

Date: April 27, 2006

To: Policy and Finance Committee

From: David Mullan, Integrity Commissioner

Subject: The Hiring and Appointment of Relatives of Members of Council to City of Toronto Staff and Agencies, Boards and Commissions.

Purpose:

To report on the appointment of relatives of Members of Council to staff positions and City of Toronto Agencies, Boards and Commissions.

Financial Implications and Impact Statement:

There are no financial implications arising from this report.

Recommendations:

It is recommended that:

- (1) Council establish a policy that relatives of Members of Council (as specified in section 10(1) of the *Ontario Human Rights Code* (spouses and those in a conjugal relationship, children and parents)) be ineligible for appointment to the following positions or offices: City Manager, Deputy City Manager, City Clerk, City Solicitor, Chief Planner, Director, Internal Audit, Director, Elections & Registry Services, Director, Corporate Access & Privacy, Director, Council & Support Services, Auditor General, Integrity Commissioner, and, if created, Ombudsman, as well as civilian members of Agencies, Boards and Commissions.
- (2) Council exempt from the application of the previous policy any persons already occupying any of the designated positions but extend that same policy to relationships between Members of Council which come into existence after this policy is in place to the extent that either the Member of Council or the appointee will be obliged to resign unless explicitly exempted from so doing by Council.
- (3) Council establish a policy that, where a Member of Council is a member of an appointments committee or otherwise involved as a decision-maker (including

participation at City Council) in any City appointment process, he or she should declare a conflict of interest and withdraw from that appointment process if a relative (as defined in the October 5, 2005 City of Toronto Employment of Relatives Policy) is a candidate for appointment or, in the case of a recommendation to Council for appointment, withdraw from participation and voting if the recommendation is for the appointment of a relative.

- (4) Council expand the current conflict of interest rules to provide that Members of Council declare a conflict of interest and refrain from participation or voting in Council in relation to the following matters in which a staff member relative (as defined in section 10(1) of the *Ontario Human Rights Code* (spouses and those in a conjugal relationship, children and parents)) has been involved or where the interests of a staff member relative will be affected:

1. The collective bargaining process where a relative is a member of the affected bargaining unit, and any other personnel policy matter, which affects a relative of the Member of Council.
2. Committees and reports of committees where a staff member relative has had a lead or significant role in the development of the policy, option or position coming before Council or one of its committees, or a City Agency, Board or Commission.

Background:

At its meeting of October 7, 2005, the Administration Committee dealt with a motion submitted by Councillor Soknacki requesting me to report to Council “as soon as possible with guidelines on”:

- (a) appropriate responses to requests for letters of recommendation and requests for employment at the City of Toronto;<sup>1</sup>
- (b) the appropriateness of family members of Members of Council being hired by the City, and if so, what disclosure ought to be provided;
- (c) how Members of Council ought to respond to City business decisions where the City employs family members.

Contemporaneously, the Administration Committee also requested the City Manager to report back to it on various questions about the hiring of permanent and temporary staff and what changes should be made to existing policies and procedures to guard against conflicts of interest and to ensure the maintenance of standards. Included in the sub-clauses to that Motion, as passed by the Administration Committee, was a statement to the effect that the City Manager’s report include

...a recommendation that any proposed guidelines for Members of Council also apply to City Staff.

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<sup>1</sup> I have addressed this in a separate report on Councillors providing references for those seeking employment or an appointment with the City.

The Administration Committee also requested that I provide input to those charged with developing the report on the policies and procedures for the hiring of City Staff. As a consequence, the two reviews overlapped and I was involved with those members of staff engaged in responding to that motion.

As well, I sent a memorandum to all Members of Council asking them for their views on what should be the policy for Members of Council on City hiring of relatives of Members of Council. That produced a number of responses, both oral and written. I also received a few unsolicited communications from members of the public. In addition, I reviewed other policies and statements on these matters and, in the context of the hiring of relatives, took into account Ontario law governing anti-nepotism policies.

