

### CHAPTER 4

# Essentials of Code of Conduct Enforcement

## When to Consider Enforcement

In most cases local governments find it is worth exerting considerable effort towards informal resolution, and considering enforcement only if those efforts prove unsuccessful. Conduct is often about relationships, and with the collective governance model of local governments, good working relations are critical to good governance. Informal resolution can help to maintain relationships. Enforcement processes – being lengthy, protracted affairs that sometimes pit colleagues against each other – can serve to erode relationships as well as public trust in the process and the local government.

For this reason, local governments generally find informal resolution more effective, and are more satisfied with its outcomes (see Chapter 3, 'Resolving Conduct Issues Informally' for details). If informal resolution is not attainable, local governments may wish to consider enforcement.

A local government can hold its elected officials accountable for their conduct through an enforcement process articulated within its code of conduct, so long as that process is fair. This chapter focuses on characteristics of these code of conduct enforcement processes, and what to consider in their development, but first, it points to enforcement approaches outside of a code of conduct that may be applicable.



## Overview of Other Enforcement Approaches

### Specific Statutory Processes

Various federal or provincial laws provide specific accountability or enforcement processes for certain conduct matters, for example:

- **Incidents and complaints regarding bullying and harassment of an employee and/or other conduct that affects employees:** Local governments are responsible for the safety of their employees at work. If a complaint relates to matters covered by legislated provisions to address workplace bullying and harassment, the complaint **must** be dealt with in accordance with the *Workers Compensation Act* and Occupational Health and Safety policies established by WorkSafeBC. There may also be other laws, local government policies or employment arrangements that will govern how to respond when an employee indicates they have been subjected to unsafe working conditions or inappropriate behaviour.
- **Application to court for a declaration of disqualification and forfeiture of financial gain for contraventions of conflict of interest and other ethical conduct requirements:** The *Community Charter*, *Local Government Act* and related legislation provide rules for conflicts of interest, inside influence, outside influence, gifts, contracts and insider information. Contraventions result in disqualifications and may result in forfeiture of any financial gain that resulted. Electors or the local government may apply to the Supreme Court for a declaration of disqualification and for an order to forfeit financial gain.

- **Prosecution of an offence:** Some contraventions of legal requirements are offences which may, at the discretion of the provincial Crown Counsel, be prosecuted in court, and convictions may result in fines and/or imprisonment (e.g., unauthorized disclosure of personal information under the *Freedom of Information and Protection of Privacy Act*, and unauthorized disclosure of certain confidential information under the *Community Charter*, *Local Government Act* and related statutes).

#### LEADING PRACTICE TIPS

This list is not exhaustive. There are numerous other federal or provincial laws that provide enforcement processes (e.g., Court-based prosecutions under the Criminal Code of Canada for contravention of laws related to libel or slander; Human Rights Tribunal determination of discrimination complaints under the BC Human Rights Code). Local governments will want to familiarize themselves with all applicable legislation before initiating a local government enforcement process.

## Local Government Process to Decide on a Specific Alleged Conduct Contravention and Impose Related Sanctions

The courts have found that a local government has an ability to control conduct of its members in some circumstances, and local governments have relied on this to impose sanctions for contraventions on a case-by-case basis.

These case-by-case processes are similar to enforcement processes articulated within a code of conduct: both can result in sanctions; both must be undertaken using a high standard of fairness; and both are complex from a legal perspective.

However, an important distinction between them relates to whether the process is established in advance (as it is for processes articulated within a code of conduct), or whether it is developed each time it is needed (as it is for case-by-case processes).

### LEADING PRACTICE TIPS

Before getting into a situation where misconduct of a Council or Board member becomes an issue, develop a code of conduct to set standards of conduct, and include within the code the process that will be used to deal with alleged contraventions.

An enforcement process articulated within a code of conduct has several advantages over a case-by-case enforcement process, as illustrated in the graphic, and is strongly recommended.

