Attention: **Robert Marleau, B.A., D.U.**
Integrity Commissioner

Dear Commissioner Marleau:

Re: Report to Council on an Inquiry Respecting the Conduct of Councillor Harder

As you are aware, we are Counsel to Councillor Harder in this matter. We write to you today to provide comments on your draft report (the "Report") provided to us for review.

Much of this letter is in our words, on the Councillor's behalf. At the bottom, you will find her personal remarks to you and Council. For these reasons, Councillor Harder requests that this letter, in its entirety, be appended to the final report.

Perception is a theme in the Report. Perception of course, is in the eye of the beholder. The beholder must be held to a standard of knowledge that is appropriate before that perception can be judged to be of real value. One must also give thought to the source of complaint and the basis for it.

There are a number of other themes in the Report. Our identification of, and comments on them are as follows:

1. Benefit to the Councillor – the Report returns time and again to the notion of a benefit to the Councillor arising out the "gap period" between contracts 2 and 3. The difficulty with this notion is that all payments, under all three of the contracts with TSG, came from the City of Ottawa. Therefore, any benefit that accrued, accrued to the City, and not the Councillor.

The Code of Conduct refers to "gift, benefit or hospitality". No definition is offered. While, as the Report sets out, the *Municipal Conflicts of Interest Act* does not apply, we note that the Report often resorts to it for assistance. The MCIA does not speak in terms of benefits. It speaks in terms of pecuniary interest. Suffice to say that a scenario of saving the City payments of \$12,000 by failure to enter into a contract does not, under any circumstance, meet the definition of a direct or indirect pecuniary interest under the MCIA.

The Code of Conduct provides "For these purposes, a gift, benefit or hospitality provided with the Member's knowledge to a Member's spouse, child, or parent, or to a Member's staff that is

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connected directly or indirectly to the performance of the Member's duties is deemed to be a gift to that Member." None of these are present in this circumstance. We conclude therefore, that no such benefit exists, and any assertion that TSG "provided unpaid work" for the Councillor is simply incorrect.

At most, the failure of TSG to charge its monthly fee could be seen to reduce the expenditures of the Councillor's office. This is the only potential benefit that accrued. There is a simple solution to this, in that Council could decide to attribute the cost even though it wasn't paid.

However, an examination of the Councillor's office finances shows that her budget surplus was \$59,000 in 2020 and \$29,000 in 2019. She had no reason to "accept a gift" and could easily have covered the agreed to stipend.

2. Some facts set out in the Report are simply incorrect or misleading. Among these are:
 - a. Paragraph 27, first and second bullets – the Councillor and Mr. Stirling (apart from the Contracts) have never had a business relationship. They have been friends since the Councillor was at the former City of Nepean, and Mr. Stirling was Commissioner of Planning there; and,
 - b. The mention of applications for Minor Variances before the Committee of Adjustment in paragraphs 73, 93-98 is misleading and disingenuous. Councillors are circulated with Notices of Application in the normal course, as part of the internal City circulation of such applications. Councillors have no role in the Committee of Adjustment, which the Report notes is independent and quasi-judicial. The mention of these applications has no bearing in this matter and is prejudicial to the Councillor.
3. The lack of a Non-Disclosure Agreement with TSG or Ms. Clarke – the Report, commencing at paragraph 99, discusses the lack of an NDA. The discussion itself makes it clear that such NDA are generated by, and administered by, Council Support Services ("CSS"). The failure of CSS to follow up on this matter after an initial email is not the responsibility of the Councillor. Clearly, the City requires better controls on such matters. No Councillor should be held to be responsible for the lack of an NDA administered by CSS.
4. Mr. Stirling's Role on the Planning Advisory Committee ("PAC") – the City's website states that:

"The mandate of the Planning Advisory Committee is to advise Ottawa City Council on planning matters, specifically with respect to the annual work plan of the Planning, Infrastructure and Economic Development department (PIED) and such other matters as Planning Committee, Agriculture and Rural Affairs Committee or Council may specify."