Comments:

At present, the City of Toronto lacks clear policies and rules on the hiring or appointment of relatives of Members of Council to City positions, be they Public Service staff, independent officials, or memberships on an Agency, Board or Commission. As is recognized in the City's current policies governing the hiring of relatives of other City employees and the policies of other municipalities, there is the potential for conflicts of interest and perceived conflicts of interest to arise where relatives work in close proximity to one another or where someone has a critical role in a hiring or preferment decision affecting a relative.

The media and others have drawn attention to this gap in the City of Toronto's policies. Indeed, for the most part, Members of Council themselves, or at least those who communicated with me, supported some form of regulation. However, any restriction on the hiring of the relatives of Members of City Council constitutes a form of discrimination, and interests of fairness and equity as well as the dictates of the law indicate the need for very careful crafting of the situations where the City imposes prohibitions and constraints.

For these reasons (elaborated on more fully in Appendix 1), it is my recommendation that Council not impose an outright ban on the hiring of the relatives of its Members, irrespective of how the term "relative" is defined. Rather, any restriction on the hiring of relatives of Members of Council should be restricted to a designated list of senior and sensitive staff positions and offices (as well as Agencies, Boards and Commissions). Indeed, even there, the reach of the prohibition should not be based on the expansive City policy currently in place for relatives of staff but the more narrow definition used by the *Ontario Human Rights Code* in establishing permissible discrimination in employment on the basis of marital or family status – spouses, parents and children. To go further would be to risk both public criticism and judicial condemnation and, ultimately, in my view, would be overreaching in terms of the perceived dangers as well as unfair to Members of Council, their relatives, and the interests of the City.

The recommendations also recognize that there need to be exceptions created for those who are already in a position that will be affected by the ban. They should be exempt. There should also be a rule to cover situations where any such relationship comes into existence between a Councillor and an existing member of staff in the listed category.

Beyond that, Members of Council should not be involved in decision-making processes for positions for which their relatives (more broadly defined) are candidates, or in decision-making processes affecting the interests of their relatives who are employed by the City. For these purposes, “interests” includes both personal interests, such as salary and promotion, and professional interests, such as significant engagement in the development of Public Service policy positions or recommendations. In these domains, the recommendations call for disengagement from the process, including in certain instances the declaration of a conflict of interest.

Conclusions:

Recommendation 30 of the Bellamy Commission Report states:

Elected officials and staff should take all necessary steps to avoid preferential treatment or the appearance of preferential treatment for friends and family.

The potential for preferential treatment or the appearance of preferential treatment for family members clearly arises when Members of Council are part of any decision-making process from which their relatives stand to benefit. The same perceptions can arise in situations where Members of Council have a close working relationship with senior members of staff who are close relatives or where a close relative, employed by the City, has taken a lead role in a policy initiative in which a Member of Council is involved.

To avoid these problems and to achieve approximate parity between the situation of Members of Council and that of members of staff, some regulation in the form of restrictions is called for. This Report proposes a set of regulations that aim at striking a balance between the problems of perception identified by the Bellamy Report and the requirements of the law, ethics and sound public policy that discrimination on the basis of kinship is not appropriate unless there are strong countervailing considerations. Ultimately, their aim is to both diminish the potential for conflicts of interest and to engender a greater public confidence in the probity of the City in such matters.

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## Appendix 1

### Hiring of Relatives of Members of Council

#### 1. The Current Regulatory Environment

##### Rules Applicable to Members of Council Hiring Their Own Staff

Currently, the only direct or indirect restriction on the City of Toronto's employment of relatives of Members of Council is the policy prohibiting Members of Council hiring their own relatives or the relatives of any other Member of Council as members of their own staff. This policy, which Council approved at its meeting of June 7, 8 and 9, 2000, defines "relatives" in terms of

- Spouse including common-law and same-sex spouse.
- Parent, including step-parent and legal guardian.
- Child, including step-child.
- Sibling.
- Any person who lives with the Member of Council on a permanent basis.

