

NOTICE OF MOTION

Annual Report of the Integrity Commissioner for the Period September 1, 2004 to December 31, 2005

Moved by: Mayor Miller

Seconded by: Deputy Mayor Feldman

“**WHEREAS** City Council appointed David Mullan as the Integrity Commissioner for the City of Toronto to provide independent and consistent complaint prevention and resolution, advice, opinion and education respecting the application of the Code of Conduct for Members of Council, and other by-laws/policies governing the ethical behaviour of members, including general interpretation of the *Municipal Conflict of Interest Act*; and

WHEREAS the Integrity Commissioner has submitted his annual report on the operations of the Integrity Commissioner’s Office for the period September 1, 2004, to December 31, 2005;

NOW THEREFORE BE IT RESOLVED THAT City Council consider the report (May 8, 2006) from the Integrity Commissioner, and that the report be received for information.”

May 23, 2006

Attachment

According to Chapter 27 of the Municipal Code, the foregoing Notice of Motion:

Notice was previously given	
Meets Municipal Code provisions and requires only simple majority to introduce and debate – Integrity Commissioner Reporting Protocol	(√)
Requires two-thirds to waive notice	
Requires two-thirds to re-open	
Fiscal Impact Statement provided	*
Should have Fiscal Impact Statement prior to debate	*
Requires two-thirds to waive requirement if Council wishes to debate	
Should be referred to the Committee/Community Council	
Requires two-thirds to waive referral if Council wishes to debate	
Recommendations are time sensitive	

* Deputy City Manager and Chief Financial Officer to advise.

Date: May 8, 2006
To: City Council
From: David Mullan, Integrity Commissioner
Subject: Annual Report

Purpose:

To report on the operations of the Integrity Commissioner's Office for the period September 1, 2004 to December 31, 2005

Financial Implications and Impact Statement:

There are no financial implications arising from this report.

Recommendations: It is recommended that Council receive this report.

Introduction

This is my first annual report. It covers the period September 1, 2004 to December 31, 2005. This reflects the decision that that it made sense for the period covered by the Integrity Commissioner's Reports to correspond to the office's fiscal year.

The Creation of the Office and the Appointment of an Integrity Commissioner

At its meeting on March 1, 2 and 3, 2004, City Council adopted a Report from the Policy and Finance Committee authorizing the recruitment and appointment of a City Integrity Commissioner. At the conclusion of the recruitment process, City Council appointed me as its first Integrity Commissioner. I assumed my responsibilities on September 1, 2004 (though, as I noted in an April 2004 interim report to City Council, it was some time before I entered into a formal contract with the City).

At the same time, City Council requested the Budget Committee to provide funds for the office for the balance of 2004 in the amount of \$90,000, based on an annualized budget of \$200,000. This request was met and, subsequently, City Council allocated \$200,000 to the office for the fiscal year 2005. One of the assumptions behind the setting of this budget was that the office would at least initially be a part-time one, and that is reflected in my contract with the City.

My initial contract was for one year. However, at its meeting of July 19, 20, 21 and 26, 2005, City Council authorized the City Manager to enter into a further contract with me for a period up to the end of August 2007. As a consequence, I currently am operating under a two-year contract with the City that expires on August 31, 2007. Under that contract, the City may terminate me for cause or by giving me six months notice or salary in lieu.

The motion authorizing the appointment of an Integrity Commissioner spells out the mandate of the office. The Integrity Commissioner is

...to provide independent and consistent complaint prevention and resolution, advice, opinion and education respecting the application of the Code of Conduct for members of Council ("Code of Conduct") and other by-laws/policies governing the ethical behaviour of members, including general interpretation of the *Municipal Conflict of Interest Act*.

It is under that mandate that I operated during the first sixteen months, and, indeed, still do today. However, City Council did contemplate an extension in the functions of the Integrity Commissioner. It also passed a motion recommending that the City

...continue to seek enabling legislation necessary for Council to enact by-laws implementing full Integrity Commissioner and Lobbyist Registry functions based on the provincial model.