The PAC has no role whatsoever in the approval of planning applications. It provides general advice only. No information gained in service on the PAC would benefit anyone in the filing of applications for planning approvals. As well, Mr. Stirling's appointment was by Council, not the Councillor. The conclusion in paragraph 141 that TSG was privy to insider information is simply incorrect and uninformed. As indicated above, the reasonable person is not expected to be completed uninformed. In order to form such an opinion, one would expect the reasonable

person to understand what the PAC does. Once armed with such information, the reasonable person cannot under any circumstances, draw such a conclusion.

The discussion commences again at paragraph 200. The tone of the discussion suggests that the Councillor was somehow responsible for the appointment of Mr. Stirling to the PAC. It is important to reiterate that the appointment was by Council. Mr. Stirling is well-known to Council.

5. Appearance of a Conflict of Interest – As stated above, one must give thought to the source of the complaint. Paragraph 143 points to an article in The Leveller. The Leveller on its website describes itself as:

The Leveller is a left-leaning newspaper covering Carleton University, University of Ottawa, the city of Ottawa, and the wider world. Our aim is to provide news and analysis in support of people everywhere who are fighting against all forms of oppression – among them ... capitalism.

The Report tries to make two inconsistent arguments; that the MCI does not apply, yet there is an appearance of a conflict. We agree that the MCI does not apply. There is no conflict. In our opinion, that is where the analysis must end. The conclusion in paragraph 169 is ill-founded. The City has had a long history of asserting conflicts of interest in staff, primarily women, where none exist. The Report itself speaks to the fact that the information available to Ms. Clarke was identical to that available to the public. As such, where is the benefit to TSG? The Report, in paragraph 183, reaches a conclusion on available information on the basis of one example. And in that example, the Report concludes that TSG had no interest. Additionally, had CSS done its job and required an NDA, then this would never have been an issue.

As for the conclusion in paragraph 185 about gaining “information about the preferences and institutional values of City staff and decision makers”, it is simply incorrect. Anyone working with staff and decision makers over a period of time gain this kind of information. Additionally, staff and politicians leave the City with this information regularly.

The discussion commencing at paragraph 193 is simply ill-founded. The communications described take place regularly. Developers and their consultants seek meetings with members of Council and the Mayor on items that could be more difficult to approve.

6. The Councillor’s Management of the “Apparent” Conflict – As we have argued, the absence of an actual conflict, in our view, ends the analysis. However, the “apparent conflict” as it is stated in the Report, is based on The Leveller article. One need only peruse the website’s pages to see that it has difficulty with every aspect of the development process. An article of that kind, one-sided and biased as it was, is a no-win scenario for anyone seeking to respond. That the Councillor and Mr. Stirling chose not to respond, or indeed to change any approaches, is completely understandable. Just because one has a website does not elevate the opinions contained in it to a level deserving of response or a modification of behaviour.
7. Formal conflict screen – this is something best mandated by the City in the Code of Conduct. It is not.

8. The Councillor's action when faced with the claim of an apparent conflict – As we have argued, the absence of an actual conflict, in our view, ends the analysis. However, the “apparent conflict” as it is stated in the Report, is based on The Levellor article. One need only peruse the website's pages to see that it has difficulty with every aspect of the development process. An article of that kind, one-sided and biased as it was, is a no-win scenario for anyone seeking to respond. That the Councillor and Mr. Stirling chose not to respond, or indeed to change any approaches, is completely understandable. Just because one has a website does not elevate the opinions contained in it to a level deserving of response or a modification of behaviour.
9. The Councillor's duty – As we have argued, the absence of an actual conflict, in our view, ends the analysis. However, the “apparent conflict” as it is stated in the Report, is based on The Levellor article. One need only peruse the website's pages to see that it has difficulty with every aspect of the development process. An article of that kind, one-sided and biased as it was, is a no-win scenario for anyone seeking to respond. That the Councillor and Mr. Stirling chose not to respond, or indeed to change any approaches, is completely understandable. Just because one has a website does not elevate the opinions contained in it to a level deserving of response or a modification of behaviour.