## ADVANTAGES OF CODE OF CONDUCT ENFORCEMENT

### ENHANCED CERTAINTY AND TRANSPARENCY IN THE PROCESS

- Everyone understands the process by which officials will be held accountable for their conduct
- Improved public confidence

### IMPROVED COMPLIANCE

- Those who are subject to a code may be more likely to comply if there are known consequences for contraventions

### ADMINISTRATIVE EFFICIENCIES

- Once the process is developed, using it for a subsequent contravention allegations will eliminate the need to “reinvent the wheel” each time an allegation is made

### ENHANCED FAIRNESS

- Consistent use of the same process helps to ensure everyone is treated fairly
- Can help to overcome perceptions of bias in decisions about the process itself

## Obtaining Legal, Law Enforcement and Other Advice About Enforcement Processes

Conduct enforcement is a complex and evolving area of law; while this guide is intended to help support local government decision-making in relation to conduct matters, it does not provide legal advice, and it is not a substitute for that advice.

Code of conduct enforcement does not replace other enforcement approaches that may be available or required, such as those described above. As a local government begins to explore what enforcement processes are available for a particular conduct contravention, it may want to consider discussing the matter with their legal advisors and, in some circumstances, with law enforcement or other agencies (e.g., WorkSafe BC for matters in which the conduct affects an employee; Office of the Human Rights Commissioner for matters that may be discriminatory).

Code of conduct enforcement is a complex process and its outcomes can be significant, so it is important for local governments to give considerable thought to how to ensure its process is sound. Articulating an enforcement process within a code of conduct is also a relatively new practice in B.C. and largely untested in the courts, which represents some legal uncertainties. These factors give rise to a critical need to seek legal advice on details of the process as it is being designed and when it is implemented.

This guide should not be used as a template for designing a code enforcement process, because some elements (e.g., what is an appropriate standard of fairness; what would comply with open and closed meeting rules; how to ensure that informal processes do not jeopardize a subsequent enforcement process; what complaints can be dismissed; what sanctions may be imposed) can vary considerably depending on specific circumstances. The considerations and current practice set out in the guide are intended to support a local government's initial thinking about these processes and as a starting point for it to have an informed discussion with its legal advisors about how to design an enforcement process that will meet its unique circumstances and needs.

## Code of Conduct Enforcement: Overarching Considerations

### Ensuring a Fair Process

Code of conduct enforcement processes have two stages: determining if there has been a contravention (e.g., taking complaints; conducting investigations; making determinations), and if so, making decisions on what, if any, sanctions to impose (e.g., recommendations from investigation and/or a Council/Board decision on sanctions). Fair process in both of these stages is critical.

A local government is obligated to ensure its decision processes are fair, particularly where the decision affects the interests of a specific individual.

Given the significance of these processes to elected officials, local governments need to consider how they can meet a high standard of fairness, including finding ways to ensure throughout the process that:

- The person affected by a decision is able to participate in the process before the decision is made (e.g., is notified of allegations, findings and recommendations and provided all documents and information that will be relied on by decision-makers, is provided with an opportunity to respond and sufficient time to prepare, and is given an opportunity to be represented by legal counsel at the appropriate stage);
- The decision-makers are open-minded (i.e., they have neither a conflict of interest nor a predetermined bias); and
- The decision is based on relevant evidence and, where applicable, the justification for the decision is given to the person(s) affected by it.

### LEADING PRACTICE TIPS

Build timelines into the various steps of your enforcement process. This will enhance fairness, and can avoid eroding relationships further as the process drags on.

Build an informal resolution component into your code of conduct enforcement process.

Consider carefully managing the extent to which staff are involved in enforcement processes. Given the nature of these processes, critical staff-elected official working relationships can be significantly affected.

Consider specifically referring to legislated confidentiality requirements in your code of conduct, so members know how they will be held accountable for contraventions of those provisions.

### Ensuring the Investigator has Sufficient Independence, Expertise and Authority

It can be extremely challenging to ensure the person conducting an investigation is free from bias or the perception of bias when investigating a colleague (i.e., where a Council/Board or one of its committees is investigating the conduct of a Council/Board member) or when there is an employer/employee relationship (e.g., where a CAO is investigating the conduct of a Council or Board member).

In order to remove this perception of bias, improve fairness, and enhance public trust in the process, investigations are most often assigned to an independent third party.

### Balancing Transparency and Confidentiality

Local government legislation provides rules around what must be dealt with in open meetings, and what may or must be dealt with in closed meetings. The *Freedom of Information and Protection of Privacy Act* provide rights of access to certain records, as well as a requirement to protect personal information. A local government will need to ensure compliance with these laws as it develops and implements its enforcement processes.