That has not yet taken place though the passage of Bill 53, the *Stronger City of Toronto for a Stronger Ontario Act* ("Bill 53") will presumably result in City Council possessing the capacity to achieve many, if not all of those objectives.

Critical to the successful functioning of the office and, in particular, maintenance of stakeholder confidence in its integrity is the concept of independence, a concept explicitly embodied in the Council motion authorizing the creation of the office. One of the ways that this objective is achieved is through the reporting process. I do not report to or through either the Mayor or the City Manager but to Council itself. In the case of reports on complaints and my annual and other interim reports, I report directly to Council while, in the instance of policy reports, I report to Council through the Policy and Finance Committee. It should also go on the public record that, during the period covered by this report (and to this day), I have had nothing but the utmost regard for the independence of my position from all at City Hall with whom I have had contact.

Getting the Office Started

Much of my time during the first four months was spent setting up the office both physically and operationally. In this, I was very capably advised and assisted by the City Manager's Office and the City Clerk's Office with briefings from many other members of Staff with whom I could expect to interact given the nature of my responsibilities. I also benefited from discussions with the Honourable Coulter Osborne, the Integrity Commissioner for the province of Ontario and the City's Auditor General, Jeffrey Griffiths.

I was given an office on the 15th Floor of the West Tower of City Hall and continue to operate out of there today. Since late November, 2005, Zorida Ali, my part-time, Administrative Assistant has

been an essential and highly valued part of my office. With the help of Staff, I was also able very quickly to establish a website; <http://www.toronto.ca/integrity/index.htm>. As well as describing my functions and providing biographical details, the website contains information about commencing complaints against Members of Council including the text of the Code of Conduct, the Complaint Protocol under which I operate, and the form required for lodging a formal complaint. All my public reports appear on the website and there is a segment containing frequently-asked questions.

During the first few months of my appointment, I also met with all Members of Council both to introduce myself and the facilities of my office and to benefit from their perspectives on my role. That has proved invaluable.

Events Affecting the Work of the Office

Two events occurred in 2005, which will have a long-term impact on the nature and workings of the Integrity Commissioner's Office. The first was the release in September 2005 of the Report of the Commission of Inquiry into the Leasing of Computers at the City of Toronto ("the Bellamy Commission Report") and the second was the introduction into the provincial legislature on December 15, 2005, of Bill 53.

Much of the overall thrust of the Bellamy Commission Report as well as a whole slew of its detailed recommendations underscore the centrality of ethical behaviour and integrity in the functioning of this municipality. In its endorsement of the office of Integrity Commissioner and its calls for the enhancement of the powers of that office as well as the setting of higher standards for the conduct of Members of Council, it called on the City to reexamine the foundations of my Office and what it does. That process is ongoing and I am playing some role in the reevaluation. It is also important to note that, should City Council accept the bulk the recommendations of the Bellamy Commission Report on the role of the Integrity Commissioner, it is inevitable that the position would have to become a full-time one with a significant increase in the level of support.

If enacted in its present form, Bill 53 will provide the office of Integrity Commissioner with a statutory basis and confer on City Council much, if not all of the legal capacity it requires to establish a permanent office along the lines of that of the provincial Integrity Commissioner. It also makes specific provision for sanctions against Members of Council for Code of Conduct violations. In its mandating the office of an Ombudsman, it opens the door to the creation of a parallel mechanism for the making and resolution of complaints against Staff. As well, it requires a much closer monitoring of lobbying.

Having said that, I should also make it clear that I am concerned about some of the provisions in Bill 53 affecting the office of the Integrity Commissioner and made that clear to City Council Staff charged with representing the City's interests as this Bill proceeds through the legislative process. In particular, I think it is regrettable that the Act itself does not set the terms of office of the Integrity Commissioner and make provision that the Council must have cause to dismiss the Commissioner during her or his term of office. That is left to Council's discretion. If independence is a critical aspect of the office of Integrity Commissioner (and I have no doubt that it is), then, even in a Bill that has at its principal objective the devolution of far greater autonomy to the City, there should be specific provision for the customary guarantees of independence.