##### Rules Applicable to the Hiring of Relatives of Other City Employees

On October 6, 2005, the City implemented a revised and more restrictive policy on City employment of the relatives of other City employees. That policy prohibits relatives from working together

...if this places them in a supervisory relationship, either in a subordinate or supervisory role to each other.

The policy then goes on to define a supervisory employment relationship as one

...where one relative has **direct or indirect authority** over a relative's employment through decisions, recommendations or judgments related or influence to:

- the approval/denial of increments/performance pay,
- the assignment and approval of overtime
- the negotiation of salary level
- the conduct of performance appraisals
- discipline
- the assignment or direction of work assignments
- the approval of leaves of absence

The policy also stipulates that a supervisory relationship exists "even though there are levels of supervision in between two employees who are relatives".

For the purposes of the October 6, 2005 policy on the hiring of relatives of City employees, there is a different definition of "relative" than applies in the case of the hiring of relatives by Members of Council:

- spouse, any person to whom the person is married or with whom the person is living in a conjugal relationship outside marriage
- parent, including step-parent and legal guardian
- child, including step-child
- sibling and children of siblings
- father/mother-in-law, brother/sister-in-law, son/daughter-in-law
- any family member who lives with the employee on a permanent basis

It is wider in that, since the October 2005 revisions, it includes in-laws and the children of siblings, while the June 2000 policy on Members of Council hiring their own staff does not. It is narrower in that it does not reach all those who live permanently with an employee but only those living with the employee **and** who are related to him or her.

### Other Municipalities

Other municipalities have such policies and, in at least some instances, those policies also extend explicitly to the relatives of Members of Council. For example, the City of Waterloo, in addition to having a restriction on the City hiring of relatives that is similar to that of Toronto, contains an absolute ban on the hiring of a child, parent or spouse of an elected official as well as the CAO, a Department Head, head of a division, or a Human Resources employee.

### 2. Legal Constraints on Regulation

There are, nevertheless, legal constraints on how far such restrictions can go. Thus, in 1998, the Supreme Court of Canada<sup>2</sup> held that the Town of Brossard in Quebec had gone too far in banning members of the immediate families of full-time employees and Members of Council taking up employment with the Town. This amounted to discrimination on the basis of “civil status” contrary to the provisions of the Quebec *Charter of Human Rights and Freedoms* and could not be justified by reference to any of the exceptions created by that Act and, in particular, that pertaining to good faith requirements of the particular positions. An outright ban of this kind was disproportionately stringent and not sufficiently tailored to the Town’s legitimate interests in guarding against abuses of power and to avoid both real and perceived conflicts of interest.

In Ontario, the provincial *Human Rights Code*, while prohibiting discrimination on employment on the basis of family or marital status,<sup>3</sup> does create an exception in the case of hiring and advancement of the spouse, child or parent of the employer or another employee.<sup>4</sup> For these purposes, family and marital status are defined in terms of a parent and child relationship, and marriage and any conjugal relationships outside of marriage.<sup>5</sup> More generally, under the *Human Rights Code*, broader prohibitions will be protected only if they can be justified as a reasonable and *bona fide* qualification for the employment and then only in the case of marital, not family status.<sup>6</sup>

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<sup>2</sup> In *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279.

<sup>3</sup> Section 5.

<sup>4</sup> Section 24(1)(d). It is not, however, clear to me whether a Member of Council would be another “employee” for these purposes.

<sup>5</sup> Section 10(1).

<sup>6</sup> Section 24(1)(b).

The adoption of any new policies in this domain may also be affected, particularly in the case of current employees, by general principles of employment law and limitations on the right of the employer to unilaterally impose new terms on an existing relationship, as well as the terms of collective agreements to which the City is a party.