Within these legislated parameters, there may be some discretion for local governments to make choices about whether to conduct some parts of the enforcement process in open or not. Where there is sufficient discretion, local governments may wish to consider where confidentiality is needed to support a fair process, where transparency is needed to enhance public confidence in the process, and how to balance these two objectives in each step of the process and overall.

For example, to protect the privacy of the individuals involved and ensure investigations are free from bias, most local governments maintain confidentiality throughout the complaint and investigation processes (e.g., notifying only those involved and requiring them to maintain confidentiality). Once the investigation is complete, and if it finds there was a contravention, the balance can sometimes shift towards transparency by providing for consideration of, and decisions on, investigators' reports and sanctions in an open Council or Board meeting. This is typically because the legislation requires this (i.e., the subject matter does not meet the criteria for discussion in a closed meeting) and/or the local government considers the public interest is best served by making these decisions transparently.

### Matters of Cost, Capacity, Efficiency and Effectiveness

Decisions around process will have an impact on financial and human resource capacity. For example, decisions about who can make a complaint (e.g., elected officials, staff or the public) can significantly affect the volume of complaints and investigations. This will affect resources that will need to be dedicated to the enforcement process, since investigations can be time consuming and require people with highly specialized skills.

These considerations can help to sharpen the focus on various design elements and implementation strategies, not just for enforcement but for all elements of building and restoring responsible conduct. In addition, they may encourage reconsideration of alternative measures (e.g., prevention activities or informal resolution of conduct issues) that may have been previously discarded because of their associated costs (yet may be much less costly – both financially and in relationship impacts – than code of conduct enforcement).



## Code of Conduct Enforcement: Process Steps, Current Practice and Considerations

The inclusion of details of how alleged contraventions will be addressed is a recent trend in B.C. local government codes of conduct. Where processes are articulated, they tend to consist of a number of distinct steps, within which there are both some common elements and some variation.

The following tables are snapshots of these provisions taken from a small sample of current B.C. codes. Readers are cautioned that this does not represent the full extent of existing practice, but rather an overview intended to be generally representative of the range of enforcement approaches articulated currently in B.C. codes of conduct.

As noted earlier, including enforcement provisions in codes of conduct is an emerging area still largely untested in the courts.

**The examples provided here are not provided as templates but rather as a starting point; each local government needs to consider its own circumstances and seek its own legal advice as it develops its processes and sanctions.**

It is critical that local governments exercise a high standard of fairness in these processes. Some jurisdictions choose to articulate this extensively in their code in order to provide clarity and certainty, while others do not articulate this in their code, but instead provide fair process as a matter of practice, allowing some flexibility to adapt to specific circumstances. Do not assume that codes that lack explicit fair process provisions mean that the jurisdiction is not practicing fair process. The choice is not whether or not to provide a fair process, but rather how and where to define it.

## INITIATION: What triggers the process?

<p><b>How is the enforcement process initiated and who can make a complaint?</b></p>	<p>The process is typically initiated by a complaint, and complaints are allowed from any member of the Council or Board. In some cases, committee members and/or staff may also make a complaint, and in a few cases, complaints are accepted from “any person,” which would include all of the above as well as members of the public.</p>
<p><b>How is the complaint made, and what must it contain?</b></p>	<p>Typically, the complaint must be in writing, and most require these to be signed and dated by the complainant. There are varying degrees of specificity in the detail to be provided, with some codes saying nothing about this, and others requiring more specifics (e.g., detailed description of the conduct, witnesses and supporting documents).</p>
<p><b>To whom is the complaint made?</b></p>	<p>Most are delivered to the mayor/chair and/or a staff official (e.g. CAO), with provision that if the mayor/chair is involved, delivery is to the acting mayor/chair. In a few cases, delivery is to mayor and Council/chair and Board, and in some cases, complaints go to an investigator if one has been appointed.</p>

### Considerations:

- › **Fair process/cost and capacity:** Fairness would dictate that at a minimum, anyone subject to a code of conduct should be allowed to make a complaint. From a public trust perspective, consideration could be given to allowing complaints from anyone impacted by the conduct (e.g., members of the public who are impacted by the erosion of good governance resulting from the conduct). The volume, and perhaps the complexity, of complaints tends to increase as the number of potential complainants increases, which will have cost and capacity impacts.
- › **Fair process:** Consider timelines for making a complaint. Existing practice examples: some codes don't explicitly provide a deadline, while others tie a deadline to the breach (e.g., as soon as possible after, or within six months).
- › **Fair process:** Consider how much detail to require in a complaint. Part of a fair process is enabling the respondent to respond, which would be difficult without sufficient detail as to the allegation. To be clear about process, consider explicitly stating that the respondent is to be provided notice of the allegations and an opportunity to respond before a decision to proceed to an investigation is made, perhaps with some deadlines. Existing practice examples: some codes do not provide this explicitly, while others do and provide deadlines (e.g. must respond within 14 days of notification).
- › **Confidentiality/transparency:** Consider measures to ensure confidentiality until an investigation of the allegations is complete.