The Regular Work of the Office

The three principal components of my work are Advisory, Complaint Investigation and Adjudication, and Educational.

Advisory

The Advisory function has two formal dimensions as well as an informal element. I am formally responsible for providing advice to individual Members of Council who seek it. I also respond to references from City Council (including its Committees) requesting my guidance on policy issues involving ethics and integrity. Informally, I also interact with Staff in the development or assessment of policies and functions that raise ethics and integrity concerns or that affect the functioning of my office.

Giving advice to individual Members of Council is the least visible of my functions but it is a critical one. It is the least visible because, in most instances, advice is sought and given on a confidential basis (though I do provide examples later in this report of advice that I have given). It is critical because, as I pointed out in my April 2004 interim report, "it is far better to pre-empt potential violations of the Code of Conduct than to have to deal with such matters after the event by way of a complaint". Indeed, the more frequently Members of Council seek advice, the more justification there is for the claim that they are becoming much more attuned to the demands of the Code of Conduct and have developed confidence in the probity of my office.

Requests for advice come in a variety of ways from email and phone calls to formal letters seeking a written opinion. Often in the case of email and phone inquiries, there will be a quick or obvious answer. However, that is not always the case and I will need time to research and reflect. I have no problem at all putting any advice that I provide in writing and, indeed, will sometimes suggest that even where the request for advice is made verbally. I also do not have any concerns generally with the use to which a Member of Council puts any written advice that I have given and I make that clear in providing the advice. However, I am now insisting, if a Member of Council releases my advice publicly, that any such release be of the entire text of the opinion. To this point, I have not been put in the position of receiving a complaint against a Member of Council for engaging in a course of conduct that I advised would not violate the Code of Conduct!

In the period covered by this report, Council referred two matters to me for consideration: the possible leak of the name of the nominee to a civilian position on the Police Services Board and the issue whether Members of Council should be able to intervene on a Ward matter arising in another Councillor's Ward. On the first, I was not able to find the source of the leak but did make some general recommendations on the whole issue of confidentiality. My report on the second matter is described in greater detail later in this report in the context of a discussion of the Code of Conduct.

Council also implicated the Integrity Commissioner in two other matters during 2005. It set up an Advisory Task Force, of which I was a member, to consider improvements to the Code of Conduct Complaint Protocol and in particular to provide greater protection to Members of Council from complaints that were trivial, vexatious, not made in good faith, or without any substance. The Task Force completed its work and forwarded a report to the Policy and Finance Committee in December

2005. As well, City Council made a reference to the Auditor General that involved the functioning of a panel of the Committee of Adjustment. In that matter, the Integrity Commissioner (along with the City Solicitor) was required to review the Auditor General's conclusions and report to Council.

In addition, the Mayor asked me to report to Council on the propriety of Members of Council providing references for those seeking positions with the City of Toronto, and the Administration Committee reiterated that request a few days later. The Committee also asked me to report to Council on the issue of City hiring of the relatives of Members of Council. As of December 31, 2005, I had not completed that work.

At a more informal level, I was involved with staff in a range of issues including aspects of the operation of the Corporate Access and Security office, the conflict of interest policy applicable to Staff, negotiation of community benefits as part of the planning process, and the development of strategies and technologies for protecting confidential information.

Complaint Investigation and Adjudication

My complaint investigation and adjudication function is confined to allegations of misconduct against Members of Council. It does not extend to the conduct of Staff. Other Members of Council, Staff, and the general public may bring a complaint.

During the first sixteen months, I received twenty-one formal complaints. Four of those complaints were from Staff or former Staff and only three from Members of Council, including a self-complaint. In fact, it was not until October 2005 that I received a formal complaint by a Member of Council against another. The other fourteen complaints came from members of the public.

