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November 5, 2021

Attention: City Clerk

The Mayor and Members of Council
City of Hamilton
71 Main Street West
Hamilton, ON

Dear Mr. Mayor and Councillors of the City of Hamilton:

**Re: PRINCIPLES INTEGRITY REPORT AGAINST COUNCILLER WHITEHEAD DATED
NOVEMBER 3, 2021**

Please be advised that I represent Councillor Whitehead and was initially retained for the purposes of reviewing the complaint made against him which is the subject of the report of Principles Integrity dated November 3, 2021 and which will be presented to you on November 10, 2021 for discussion and consideration.

On March 26, 2021, we submitted to the Integrity Commissioner, on behalf of Councillor Whitehead, a full defense to the complaint and set out the basis for our position that the manner in which the complaint was processed, from start to end, was inherently flawed and the ensuing investigation with unduly punitive recommendations should not have been pursued.

A full copy of the response to the Integrity Commissioner relating to the Preliminary Findings Report and dated March 26, 2021 is enclosed. We ask that you carefully review the Reply in detail and take into consideration the detailed reply of Councillor Whitehead to each and every component set out in the Preliminary Findings Report. Please note that a point by point reply to the matters raised in the Preliminary Report is outlined in the Reply.

It is our position that there was no authority to proceed with an investigation as the Complainant recognized by the Integrity Commissioner had no status to lodge a complaint under the relevant By-Law. In that regard, I draw your particular attention to paragraphs 35 and 36 of the Reply which confirm that the initial complaint lodged by Staff Member A was withdrawn and subsequently replaced with a new complaint from "The City of Hamilton Human Resources Department". The change in both identity and nature of the complainant recorded on November 12, 2020 was not brought to the attention of the Councillor and such a significant change should have been set out in the letter to him of November 18, 2020 or at the very least in a second letter which could have been sent over the 2 and ½ months between November 18, 2020 and the February 2, 2021 Preliminary Report. At paragraph 46 of the Reply (page 11), reference is made to the By-Law which states that a complaint must come from "a request by City Council, a Member of Council, a City employee, a City resident, or a person who has business, institutional or other premises in the City". **The ambiguous and non-identifiable "The City of Hamilton Human Resources Department" is clearly not a permitted complainant pursuant to City By-Law 16-288.**

One is left to wonder exactly what it is that this entity represents. Does it represent the Manager or Managers? Does it represent each and every member of that Department? Was a vote taken with regard to lodging the complaint as an entity and did 100% of members of the Department agree with advancing the unqualified complaint?

As “the City of Hamilton Human Resources Department” is not a Member of Council, a City employee, a City resident or a person who has business, institutional or other premises in the City” there is no jurisdiction to proceed with an investigation as the Complainant has no legal status pursuant to the provisions of City By-Law 16-288.

It is our position that in view of this legislative lack of standing on the part of the Complainant, Council should not and cannot proceed to move forward with review of the Final Report and its harsh, punitive recommendations. There exists no legal basis for the investigation.

Further, it is our position that the investigation itself is replete with conflict of interest to the extent that the investigation is irrevocably tainted. The investigation involved extensive interviews conducted by an Integrity Commissioner who is a former employee of the City of Hamilton and constitutes a clear and transparent conflict of interest. As noted in the Reply, the past associations of that Integrity Commissioner with Staff and presumably Members of the Human Resources Department render her participation suspect with the inevitable innuendo of inherent bias.

The essence of the Principles of Integrity dictate that she should have recused herself from taking part in any component of the investigation and having failed to do so, the investigation and its conclusions cannot be relied upon for implementation of the punitive recommendations.

With regard to the findings set out in the Recommendation Report of the Integrity Commissioner dated November 3, 2021, it is our position that those findings are unsupported by fact and that the conclusions outlined therein are representative of “opinion” and “conjecture”. By way of example, at paragraph 116 (page 14), the Report states “we find it more likely that he was intentionally attempting to plant the seed with his falsehood, to put in motion a process that would result in removal of Staff Member A, for the simple reason that he found the person resistant to complying with an acquiescing to the expectations and demands of the Councillor”. **I submit to Council that this represents mere speculation as nowhere in the investigative process is there an iota of fact to substantiate this finding. This “finding” is not only speculative, but it is malicious.**

Similarly, at paragraph 129 (page 16), “in the course of this investigation, it was made clear that there is no expectation among management staff that the Councillor will actually genuinely apologize for or even acknowledge problems with, his conduct and behaviour”. What exactly is the measure of “... actually genuinely apologize for...”? **The apology was made to Staff Member A and accepted by that Staff Member. There is no evidence whatsoever that the apology was not genuine, nor that it was accepted as anything other than genuine.** There is evidence however that when Staff Member A withdrew his complaint preventing the proposed investigation to proceed, a new Complainant “The City of Hamilton Human Resources Department” conveniently appeared to fill the gap. Such convenience and expedient replacement is suspect and unacceptable.

With regard to the recommendations set out in the Report, we have the following comments:

1. The recommendation to impose the sanction of suspension of the Councillor's remuneration for a period of 30 days commencing with the next pay period:

The Integrity Commissioner has previously set out what is deemed to be the Commissioner's unequivocal finding that the Councillor is incapable of reform, change of conduct or reconciliation. If that is indeed the case, then the proposed pay suspension serves no purpose whatsoever other than to deprive the Councillor of his livelihood for a period of 30 days and equally important, punish his family and those financially dependent upon him for his alleged offensive conduct. The imposition of such a penalty is unduly harsh, devoid of empathy and significantly harmful not only to the Councillor but to his immediate family. Depriving the Councillor's dependents of financial security for a period of 30 days is both unconscionable and unjustified.

Aside from the injustice which would result from the imposition of such a penalty, Council may wish to consider whether, at law, it has the authority to impose suspension of payment for any time whatsoever, as such suspension is not a "fine" which Council has the authority to levy, but rather, is essentially an award of damages exceeding the authority of Municipal Councils. Generally, only a Court of Law is allowed to award damages.

2. The imposition of restrictions in communications with City Staff as set out at paragraph 164 (page 20) of the Report:

This recommendation is, to say the least, absolutely shocking. It represents a direct attack on the democratic right of free speech accorded to every person in a democratic society. Where is the legal authority empowering a City Council to abrogate the right of free speech and dictate with whom an individual may or may not communicate?

Further, it seeks to "gag" the Councillor and prevent him from discharging his duties and obligations to those who have elected him.

Please consider that the imposition of this Gag/Restraining Order would abrogate not only the right of the Councillor to the legally protected exercise of free speech, but also the rights of all of those who have elected him and in fact, of all staff members who may wish to continue to communicate with him.

With respect, I again propose that there exists no legal authority or mandate authorizing a Municipal Council to impose a "Gag Order or Restraining Order" as jurisdiction for such Orders remains with the Courts.

This penalty is unacceptable in our democratic society. It is unenforceable, repugnant and cannot stand.

If Council does proceed with consideration of the Integrity Commissioner Report, notwithstanding our position that it should not do so, then for the reasons set out herein and in full detail in the reply, we submit that none of the imposed penalties be imposed as Councillor Whitehead has already endured more than sufficient hardship.

We urge you to end the prosecution of Councillor Whitehead here and now.

Please let common sense prevail and let the Councillor resume his duties to those who have elected him.

Thank you for permitting us to make the submissions for your consideration.

Yours very truly,

JACK RESTIVO PROFESSIONAL CORPORATION

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Encl.

** Executed pursuant to the Electronic Commerce Act*