In a City of 1,000,000 people, there will be a variety of claims of conflict of interest. The very same website currently carries an article entitled “Are developer donations driving city expansion? Council approves XXXX development after large donations by YYYY.” There is an assertion of conflict of interest. Does that mean that all Councillors accepting donations are in a conflict of interest? The Report itself concludes otherwise. One must consider the source of the allegation when making such a conclusion.

10. Benefit to the Councillor – please see our discussion in paragraph 1, above. The conclusion in paragraph 248 is ill-founded. This is not the “business world”, and the Councillor received no direct or indirect benefit. The conclusion in paragraph 255 is simply incorrect. There was no gift to the Councillor. The gift, if there was one, was to the City.
11. On issues of credibility – the assertions in paragraph 270 are unfair. The investigator has no authority in law to require an oath to be taken. The legislation provides that it can be required if a witness is under a summons. Therefore, it was our advice that no oath be taken. The Councillor did not refuse. There was no basis in law for the request.
12. Paragraph 271 actually proves that appropriate conduct was undertaken. A conflict was disclosed, and prevented. As 272 says “Ms. Clarke could have had . . .” However, she did not. The Councillor could not know who the clients of TSG are, and once alerted, the Councillor took the right step.
13. On the conduct of the Councillor – We reiterate that there was no gift or benefit to the Councillor. Therefore, paragraphs 286-292 are simply incorrect.
14. Paragraph 293 – 298 and the need for transparency. The complaint itself refers to public documents. There was complete transparency. If the Report is suggesting that answers must be given to every inquiry from media or a website, then much of Council will be in breach. There was nothing secret about the relationship among the parties. It was widely known, including in the Leveller.

15. Breach of Section 4(5) – our position on this has been well-stated throughout this letter.
16. Breach of Section 13 – Again, there was no benefit or gift. Therefore, the Councillor is not in breach.

We thank you for your consideration of these comments. In the Councillor's own words:

"In my 24-year career in municipal politics, I take great pride in the fact that I have always made decisions based on what would be best for the residents of Barrhaven, the residents of Ottawa and for the long-term prosperity and success of the City I love.

This includes making decisions on what are, in all likelihood, some of the most complex city-building decisions in our City's history.

I have always and continue to demonstrate 100% commitment to integrity in all of my decision-making.

Serving as Chair of Planning has been one of the highlights of my career. It is by far the most complex and challenging role I have ever been asked to play - one in which policy visions for growth, community needs, and economic development constantly compete with each other.

I am very proud of the decisions I have made as a long-standing political leader, including surrounding myself with exceptionally competent individuals who are able to provide a strategic challenge function to my own decision-making. Often, these highly competent individuals help me to see a side of the prism or a policy angle I had not previously considered.

Namely, I am exceptionally proud of my long-standing relationship with Jack Stirling, who is named in this report, from whom I have received solid planning advice. Jack has an exceptional reputation as a City builder - having served as a Deputy City Manager, Planning & Public Works, for the former City of Nepean and having overseen a breadth of files and issues in his life that is truly outstanding. I have counted on Jack to provide me with his best advice on a range of complex, multi-jurisdictional issues - but make no mistake - I am the one at the end of the day that makes the final decision on what to support and on what to advise. And I never make complex decisions based on the advice of a sole advisor or a single point of view. Everyone knows that my door is always open and I am always ready to listen. I sincerely believe that all members of Council should continue to seek a wide range of advice on complex City-building issues from a broad range of advisors.

I am also very proud of the fact that members of Council have the independent ability to hire persons from outside City Hall to offer political, professional, planning, and strategic advice to them on both ward specific and city-wide issues, and I believe this ability to hire independently must be cherished and protected.

I am saddened by the suggestion that someone should not be hired in an advisory capacity "because they are someone's daughter." That would be a career-limiting suggestion for many of us who have fought for equality of treatment for so many years. I took special care to openly, and with full transparency, introduce Alison Stirling in meetings and I was certainly never shy to point out her relation to Jack and his long contribution to city planning so that anyone participating in meetings were aware of this relationship.