By December 31, 2005, fifteen of those complaints had been finalized, including eight in which I made a report to Council on the merits of the complaint. In only one of those eight instances did I make a finding that a Member of Council had violated the Code of Conduct. (Subsequently, however, on another of the complaints brought in 2005 and still outstanding at the end of that year, I did determine that the respondent Councillor had violated the Code of Conduct.) In two of the five instances in which I rejected a formal complaint for lack of jurisdiction, I made a report to Council on my findings. Of the other two complaints, one was settled before my investigation got under way and the other was rejected without for lack of substance.

Below, I comment and make suggestions on a number of issues that arose about the Code of Conduct and the Complaint Protocol during the course of my first sixteen months. Many of those issues emerged in the course of my complaint investigation and adjudication work. Those matters aside, I encountered few difficulties in carrying out my investigative and adjudicative responsibilities.

With one exception, Members of Council who were the subject of complaints cooperated fully during the course of my investigations. They answered my questions, provided documentation, and

allowed me access to their staff. Given that I have no power to compel them to do any of these things, this was a relief.¹

The one exception occurred in the context of an allegation of inappropriate behaviour towards a deputant at a Community Council meeting and came about as a result of the Member of Council objecting in principle to the investigation of the particular complaint and the procedures laid down in the Complaint Protocol. Given the public nature of the events in question, my ability to complete the investigation was not compromised by the Member's failure to cooperate fully. However, as a result of the Member's expression of concern at Council about my processes, as noted above, Council referred the whole matter of greater protection for Members of Council from frivolous, vexatious, bad faith, or without substance complaints to a Task Force. Ultimately, this was a beneficial side effect of the whole controversy, albeit that it was disconcerting to have these matters aired while the investigation was ongoing.

In fact, issues of behaviour towards members of the public arise frequently both in formal complaints and informal communications to my office. I take these complaints under Clause XI of the Code of Conduct. It requires Members of Council to "treat members of the public, one another and staff **fairly** and to ensure that their work environment is free from discrimination and harassment". Almost invariably, these kinds of complaint surface in the wake of a decision-making process in which the member of the public has not obtained what he or she wanted or where the Member of Council has decided not to work on behalf of that person's interests. Without more, neither of these situations gives rise to any basis for a complaint under the Code of Conduct. I do not have nor should I have any general jurisdiction over the choices made by Members of Council as to the causes to which they will lend their energies and political support. Nonetheless, when the allegation is that the Member of Council not only made a choice against the complainant but, in doing so, was abusive, otherwise harassing, or discriminatory, it clearly comes within the realm of Clause XI and I must investigate if there is a credible foundation for the allegations in the formal complaint documentation.

With the exception of three linked complaints, my investigations during the first sixteen months were not particularly complex. I was readily able to conduct them within the existing framework and resources of my office. This also enabled me to do a passable job in keeping my workload under control. However, what has been clear to me all along is that that situation could change quickly and dramatically were I to receive more than one or two complaints that raised complex factual and legal issues and involved the pursuit and interviewing of many witnesses and the gathering and analysis of extensive documentation. Were that to occur, the current resources of the office and my part-time capacity would not be adequate to the task.

Educational

My job description requires that I provide "outreach programs to members of Council and staff on legislation, protocols, and office procedures emphasising the importance of ethics for public confidence in municipal government". That did not happen in 2004-05, though I did engage in a number of discussions with Staff about the mounting of such a programme for Members of Council.

¹ Upon enactment, Bill 53 will confer coercive powers that will enable (at least in some contexts), the Integrity Commissioner to require production of documents.

The matter remains under active consideration with the target now being a programme in late 2006 or early 2007 following the swearing in of the new Council after the November 2006 municipal election.

To this point, the extent of my work on the educational element of my mandate has come indirectly through my other roles – reporting to Council and giving advice to Members of Council as well as in the creation of the frequently-asked questions segment of my website.