## INFORMAL RESOLUTION: What informal resolution processes are available?

<p><b>When does informal resolution occur and how is it triggered?</b></p>	<p>Most codes explicitly provide for informal resolution. Some create an informal complaint process, and encourage complainants and respondents to try informal resolution before a formal complaint is made. Some other codes encourage an attempt at informal resolution after a formal complaint has been submitted and before the complaint review process; in these cases, the CAO and/or mayor/chair become involved in that informal resolution step.</p>
<p><b>What is the informal resolution process?</b></p>	<p>Some codes that provide for informal resolution are silent as to the process. However, most others call for the complainant to address the issue directly with the respondent to encourage compliance, and/or to request the assistance of the mayor/chair to attempt to resolve the issue. In one case, a senior staff official could be called on to assist the complainant in that process, and third-party mediation is an option if these steps aren't successful in reaching resolution.</p>
<p><b>What are the timelines and fair process provisions?</b></p>	<p>There is no deadline for informal resolution where it occurs prior to receiving a formal complaint, because the de facto deadline is when a formal complaint is made. Most codes that encourage informal resolution after a formal complaint is made set a 30-day deadline to attempt informal resolution prior to an investigator being appointed. Most do not have specific fair process or transparency/confidentiality provisions for this informal stage. However, in some cases, there are specific provisions for confidentiality, and where mediation is part of the process, legal or other representation for the complainant and respondent are offered for that part of the process.</p>

### Considerations:

- › **Cost/capacity/efficiency/effectiveness:** Local governments may want to consider encouraging informal resolution because that can be less costly and lead to better outcomes than investigation and sanction processes (see Chapter 3, Resolving Conduct Issues Informally).
- › **Confidentiality/transparency:** Consider measures to keep informal resolution processes confidential.

## APPOINTMENT OF INVESTIGATOR: Who is appointed to investigate and how are appointments made?

<p><b>Who is the investigator, who makes the appointment, and on what basis?</b></p>	<p>In the majority of cases, the investigator is an independent third party, typically appointed by either the mayor/chair, the person acting in their place, or jointly by the mayor/chair and CAO. Exceptions include when the code assigns investigator duties to a position (e.g., senior staff official), or when the investigator is defined as the Council/Board or an individual or body appointed by the Council/Board. In cases where a senior staff official is assigned in the code as investigator, the code also provides for that individual to appoint an independent third party to investigate instead of the senior staff official.</p>
<p><b>What duties does the investigator perform?</b></p>	<p>Typically, investigators undertake the complaint review process, investigation and reporting of findings. In at least one case, a senior staff official is responsible for the complaint review process, and the investigator is appointed only after the complaint review process is complete, if needed. In one case, the investigator is assigned a broader range of responsibilities.<sup>6</sup></p>
<p><b>What are the timelines and fair process provisions?</b></p>	<p>Several jurisdictions require the investigator be appointed within 30 days of receipt of a formal complaint (unless the matter is resolved informally within that time frame). See “Who is the Investigator” above for fair process provisions.</p>

### Considerations:

- › **Fair process/investigator independence, expertise and authority:** Choosing an investigator who is free from bias is critical. This would indicate a need to appoint an independent third party, and/or ensure other mechanisms are in place to protect investigator independence. Assigning an investigation to a senior staff position, such as a CAO, is not recommended for most investigations as it would be very difficult to achieve the needed level of independence, and because the investigation could harm the staff-Council/Board relationship, compromising both the ability of the Council/Board to provide good governance and the CAO’s ability to effectively perform their duties. Providing for input from the complainant and respondent on the choice of investigator can help ensure all parties agree the investigator is unbiased and qualified; this effect can be enhanced by provisions that refer to the need for investigators to have professional skills/expertise.
- › **Confidentiality/transparency:** The choice of who appoints the investigator (e.g., Council/Board, mayor/chair and/or CAO) may impact when complaint information becomes public, since Council/Board decisions may need to be made in an open meeting.

