

INSTITUTIONAL CAPACITY TO PREVENT CONFLICT OF INTEREST

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Institutional Capacity to Prevent Conflict of Interest

Introduction

Tell the truth, don't lie, be nice to others, and obey the rules.

This is as good a place to start as any. But, wait a minute, tell the truth, don't lie, be nice to others, and obey the rules, aren't these rules we teach our children? Somewhere along the line the values that we have learned at home as children become blurred in a work environment. Why is this? Well, it is simple; we start to make decisions that affect others, not just ourselves. When that happens, the "others" want to be assured that their interests are taken into account, not just ours.

In the context of public officials, we are given authority to make decisions in relation to the disbursement of public funds, the issuance of licences, provision of grants or subsidies, or development of policy.

Unfortunately, there are examples in virtually all jurisdictions where an individual has exercised his or her duties and responsibilities in order to advance their own private interests or those of others that have in some way, a link to them. This has led to skepticism by the public in relation to the discharge of an institution's public duties. The trust that the public has in relation to the whole institution is brought into question by the actions of a few.

However, we should not establish a conflict of interest regime based upon the premise that all are corrupt. That is simply not the case. Rather, we should attempt to reflect the rules and values that the majority already follow.

Building Blocks

Before one attempts to discuss the capacity of an institution to prevent conflict of interest, some basic concepts in the administration of a conflict of interest regime should first be understood.

While I do not propose to provide an exhaustive list of items that are fundamental to the establishment of an effective conflict of interest regime, the following are, from my experience, a sound basis upon which to build.

First, when dealing with the discharge of public duties by public officials, we must understand their role in relation to the public, their superiors and themselves. In this regard, some loosely phrased definitions of responsibility, accountability and blame are of a benefit.

All public officials are, through their job descriptions, assigned various duties and responsibilities. In some cases, the duties and responsibilities may require a public office holder to make decisions involving: the disbursement of public funds, whether for the purposes of contractual payment, provision of a grant or contribution; the making of a decision to grant a licence or provision of some regulatory approval; or the development of a policy that could have a direct impact upon an organization. When we examine responsibility, accountability and blame in the context of the discharge of an individual's public duties and responsibilities, what does this mean?

Each public official is "responsible" for the discharge of their assigned duties and responsibilities.

However, should a problem arise, the individual becomes "accountable", that is, the individual must be able to explain what occurred in relation to the discharge of the duties and responsibilities and, if necessary, what corrective action has been taken in order to ensure that the problem does not reoccur. In this context, an individual may have to account to their superior as to what occurred and, correspondingly, that superior may have to explain to the head of the organization, what has occurred within his unit and the corrective action that will, or has been taken.

Ultimately, "blame" may have to be assessed against an individual if, that individual's personal conduct was inappropriate.

There are three additional building blocks that are fundamental to the establishment of a conflict of interest regime. They are, confidentiality, transparency and impartiality.

While it might seem odd that confidentiality and transparency are fundamental building blocks because their purpose seems so diametrically opposed, they are essential.

An organization that administers a conflict of interest regime must be able to ensure that the information that they obtain remains confidential. In this context, the public official should have the confidence that the information they provide will remain in confidence and not be available for any other purpose.

However, in order to permit the public to assure themselves that a public official is not advancing their private interests in the discharge of their public duties, there should be partial disclosure of pre-identified assets or activities of the public official. This will allow the public to assure themselves that the official is not advancing his or her private interests in the discharge of his or her public duties. For example, a conflict of interest regime may require the public disclosure of the ownership of private corporations or the disclosure of certain interests family members may hold, where those holdings may have dealings back with the organization in which the public official works.

As well, individuals who administer a conflict of interest regime must be able to continually ensure, both the individuals that seek their advice and guidance and the public, that they remain impartial in the discharge of their duties.

Role of an Office

In the establishment of an Office for the administration of a conflict of interest regime, fundamental decisions must be made at the outset.

For example, will the Office be proactive or reactive to conflict of interest situations? In the former, that is, a proactive office will liaise directly with a public official and assist them

throughout their time in public office. However, if one establishes a reactive regime, the role tends to become more assessing whether or not a rule or principle has been observed, or broken. Essentially, the difference between the two is preventative versus assignment of blame.

Will the regime be principles based, rules based, or, a combination of both?

While I am not a believer in an entirely rules based or “check box ethics” system, some rules may be necessary. However, a word of caution from Plato, “good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws”.

When establishing a conflict of interest regime, do you want to provide guidance or establish a “gotcha” environment? Is the purpose to restrain bad behavior or encourage good? Or, is our purpose to guide the future or punish the past?