Other Aspects of My Work

In the course of the first sixteen months of the office, the media approached me on a number of occasions for information about the nature and workings of my office and I have always been willing to respond to such requests. I was also asked to speak to a variety of groups about the functions of the Integrity Commissioner. Once again, where feasible, I accepted those invitations. A list follows:

Toronto Board of Trade Municipal Affairs Committee
 Queen's University Alumni Association, Toronto Branch
 City Solicitor's Solicitors' Meeting
 Ontario Bar Association Municipal Law Section/MLDAO Joint Programme
 Two delegations of Chinese Public Servants
 Governing Toronto Panel

In addition, I made linkages with the York University Centre for Practical Ethics, the University of Toronto Centre for Ethics, and Professor Greg Levine, instructor in Government Ethics Law in Canada at the University of Western Ontario. I also accepted an invitation to join the organization of Canadian Conflict of Interest Commissioners.

Many of the calls and emails to my office from members of the public were about matters over which I have no jurisdiction or authority. In most of those instances, the person had misconceived the nature of what I do, been given inaccurate advice, or simply did not know where else to go. Both my Assistant and I try where possible to direct the person to the office in City Hall that is best suited to deal with the particular concerns. We both assume, however, that the number of these calls will diminish with the advent of the 3-1-1 system.

Statistics for the Period September 1, 2004 to December 31, 2005

Formal Complaints

Received:	21	
Settled or Withdrawn:	2	(Report to Council on 1 – issue of jurisdiction)
Rejected as Beyond Jurisdiction:	4	(Report to Council on 1)

Rejected as Frivolous or Vexatious, Made in Bad Faith or Without Substance:	1
Rejected after an Investigation:	8
Justified:	1
Still under Investigation (as of December 31, 2005)	6 ²
Complaints by Staff	4
Complaints by Public	14
Complaints by Members	3 (including 1 self-complaint)
Members Complained Against	16 (including 1 self-complaint and 1 complaint against 5)

References

By Council	2
By Committee	1
By Mayor	1
Otherwise involving IC	2

Advice to Councillors

Advice Sought	42
Members Seeking Advice	24

Citizen and Staff Inquiries

Citizen	139
Staff	8

² As of the date of this Report, I have completed one more investigation and reported to Council. Final reports are pending in three more (a linked group), one is still being investigated, and one is suspended pending other developments.

Code of Conduct and Complaint Protocol

The foundations of my complaint resolution authority are the Code of Conduct for Members of Council (“Code of Conduct”) and the Council Code of Conduct Complaint Protocol (“Complaint Protocol”).

In the period covered by this Report, a number of issues arose in relation to each of these instruments. Those issues can be classified into four categories: (1) Jurisdiction; (2) Substance; (3) Sanctions; and (4) Procedure.

(1) Jurisdiction

Agencies, Boards and Commissions

Clause XII of the Code of Conduct makes it clear that it applies to non-Members of Council who are members of Agencies, Boards, and Commissions and other emanations of Council, with the exception of purely advisory bodies. However, the terms of the Complaint Protocol are expressed solely in terms of Members of Council. When an issue arose as to whether I could entertain a complaint against a civilian member of a City Agency, I sought a legal opinion from the City Solicitor. That opinion was to the effect that I did not have jurisdiction over such persons.

The impact of this is that, while civilian members of Agencies, Boards and Commissions are bound by the Code of Conduct, there is no formal mechanism in place for anyone to complain that a civilian member of an Agency, Board or Commission has violated that Code. This is an anomaly that should be rectified.

Complaints against Staff

At present, I clearly do not have any jurisdiction over complaints against Staff. The Bellamy Report recommends that I should have. Indeed, I receive more phone and email preliminary complaints about the conduct of Staff than I do about the conduct of Members of Council. The lack of any jurisdiction over Staff also causes problems in situations where a member of Staff may be implicated in conduct by a Member of Council that has given rise to a complaint or where a complaint against a Member of Council gives rise to a counter-complaint against a member of Staff.