<sup>6</sup> City of Surrey Bylaw 20018 creates an Ethics Commissioner position and assigns a number of roles to the position, including providing advice and delivering training. See link in Chapter 6, Resources.

## COMPLAINT-REVIEW PROCESS: How are complaints initially dealt with and by whom?

<p><b>What is the complaint review process and who carries it out?</b></p>	<p>If informal resolution is not reached, complaints undergo an initial assessment and are either dismissed or proceed to investigation. Almost always, the investigator is responsible for the initial assessment, although in at least one code of conduct, this role is assigned to a senior staff official.</p>
<p><b>On what basis can a complaint be dismissed?</b></p>	<p>Reasons that a complaint may be dismissed are usually provided, but there is some variation on the grounds for dismissal. Many refer to complaints that are frivolous, vexatious and/or not made in good faith. Several also mention complaints that are unfounded, based on insufficient grounds, unlikely to succeed and/or beyond the jurisdiction of the code or other conduct policy.</p>
<p><b>What is the process if a complaint is dismissed?</b></p>	<p>Many do not provide a specific process. Where one is provided, there is a requirement to inform the complainant and, in at least one code of conduct, the Council or Board.</p>
<p><b>What are the timelines and fair process provisions?</b></p>	<p>Codes don't typically set timelines for this step. Some codes provide that the respondent must be notified and given an opportunity to provide an initial response prior to the complaint review process; of these, a few provide deadlines for the initial response (e.g., within 14 days of notification).</p>

### Considerations:

- › **Cost, capacity, efficiency, effectiveness:** Local governments will want to consider some form of complaint-review process, to ensure that investigations aren't required when not warranted by the nature of the complaint.
- › **Fair process:** Both fair process and public trust can be enhanced by being clear about the types of complaints that can be dismissed, while providing some discretion for investigators to make decisions based on their professional judgement and specific circumstance. Local governments may also want to consider whether to provide some deterrents for vexatious complaints (see Other Enforcement-Related Provisions table).
- › **Confidentiality/transparency:** For complaints that are dismissed, local governments will want to consider how to treat the involved parties fairly when making decisions about whether or not to provide notification about the complaint and the reasons it has been dismissed, and the extent of that notification. For complaints that proceed to investigation, fair process would require notification to both the complainant and respondent, and opportunities for the respondent to respond during the investigation (see the Investigation table below).

## INVESTIGATION: How are complaints investigated?

<p><b>What is the purpose of the investigation and how is it conducted?</b></p>	<p>Investigations tend to be described quite generally (e.g., independent, impartial investigation of complaint; determine the facts, review relevant documents, conduct interviews), which provides considerable room for investigators to use their professional judgement to adapt the investigative process to meet the circumstances. Specific provisions relate to fair process, described below.</p>
<p><b>What are the timelines?</b></p>	<p>Some codes do not provide timelines. Where they are provided, timelines can refer to when the investigation begins (e.g., within 10 days, or as quickly as possible), when updates are provided (e.g., updates within 90 days after investigator's appointment) and/or when the investigation finishes (e.g., within 30 days, with extensions possible).</p>
<p><b>What are the fair process provisions?</b></p>	<p>Codes typically provide for confidential investigations and require participants to respect that confidentiality. All codes have investigation fair process provisions, that are either general (e.g., investigate in a manner that is fair, timely, confidential and otherwise accords with the principles of due process and natural justice), or more specific (e.g., complainant and respondent are provided notice, and relevant documents, respondents must be given opportunity to respond, and participants may be represented (including legal counsel)).</p>

### Considerations:

- › **Fair process:** Whether or not specific provisions are included in the code, participants must be afforded fair process. Local governments will need to consider how they will provide key fairness elements, like:

  - How respondents will be able to effectively participate, including how and when they will be provided with relevant documents, how and when they can respond (ensuring they are given sufficient time to prepare that response); and when are respondents and potentially others given an opportunity to be represented and by whom; and
  - How to ensure the decision is based on relevant information (e.g., considerations around things like documentation of evidence, findings and decisions).

In addition, local governments will want to consider how much of this to detail within their code. More detail helps to ensure processes are consistently applied and things don't get missed, but may make the process less flexible and more difficult to adapt to emerging circumstances.