Further, planning decisions at the City of Ottawa are framed by two very important safeguards - the Planning Act and the independent recommendations of professional and highly competent planning staff. Members of Council and the public have the opportunity to challenge staff recommendations in a highly structured public process - and they avail themselves of these processes consistently - including the legislative appeal processes available when individuals or community groups disagree with a staff recommendation or a Council decision.

I am saddened by the fact that this investigation appears to be a politically motivated attack on me personally as the Chair of Planning. These claims do not allege a specific wrongdoing that could be addressed in a fully public and transparent manner. In this sense, the anonymous complainant seeks to smear and besmirch an entire lifetime of community and political contribution with a general allegation that provides no specific sense of how the complainant might have been wronged.

Personally, I believe that this is a political attack masquerading as an integrity complaint because the complainant is unable to point to a specific decision that would have harmed this individual.

Although I respect the fact that the Integrity Commissioner is bound by the confidentiality rules of his office, I believe that it is a principle of natural justice that an accused person should know their accuser - especially in the case of a personal political attack.

In closing, I disagree with the findings of the Integrity Commissioner.

I believe that the safeguards that are in place to protect the integrity of decision-making at City Hall are robust, and that elected officials should continue to have the freedom to use their discretionary budgets to hire persons whom they deem worthy of trust and who are able to provide the best ideas, advice, and challenge function based on their own personal experience, qualifications and past contributions.

Further, I will always continue to uphold the principles of the Planning Act, support and respect the independent and professional position of staff and objectively consider their recommendations, combined with my own personal experience and judgement of what is best for the residents of my community and of our wonderful City."

Yours very truly,



Michael S. Polowin
Partner

MSP
Encl.

cc: Client

Appendix D



Tony E. Fleming
Direct Line: 613.546.8096
E-mail: tfleming@cswan.com

June 15, 2021

Delivered by email: Robert.Marleau@ottawa.ca

Robert Marleau
Integrity Commissioner
City of Ottawa
110 Laurier Avenue West
Ottawa, Ontario
K1P 1J1

Dear Mr. Marleau:

**Re: Complaint Against Jan Harder
Our File No. 16048-5**

You requested our opinion with respect to two specific issues raised in a letter dated June 10, 2021 from counsel for Councillor Harder. We understand that the comments arise after a review of your draft report. We considered your draft report as well as the June 10 letter in order to provide this opinion.

The issues are i) whether you were obliged to disclose the identity of the complainant to the Councillor and ii) whether it was “unfair” to reveal in the report that the Councillor refused to provide evidence under oath (on advice from legal counsel).

The facts and results of the investigation, as well as your findings, are well-documented in the draft report and will not be repeated here.

Identity of the Complainant

Councillor Harder characterized the complaint as a “political attack” and takes issue with the fact that the identity of the complainant was not disclosed. The argument, although not stated in so many words is that it is unfair or prejudicial to the Councillor to not have the identity of the complainant disclosed to her.

00401764.DOCX:

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The *Municipal Act* provides:

223.5 (1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

...

223.6 (2) If the Commissioner reports to the municipality or to a local board his or her opinion about whether a member of council or of the local board has contravened the applicable code of conduct, the Commissioner may disclose in the report such matters as in the Commissioner's opinion are necessary for the purposes of the report.

(3) The municipality and each local board shall ensure that reports received from the Commissioner by the municipality or by the board, as the case may be, are made available to the public.

It is therefore discretionary as to what information an Integrity Commissioner discloses as part of the investigation or the report documenting the investigation and recommendations made, if any. The Integrity Commissioner is governed by the direction in the Act to “preserve secrecy” and to only disclose those facts that are in the Integrity's Commissioner's opinion necessary “for the purposes of the report” to Council.