This is a complex issue given the existence already of a number of Protocols regulating Staff conduct and the fact that the employment relations between the City and many of its Staff are the subject of collective bargains under the province’s labour relations legislation. The matter is also further complicated by the creation in Bill 53 of the office of City Ombudsman. At this stage, I am of the view that any movement on this issue should await the enactment and proclamation into force of that legislation and the appointment of the City’s first Ombudsman. There could then be some more informed consideration of whether (and, if so, to what extent) the Integrity Commissioner should have any jurisdiction over allegations of Staff misconduct.

Behaviour of Councillors at City Council

One of the first complaints that I received involved allegations by a member of the public of inappropriate conduct on the part of a Member of Council during the proceedings of City Council. I declined jurisdiction on the basis that the City's procedural by-law placed responsibility on the Chair for maintaining order and preserving the decorum of meetings of Council and its Committees. Despite the fact that Clause VIII of the Code of Conduct obliges Members of Council to conduct themselves with decorum at Council meetings, I determined that this was an area where Council and its Committees were responsible for self-policing. I also indicated that I did not see members of the public as having the right or status to complain about how Members behaved in Council or in Committee. However, I did express concern that the matter needed further attention and made a recommendation to that effect in my report to Council.

Subsequently, I received complaints concerning the behaviour of Councillors towards deputants at Community Council and Council Committee meetings. In each of those instances, I assumed jurisdiction to deal with the complaints of those deputing. My position was that, where the alleged conduct was aimed at someone who was appearing before Council to make representations, I should be prepared to assume jurisdiction to investigate a complaint that the conduct of the Member of Council in question amounted to discreditable conduct in terms of Clause XI of the Code.

Notwithstanding my assumption of jurisdiction in those cases, there is still a lack of clarity on this matter and I would reiterate my recommendation in the report on the original case declining jurisdiction. Indeed, I am still expecting that this will be done as part of the ongoing review of the City's procedural by-law. Once that process is completed, it may become necessary to include, in either the Complaint Protocol or the Code of Conduct, an express provision on the capacity of the Integrity Commissioner to deal with complaints about the behaviour of Members of Council at meetings of City Council and its Committees.

Preamble to the Code of Conduct

The Code of Conduct contains a number of key statements of principle:

- Members of Council shall serve and be seen to serve their constituents in a conscientious and diligent manner;
- no Member of Council shall use the influence of their office for any purpose other than for the exercise of his or her official duties;
- Members of Council are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and will bear close public scrutiny; and
- Members of Council shall seek to serve the public interest by upholding both the letter and the spirit of the laws and policies established by the Federal Parliament, Ontario Legislature, or the City Council.

I received a complaint that a Member of Council, in the conduct of his private affairs, had misled a Committee of Council and improperly used the influence of his office. I was immediately concerned

as to whether I had jurisdiction over these matters and sought independent legal advice. That legal opinion was to the effect that the key statements of principle in the Preamble did not create free-standing Code of Conduct offences. Unless I could find a basis for proceeding to deal with the complaint in one of the specific provisions of the Code of Conduct, I had no jurisdiction to investigate. As there is no provision in the Code of Conduct dealing specifically with the improper use of influence or inappropriate behaviour in the conduct of a Member of Council's private affairs, I declined jurisdiction over the complaint and reported that to Council.

In that report, I did however make it clear that I regarded the lack of a specific provision covering the improper use of influence as a serious gap in the Code of Conduct and recommended that that gap be filled. I also called for consideration whether the Code should deal with misconduct on the part of Councillors in the conduct of their private affairs, particularly in the instance of interactions with the Council of which they are Members.

More generally, this raises the question whether the Code of Conduct should be amended to convert the key statements of principle into stand-alone Code of Conduct offences. While I am certainly of the view that that should happen in the case of improper use of influence, I am equally firm in my view that the principle that calls upon Councillors to serve their constituents in a conscientious and diligent manner should not become a stand alone substantive provision of the Code of Conduct.