- › **Confidentiality/transparency:** Considerations typically relate to how to ensure allegations and evidence remain confidential during the investigation process.

## REPORTING FINDINGS: How are investigation findings and recommendations reported and to whom?

<p><b>What must be in the investigator's report?</b></p>	<p>Reports must provide investigation findings. In some cases, there is a specific requirement to include findings as to whether there has been a contravention, and/or recommendations on resolution of the complaint.</p>
<p><b>Can sanctions be recommended if there has been a contravention?</b></p>	<p>There are two approaches: specific authority for the recommendations of sanctions from among a list of potential sanctions in the code; OR no specific mention of the ability to recommend sanctions, even though the code lists potential sanctions.</p>
<p><b>Can additional recommendations be made in the report?</b></p>	<p>A number of codes specifically allow any recommendation an investigator deems appropriate and also specifically provide for a recommendation that the complaint be dismissed.</p>
<p><b>To whom is the report delivered?</b></p>	<p>There are two general approaches, with some slight variation: to the Council/ Board, with some also provided to a staff official; OR to the mayor/chair (with provision for the acting mayor/chair if that person is involved) with most also being provided to a staff official.</p>
<p><b>What are the timelines and fair process provisions?</b></p>	<p>There are few timelines for reporting (see Investigation table above for details). In many cases, there are explicit provisions for reports to be provided to both the complainants and respondents. A few state that the report to the mayor/chair is confidential, and in one case, there is explicit provision that if there is insufficient evidence in an investigation, the investigator reports that finding but there is to be no permanent record of the complaint.</p>

### Considerations:

- › **Fair process:** Consider how and when the complainant and respondent are informed of the findings of the investigation. Consider whether different approaches are needed if no contravention has been found as opposed to if the findings indicate a contravention.
- › **Confidentiality/transparency:** Consider whether the investigator's report is provided confidentially or not. The choice of who receives the investigator's report may impact the extent to which the report is confidential, since if the report is delivered to the Council/Board, this may be in an open meeting. Where reports are not confidential, consider whether some information must be severed to comply with legislated privacy rules. Consider whether different approaches are needed if no contravention has been found as opposed to if the findings indicate a contravention.

## FINAL RESOLUTION: What actions can be taken once findings have been reported and by whom?

<p><b>If the investigator’s report goes to mayor/chair, does it also go to Council or Board?</b></p>	<p>Some codes require the mayor/chair to provide the report, or a summary of it, to the Council/Board, others allow that person to decide whether it should go to the Council/Board, and the remainder do not give direction to the mayor/chair as to whether or not the report should be provided to the Council/Board.</p>
<p><b>What happens if the investigation finds a contravention?</b></p>	<p>Some codes state that the decision about whether there was a contravention rests with the Council/Board. Others are less explicit, stating only that the investigator’s report must state whether there has been a contravention.</p>
<p><b>If there was a contravention, who imposes sanctions and what are the parameters around that?</b></p>	<p><b>In no case can an investigator impose sanctions. That decision rests with the Council/Board.</b> Codes describe what sanctions may be imposed, and in many cases, a Council/Board can choose from among those provided. In some cases, the only sanctions that can be imposed are some or all of those recommended by the investigator. In at least one case, the Council/Board is directed to consider specified factors (e.g., nature or impact of the conduct).</p>
<p><b>What are the timelines and fair process provisions?</b></p>	<p>Some codes do not articulate fair process. Others do, including: notification to the respondent prior to Council/Board consideration, stating that the respondent is entitled to respond and given time to prepare response (e.g., two weeks), stating that the respondent is entitled to be represented, including by legal counsel (some have indemnification; see ‘Other Enforcement-related Provisions’ table below). Some codes provide for Council/Board consideration in open meetings, while others provide for closed meetings for this.</p>

### Considerations:

- › **Fair process:** Whether or not specific provisions are included in the code, participants must be afforded fair process. Local governments will need to consider how they will provide key fairness elements and how much to detail this within their code. **Refer to the fair process discussion in the ‘Investigation’ table above, which is relevant for this step also.** In addition, consider how to ensure an unbiased decision on sanctions. Some local governments find that limiting Council/Board discretion (e.g. may only impose sanctions recommended by investigator, or must consider specific factors) can help to reduce the potential for bias and/or ensure the decision is based on relevant information.
- › **Confidentiality/transparency:** Consider relevant meeting rules and the nature of the matter. If these matters are dealt with in open meetings, consider whether some personal information should be severed; if dealt with in closed meetings, consider when and how the respondent is informed of decisions, and when and to what extent information is made available to the public (as a void of information can ultimately be filled by misinformation). Consider also whether different approaches are needed if no contravention has been found as opposed to if the findings indicate a contravention.