### 3. The Views of Members of Council

In my consultations with Members of Council and in other communications that I received on this subject, there was a very wide range of views on the issue of City hiring of relatives of Members of Council.

Some Members of Council and a few members of the public were of the opinion that nothing short of a total ban would remove perceptions of undue Member of Council influence in hiring decisions and, beyond that, in the way in which those relatives who are hired fulfill their responsibilities. On the part of some who held this view, however, it was accepted that the ban should only apply to a narrow range of close relatives (spouses and children) and not affect current City Hall staff.

At the other extreme were those who saw no need for regulation beyond removing Members of Council entirely from the hiring process including the writing of references for relatives. This group tended to be animated by concerns about marital and family status discrimination, a desire that such considerations not prevent the City from hiring the best possible candidates for all positions, and the inappropriateness and unfairness of a total ban in the case of the largest municipality in the country with approximately 50,000 employees. If the integrity of the hiring process was guaranteed, this group's limited concerns would be met.

In between, there were those Members of Council and others who advocated some form of more stringent regulation reaching beyond a ban on participation in the hiring process but not going as far as a total ban on the hiring of relatives. Among the suggestions were those for a ban in the same terms as applicable to the relatives of staff under the current policy detailed above – a ban based on the existence of a direct or indirect reporting or supervisory relationship. Others focused on the level of the position in question and would prohibit the hiring of Member of Council's relatives for positions at a "strategic management level".

For a further group, the real issue, beyond a ban on participation in the hiring process, was conflict of interest and the perception of conflict of interest. In most instances, they saw the way to deal with this as Member of Council withdrawal or abstention as opposed to a ban or partial ban on the hiring of relatives. Thus, it was asserted that Members of Council should disengage from involvement (including voting in Council) in the collective bargaining process where a relative is a member of the affected bargaining unit. Similarly, Members of Council should not participate on committees or vote on matters coming from those committees where a relative was part of the City Clerk's staff servicing those committees. Likewise, Members of Council should abstain from involvement (including voting) in relation to matters in which relatives had had a role in the development of the policy, option or position coming before Council or one of its committees.

At least one of this group also argued that, in some instances, these concerns might lead to the more drastic step of either the Member of Council or the relative resigning her or his position. There are situations where, under this standard, disqualification from participation would be so frequent as to

in effect disable the Member of Council from fulfilling his or her responsibilities, as, for instance, where the Member of Council is a close relative of the City Manager, City Clerk or the City Solicitor. In the case of appointments to Agencies, Boards and Commissions and the independent officers of the City (such as the Auditor General and the Integrity Commissioner), Members of Council should also resign from any selection committee where a relative is a candidate for appointment and, more generally, declare a conflict and refrain from voting in City Council on any recommendation from a selection committee for the appointment of a relative of the Member of Council.

#### 4. The Competing Considerations

As the law in this area illustrates, the question of what is an appropriate policy for the hiring of relatives involves a balancing of competing interests.

On the one hand, where relatives are eligible to work in the same workplace, there will often be concerns about whether this will have a distorting effect on the hiring and preferment processes as well as job performance. Where relatives are hired, either in reality or perception, conflict of interest is commonly going to be a concern. Indeed, in some instances, this factor may lead to over-compensation with candidates who are relatives of existing employees or office holders being disadvantaged. Either way, the concern is that considerations other than merit may intrude. Once a relative is hired similar realities or perceptions may continue in the sense of the relationship potentially affecting job performance either by reason of preference for the desires, choices and interests of a Member of Council who is a relative or, once again, an unwillingness to be seen as in any way favoring those desires, choices and interests. Particularly, in the case of close relatives of a Member of Council, fellow employees may also experience a level of discomfort in working with someone who is a confidant of a Member of Council, albeit that in theory Members of Council can have no impact on the position or careers of fellow employees of their relatives.