We certainly want to prevent abuse and the exercise of undue influence of public officials but, in doing so, we want to strengthen their role.

I believe that an organization should have a sound conflict of interest code which is a combination of principles and specific rules. I do not believe that a conflict of interest regime should solely be rules based. Where ethics fails, the law rushes in.

What should be the role of an Office in the administration of a conflict of interest regime?

Should that Office only provide advice to public officials, have the authority to provide binding opinions, or should it also have the power to investigate transgressions of the Conflict of Interest Code?

While arguments can be made that an investigative power should be independent from that of the office that provides advice to public officials, if one considers the ultimate role of the office is to ensure accountability to the public, then the two roles can co-exist. Then the purpose in the provision of advice and the power to investigate is the same, that is, ensuring the public interest

is considered over and above the individual public official's private interests in the discharge of their official duties and responsibilities.

Independence

In order to ensure and instill confidence in the public that an Office will impartially administer a conflict of interest regime and investigate transgressions, the head of that institution should have security of tenure; this usually implies that the individual is appointed for a fixed period of time and that he or she cannot be easily removed from office, particularly by those who approved the appointment. As well, approval of the Office's annual budget should be done independent of any involvement of the individuals for whom the office may be called upon to provide advice or investigate any transgressions.

In addition, depending upon the particular regime within which an Office is working, it may be necessary to ensure that the individuals who conduct investigations are not subsequently compellable in any civil or criminal proceedings; this is simply meant to ensure that the individuals that provide evidence in relation to any investigation are more at liberty to speak openly and freely as to what transpired in the discharge of their public duties and responsibilities.

Investigative Authority

Depending upon the institution within which the investigative authority is being exercised, the process that will be followed may be markedly different.

As an interesting example, our Office has had the opportunity to develop an inquiry procedure that applies in relation to the conduct of investigations within the Westminster Parliamentary system of government. I have provided as an Appendix to the paper a diagram or flow chart which shows the steps that are followed in the conduct of an inquiry where an elected representative has made an allegation against another elected individual that specific conflict of interest provisions have not been followed.

As you will see from the Appendix, initiation of an inquiry against an elected official may be commenced upon the request of another Member, self-initiated by the Commissioner, or as a consequence of a resolution being passed in the House of Commons that an inquiry be conducted.

In relation to a request by a Member that an inquiry be commenced or the exercise by the Commissioner of his self-initiatory power, the first consideration that must be taken into account is whether or not the alleged transgression is within the mandate and jurisdiction of the Commissioner. If that is the case, the Commissioner will then have to decide whether the information available, at that point in time, supports the reasonable grounds to believe that a breach of the provisions of a Conflict of Interest Code has occurred. If that decision is made in the affirmative, a Notice of Inquiry is then issued to the Member against whom the complaint has been made and, in that Notice of Inquiry, he or she will be provided with sufficient details to know the nature of the allegations being made.

Following the issuance of a Notice of Inquiry, the Commissioner will undertake a preliminary inquiry. In this context, it is only the Member against whom the allegation is made that is questioned. If, following the information provided by the Member against whom the allegation is made, the Commissioner is satisfied that no further action is required, he may then produce his report setting out his findings, conclusions, and recommendations, if any. That report is then transmitted to the House of Commons for its consideration, as that body has the ultimate authority in relation to the conduct of one of its Members.

However, if after the input of the Member; against whom the allegation has been made; there is a necessity to receive the input of other individuals or, if there are contested issues of fact, complex technical issues, or difficulty in assessing the credibility of evidence or testimony, the Commissioner may establish an investigatory panel. Where an investigatory panel has been established, the individual against whom the complaint has been made is at liberty to attend, cross-examine witnesses and be represented by counsel. Following the completion of an investigatory panel, the Commissioner will then prepare his report, including its findings,

conclusions and recommendations, if any. That report, is then transmitted to the House of Commons for its consideration.

If the Commissioner, following a preliminary inquiry, has determined that it is not necessary to establish an investigatory panel, but further evidence needs to be gathered, then a full inquiry is initiated. The information that is obtained as a consequence of a full inquiry must be provided to the individual against whom the complaint has been made. This is accomplished by providing that individual with a “Notice of Issues of Fact”. This Notice sets out the evidence that has been gathered in relation to the inquiry and provides the individual with an opportunity to respond.

Following the receipt of the response from the Member against whom the complaint has been made, the Commissioner will complete his report and forward it to the House of Commons, for its consideration.

In the final analysis, while it is important to have an investigatory role in order to ensure transgressions are accounted for, I believe the “capacity to prevent” conflicts of interest lies more in an office’s ability to be more proactive with its public officials.