## OTHER ENFORCEMENT-RELATED PROVISIONS: A sample of other key enforcement provisions that may be included in a code.

<p><b>What enforcement provisions are there for different groups that are subject to a code?</b></p>	<p>Many codes apply only to members of the Council/Board; some also include committee members and/or staff. Where these other groups are included, codes tend to modify enforcement provisions (e.g., who deals with complaints and how this is done; what sanctions may be imposed) for each group.</p>
<p><b>Do codes provide for reimbursement of legal costs for a person involved in an enforcement process?</b></p>	<p>Some codes make provisions for reimbursement of a respondent's legal costs under certain circumstances, and with certain limits (e.g., if the person did not act in a dishonest, grossly negligent or malicious way; for the first occurrence, but not subsequently unless agreed in advance; upon request; only reasonable costs are reimbursed, sometimes with specified dollar limits).</p>
<p><b>What are the responsibilities of persons subject to the code?</b></p>	<p>Most codes require that members refrain from discussing allegations at open meetings until after investigations and Council/Board decisions on them.</p> <p>Some codes require that members endeavour to resolve disputes in good faith, cooperate with informal resolution and/or not obstruct the Council/Board in investigations.</p> <p>Some also require that members not act or threaten reprisal/retaliation against involved persons (i.e., complainant, respondent, witness, staff). In at least one case, for complaints that are vexatious, malicious or in bad faith, complainants are subject to disciplinary action, including sanctions in the code.</p>

### Considerations:

- **When code applies to committee members and/or staff:** All processes must be fair, and all will need to consider the confidentiality/transparency balance, but how these are applied is often different for each group. There may also be different legal or contractual requirements that would guide enforcement processes that must be considered (particularly with respect to staff).
- **Reimbursement:** Fairness can be enhanced by providing clear policy in the code, rather than dealing with reimbursement of legal costs on a case-by-case basis. In considering the potential to offer reimbursement of legal costs and limitations around that, local governments may wish to consider whether their indemnification policy could inadvertently act as a deterrent to trying to work things out informally.
- **Responsibilities:** Local governments may wish to consider whether the fairness and/or effectiveness of their enforcement processes could be enhanced by provisions such as these.

# Sanctions

As described in the 'Final Resolution' table above, if the findings of an investigation indicate that there has been a conduct contravention, a Council or Board may consider what, if any, sanctions to impose.

As with other elements of a code of conduct enforcement process, legal advice is recommended as sanctions are being designed and when they are imposed.

## Current Practice for Sanctions

Codes of conduct that provide details of an enforcement process also typically set out a range of sanctions that the Council or Board could impose for contraventions.

Sanctions are stated specifically, generally, or as a combination of these. For example, some codes say that the Council/Board "may impose sanctions" and follow this with a few examples, while others provide a specific list of sanctions, sometimes followed with a general provision for "any other sanction considered appropriate" by the investigator in some cases and the Council/Board in others.

Some codes also provide overarching statements that sanctions may only be imposed if they do not prevent the member from fulfilling their legislated duties of elected office.

### Specific sanctions included in a sampling of B.C. codes of conduct are:

- Request letter of apology
- Mandatory education, training, coaching or counselling
- Suspension/removal from some or all committees or other bodies
- Public censure
- Letter of reprimand or formal warning
- Publication of reprimand or request for apology and member's response
- Suspension or removal as deputy/acting mayor/chair
- Restrictions on representing the local government or attending events or conferences
- Limits on travel/expenses beyond those in corporate policies
- Limiting access to certain local government facilities
- Requirement to return local government property provided for convenience
- Restrictions on how documents are provided to the member
- Reduction in compensation (in accordance with remuneration bylaw)<sup>7</sup>
- Written pledge promising to comply

**Readers are cautioned that this listing merely presents a compilation of sanctions currently included within B.C. local government codes of conduct.** They should be considered in the context of evolving law and the legal uncertainty that is discussed above. Given this, legal advice is advised on sanctions as well as other elements of a code of conduct enforcement process.