On the other hand, the exclusion of relatives is a species of discrimination that generally attracts the disfavour of the law: that of family or marital status. It not only may serve to deprive the employer of the benefit of the otherwise most suitable candidate for a position but it is also unfair to the candidate in depriving that person of the opportunity to make a particular career choice. This is particularly the case with employers that have large workforces and provide diverse forms of work or employment and, in some instances, represent the only or the best location for a particular kind of work. As a consequence, outright bans are no longer common and tend to be frowned on or forbidden by the law.

Where does the City of Toronto fit into the scheme of things? On any count, it is a very large employer providing a wide range of work opportunities some of which may be unavailable or scarce elsewhere. In a great number of situations, there will be little or no workplace contact, either regularly or even sporadically, between or among relatives who happen to work for the City or are Members of Council or officers of the City. As reflected in the City of Toronto's current regulations governing hiring of the relatives of staff, that points against any outright ban. Certainly, there may be slightly greater potential for the perception of conflict or nepotism in the case of the relatives of Members of Council as compared to the relatives of staff. However, in my view, that does not justify an outright ban in the case of the hiring of relatives of Members of Council, whether one is

considering close relatives (children and partners) or those more distantly related. Indeed, to go that far could court trouble with the law.

However, there is certainly a case for some level of regulation (including some prohibitions) short of such an outright or universally applicable ban on the hiring of Members of Council' relatives.

## 5. Resolving the Competing Considerations

### (a) The Hiring and Appointment Processes

In fact, the starting point should be the involvement of Members of Council in the hiring process. For the vast majority of City of Toronto positions, Members of Council have no direct role in the hiring process. That should be continued as much to preserve the independence of the Public Service as anything else. Moreover, as already recommended in my report on Councillors writing references, it should also be extended to include a ban on any form of indirect role such as acting as a reference even if the Member of Council is otherwise eligible to do so.

For those positions (such as the City Manager, the independent officers of the corporation, and members of Agencies, Boards and Commissions) where Members of Council do have a direct role in the appointment process, they should at the very least remove themselves where relatives are involved. In the case of appointment committees, this would mean resignation if a relative is a candidate and, at City Council, declaration of a conflict of interest if a relative is the recommended appointee. For these purposes, in the interests of parity, I would define "relative" in the expansive terms in which it is currently defined in the existing policy governing the hiring of relatives of staff. Indeed, as discussed below, there is a strong argument for banning the hiring of at least close relatives of Members of Council for certain high level or sensitive City positions.

### (b) Members of Council Working with Relatives

Excluding Members of Council from any direct or indirect involvement in hiring or appointment processes when relatives are applicants or candidates should minimize many problems, including those of perception of conflict of interest. Nonetheless, I do not think that goes far enough. In certain situations, where there is considerable intersection between the respective roles of Members of Council and staff, there is justification for concern about the employment of relatives in those staff positions.

In the current policy respecting the hiring of relatives of staff, this concern has translated into a ban on hiring of relatives in situations where there is a direct or indirect supervisory/reporting relationship between relatives. Indeed, in the reference to me from the Administration Committee directing my attention to the need to compare the position of Members of Council and staff on this issue, there was perhaps the implication that I should recommend that what was good for staff should also hold for Members of Council.

However, it does seem to me that the concepts of direct or indirect supervisory or reporting relationships on which that policy is based do not quite capture what is problematic in the domain of Members of Council and their relatives as staff. Members of Council do not supervise staff other than their own, and staff members do not report to Members of Council. However, Members of

Council and staff frequently work very closely together across a broad range of Council's activities. In some of those contexts, I believe that there may be dangers to the effective operation of Council's business if there is a familial relationship, and particularly a close one between a Member of Council and the relevant member of staff.