The Divisional Court has clearly confirmed that the identity of complainants must be kept confidential by Integrity Commissioners and there is no duty to disclose, unless failing to do so would prevent the Member from making full answer and defence to the allegations. In the very recent Divisional Court decision in *Dhillon v. Brampton* [(2021) ONSC 4165] the Member judicially reviewed a decision of the Integrity Commissioner and Council to impose penalties related to a breach of the City's Code of Conduct. The Court, among other matters, ruled on whether the Integrity Commissioner provided adequate disclosure. In the context of an Integrity Commissioner's investigation the Divisional Court has consistently ruled that there is a relatively low obligation of procedural fairness. The Court recognizes that the *Municipal Act* prioritizes confidentiality.

In the Divisional Court case of *Di Biase v. Vaughan* [(2016) ONSC 5620] the Court confirmed that disclosure is limited to being provided with sufficient information to understand the allegations and being given a fair opportunity to answer that case; releasing the names of complainants is not required.

The identity of the complainant in this case is not, as I understand the allegations and facts as disclosed, relevant to the ability of the Member to provide full answer and defence. There is no allegation that any information that was relevant was withheld other than the name of the complainant. I am aware of no basis to assert that the name of the complainant is necessary to answer the complaint and therefore the investigation was fair.

Refusal to Provide Evidence Under Oath

Point 11 of the Member's legal counsel's letter talks about credibility and asserts it is unfair to mention that no oath or affirmation was given by the Councillor during her interview. We understand that the Councillor declined to take an oath or affirmation on the basis of legal advice given at the interview.

The *Municipal Act* does not establish legal authority to administer an oath. Section 223.4(2) does however permit an IC to use sections 33 and 34 of the *Public Inquiries Act* if they choose. The Member's lawyer correctly points out that under the *Public Inquiries Act* an Integrity Commissioner could, under summons, require a person to give evidence under oath or affirmation. Both the *Municipal Act* and the *Public Inquiries Act* are discretionary and the choice as to how to undertake an investigation is entirely at the discretion of the Integrity Commissioner, subject only to any direction in the Code of Conduct.

That the use of the *Public Inquiries Act* is discretionary means that any Integrity Commissioner may, if he or she chooses, use the powers under that Act, or simply rely on the authority given under the *Municipal Act* to undertake the inquiry. There is no prohibition preventing an Integrity Commissioner or a person undertaking an investigation on their behalf from administering an oath or affirmation before taking evidence.

While technically you had no legal authority under the *Public Inquiries Act* in this investigation, neither you nor the investigator were purporting to use those powers. An Integrity Commissioner, in my opinion, is entitled to ask a witness to give their evidence under oath or affirmation; this is standard practice for many Integrity Commissioner's, including myself, and I am aware of no prohibition against the practice.

The *Municipal Act* gives very broad authority to undertake an investigation, but does not specify what actions that investigation may include. There is no suggestion that an Integrity Commissioner has no legal authority to conduct an interview, notwithstanding that it is not specifically listed in the Act as a power conferred on an Integrity Commissioner. The same holds true for the right to ask a witness to give evidence under oath or affirmation.

The Act gives Integrity Commissioners the authority to use sections 33 and 34 of the *Public Inquiries Act* to ensure that a reluctant witness can be compelled to participate. There is no legal authority I am aware of that prevents an IC from administering an oath or affirmation where they have elected not to issue a summons. In the circumstances where you elect not to use the powers under sections 33 and 34 of the *Public Inquiries Act* you are simply prevented from compelling a witness to attend or give evidence under oath. You may, as was done here, elect to proceed with the interview without an affirmation and apply your judgment as to credibility or weight at the end of the process.

The Councillor elected to take her legal counsel's advice not to give her evidence under oath or affirmation; that was her choice. It is nevertheless a fact that you are entitled to rely on in

assessing credibility. Given inconsistencies between two witnesses, you are within your mandate to prefer the evidence of a witness who provided their evidence under oath over a witness who did not. Stating this in your report is not unfair; it is a fact.

I trust that the foregoing opinion will be of assistance. Should you have any questions or want to discuss please let me know.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



Tony E. Fleming, C.S.
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