<sup>7</sup> This sanction is provided for in the District of North Cowichan's code of conduct, and it is specifically linked to its Council remuneration bylaw. See Chapter 6, Resources for link.



## Considerations When Imposing Sanctions

- **Fair process:** Fairness can be enhanced and the potential for bias reduced by providing direction to the Council or Board about what it must consider in making sanction decisions, or limiting Council/Board discretion to only imposing some or all of the sanctions recommended by the third-party investigator.
- **Effectiveness:** While sanctions can be imposed as a way of distancing the Council or Board from the member's conduct (e.g., public rebuke) or to penalize the member for the contravention (e.g., reduction in remuneration, imposing limits on travel or suspension of committee appointments), local governments may also wish to consider how sanctions may be used to support a return to responsible conduct and to prevent conduct issues in the future. For example, providing coaching, skills building or training can help to avoid conduct issues that stem from a misunderstanding about roles and responsibilities, from cultural assumptions or from frustration with not being able to get one's point across at a meeting. Additionally, restricting how documents are provided to the member can help to prevent a recurrence of a contravention of a duty of confidentiality.
- **Legal risk:** Sanctions are not specifically mentioned in B.C. local government legislation but local governments have been found by the courts to have the ability to manage conduct; this may include the ability to sanction in cases of the misconduct of a Council or Board member. The edges of that authority – in terms of what specific sanctions may be imposed – aren't yet clear, but some key questions to think about in imposing sanctions are set out in this graphic. Ensuring that each question can be answered with a "yes" may mean that the legal risk related to the proposed sanction is lower.

**Could the sanction fall within the local government's legislated powers?**

*(e.g. CC/LGA fundamental and included powers; power to rescind appointments.)*



**If the sanction were imposed, would the elected official still be capable of fulfilling their duties of office?**

*(e.g., a suspension or disqualification from office would mean the elected official could not fulfill their duties of office; removal from rotation as acting mayor/chair or from a committee would not have that effect.)*



**Is the sanction consistent with other policies and procedures of the local government?**

*(e.g., do policies related to compensation allow for reduced remuneration if an elected official is found to have contravened the code of conduct?)*



**Were processes to determine the contravention and impose sanctions procedurally fair, with due regard to natural justice?**

*(e.g. notice, opportunity to be heard, open-minded decision-making, and consideration of relevant facts?)*

### How to Improve the Post-sanction Environment

Disqualification is not a sanction that can be imposed by a local government. Consequently, an elected official found to be in contravention of a code of conduct will continue to be a Council or Board member. By the time formal complaints are made, relationships among Council or Board members may be very strained, and the investigation and sanction process will likely further damage these relationships.

Finding effective ways to work together will become even more important, and local governments may wish to consider what specific support could be provided to the elected official found to be in contravention, and to the collective to facilitate them working effectively together again. In addition, consideration may be given to whether policy or procedure changes could support a return to responsible conduct. Local governments may also wish to consider whether to give the investigator an ability to make these types of restorative and support recommendations, which could help to move away from a singular focus on sanctions.



## FOOD FOR THOUGHT

- › Is informal resolution something that would be suitable for the conduct issue at hand? If so, have we attempted that? If not, why not?
- › What enforcement processes and sanctions does our code of conduct include? Are they sufficient?
- › Do we have a process in place to review our code of conduct and what it covers? What can we learn from what we have just gone through for any future situations?
- › Does our code refer to legislated conduct rules? If so, is it clear about which enforcement processes refer to what code provisions? (e.g., court-based processes for conflict of interest, WorkSafe BC processes for bullying and harassment involving an employee, code of conduct enforcement for all others).
- › Have we done everything we can to make sure investigations and decisions are free from bias and administratively fair, and that the entire enforcement process reduces the potential for the process to be used for purely political purposes?
- › Are we providing the same standard of fairness to everyone?

“Justice Crawford sounded one important note of caution on the right of an elected council to take action regarding a council member’s misconduct. The power to decide whether a council member’s conduct falls below the expected standard of conduct must be exercised with great care and discretion:

‘Far too easily, this could turn into an abuse of process for cheap political gain, and any council that sets out in this direction must be careful in what it is doing.’”

*(From the Young Anderson paper Controlling Councillor Conduct)*

**CLICK HERE** for links to resources referenced in this chapter.