This is most clearly the case in the instance of the officers or senior staff of the City and, in this domain, I believe that there is justification for a ban on the hiring of Members of Council' relatives to at least the following positions: City Manager, Deputy City Manager, City Clerk, City Solicitor, Chief Planner, Director, Internal Audit, Director, Elections and Registry Services, Director, Corporate Access & Privacy, Director, Council & Support Services, Auditor General, Integrity Commissioner, and, if created, Ombudsman. I would also recommend including within the scope of this ban, the appointment of relatives as Members of Council as civilians<sup>7</sup> to City Agencies, Boards and Commissions, irrespective of whether the Member of Council is a member of the relevant Agency, Board or Commission.

There is, however, a question whether this ban should reach beyond the categories specified in the province's *Human Rights Code* (spouses, children and parents) and be as extensive as the list found in the existing City policy on the hiring of relatives of staff (and, for example, apply to siblings and nephews and nieces). Parity might suggest that the ban should be the more extensive one. However, given that this policy would not be based on reporting and supervisory relationships in the strict sense of that word and given that there may be legal problems justifying such an extensive ban, my preference would be for the narrower restriction – spouses, children and parents, including, of course, all in a conjugal relationship and children and parents by marriage or by virtue of such a conjugal relationship.

(c) Involvement in Other Forms of Decision-Making Affecting Relatives

Finally, I would recommend making explicit or expanding the current conflict of interest rules to provide for Member of Council withdrawal from participation or voting in Council in relation to the following matters in which a staff member relative of that Member of Council has been involved or where the interests of a staff member relative will be affected:

1. The collective bargaining process where a relative is a member of the affected bargaining unit and any other personnel policy matter, which affects a relative of the Member of Council.
2. Committees and reports of committees where a staff member relative has had a lead or significant role in the development of the policy, option or position coming before Council or one of its committees, or a City Agency, Board or Commission.

For these purposes, my recommendation would be that the term "relative" be once again confined to those categories covered by section 10(1) of the *Human Rights Code* and, indeed, the provisions of the *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M50, deeming the direct and indirect pecuniary interests of certain relatives of Members of Council to be those of the Member: spouses and conjugal partners, parents and children. To go further would, in my view, be to overreach.

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<sup>7</sup> That is, it would not prevent the appointment of **Members of Council** who are related.

I see these restrictions on participation and voting as responding to the third aspect of the motion from the Administration Committee, that seeking guidance on “how Members of Council ought to respond to City business decisions where family members are employed by the City”.

(d) Transitional and Subsidiary Issues

This whole issue does, however, raise a number of subsidiary issues such as whether any new policy should apply to existing employees of Council, what happens when a regulated relationship comes into existence during the course of employment, and how the City (and those responsible for hiring, preferment and appointment) are to be put on notice when there is a potential problem.

For these purposes, the October 2005 policy on the employment of relatives of staff provides a very useful template for dealing with many of the subsidiary problems.

While any new policy should not apply retrospectively to the extent of requiring resignation from a position already held, it should apply to the future activities of those affected members of staff including advancement within the City of Toronto Public Service. The policy should impose a written disclosure obligation on both candidates for hiring, preferment and appointment and also Members of Council who would otherwise have responsibility or direct involvement in that process. (I do not, however, see any real need for the maintenance of a registry of all City employees or appointees who are related to Members of Council.)

As for relationships that form during the course of a staff member’s employment or an appointee’s term of office and that would have attracted regulation or a ban had they existed at the time of hiring or appointment, at the least, there should be a duty of written disclosure to the appropriate person or office to the extent that the policy now has a bearing on that relationship *e.g.* brings the employment within a banned category or involves the Member of Council in decision-making affecting the status of or otherwise involving the other person in the relationship. Further, the Member of Council should thereafter be bound by the policy in so far as it affects her or his involvement in any decision-making process affecting the other member of the relationship. Where the new relationship brings the staff member or appointee within a banned category, there should be discussions with relevant personnel about possible redeployment, but where that is not feasible or appropriate, resignation of either the Member of Council or the staff member or appointee unless Council itself approves continuation in the position.