As noted already, among the more controversial (with Members of Council) aspects of my jurisdiction has been my investigation of complaints under Clause XI ("Discreditable Conduct") that Members of Council have engaged in harassing, discriminatory and otherwise intemperate behaviour in their interactions with their constituents. Members of Council have complained (in some instances with justification) that the complaint involved no more than a rearguard action by constituents who did not get their way in the political process. While that is certainly no reason for removing Clause XI, what it does illustrate is that a provision making it a Code of Conduct offence for a Councillor not to serve constituents in a conscientious and diligent manner would invite all manner of complaints about the way in which Councillors are performing and the choices that they have made (often from among competing constituent interests) on various issues. While that might sometimes raise integrity concerns in a broader sense, issues of performance (unless they give rise to the more specific concerns identified in Clause XI) should be left to the ballot box. For the Integrity Commissioner to become embroiled as a referee of the way in which Members of Council are fulfilling their responsibilities would risk the credibility of the office. It is not generally appropriate for the Integrity Commissioner to descend into the political fray. I would therefore certainly not recommend converting that key statement of principle into a free-standing ground of complaint.

As for the obligation to obey the laws of the land, that too raises the question whether the Code of Conduct should reach Members of Council in the conduct of their private affairs. In so far as a member of Council violates the law of the land in the course of her or his official duties, that will normally engage the *Criminal Code* or various provincial offences legislation. In that instance, the Integrity Commissioner would normally defer (as required by the Complaint Protocol) to the criminal or *quasi*-criminal processes. At this stage, I therefore have no recommendation to make on including observance of the law of the land as a free-standing Code of Conduct offence.

However, this part of the Preamble also makes reference to Council policies. My sense is that there are many City of Toronto policies that apply to Members of Council. Failure to adhere to those policies should be a Code of Conduct offence. I would therefore recommend an additional clause in the Code of Conduct making that clear. An alternative way of proceeding would be to try to identify all Council policies that bind Members of Council and list them in the Code of Conduct. However, it is my view that this would lead to an excessively complex Code of Conduct. A general or catchall provision should be perfectly adequate.

Withdrawal of a Complaint

My position has been that I have no jurisdiction to proceed once a complaint is withdrawn. Moreover, I think that, in general, this is how it should be. However, there may be rare occasions on which there are serious concerns as to the reasons for the withdrawal of the complaint such as where it may have occurred because of threats or intimidation. In one of my reports, I therefore recommended that the Integrity Commissioner should have an exceptional discretion to continue to investigate a complaint despite its withdrawal.

This also raises two subsidiary issues: whether the Integrity Commissioner should be able to initiate an investigation on her or his own initiative or whether there should be a place for anonymous complaints. The Bellamy Commission Report recommendations speak to the latter. Recommendation 41 would permit the making on anonymous complaints without a supporting affidavit. It is also the case that, at the moment, the Auditor General may initiate an investigation on his own initiative and does take anonymous complaints particularly through the fraud and waste hotline. This is clearly a matter that should be evaluated by the Bellamy Recommendations Steering Committee.

(2) Substance

In the previous section on Jurisdiction, I have noted the recommendation that Council expand the Code of Conduct to include a provision dealing with the Improper Use of Influence and a general catchall clause on adherence to Council policies. Over the course of my first sixteen months, I detected other deficiencies with the existing Code of Conduct.

Gifts and Benefits

Just over a year ago, I filed an interim report with Council recounting my experiences over the first six months of my tenure of the position of Integrity Commissioner. In that report, I identified what seemed to me to be significant problems with the existing provision (Clause II) of the Code of Conduct regulating the receipt of gifts and benefits. In particular, I identified the difficulty of drawing a line between the impermissible receipt of gifts and benefits “connected directly or indirectly with the performance of [a Member of Council’s] duties of office” and the permissible acceptance of gifts and benefits that normally accompany the responsibilities of office and that are received as an incident of protocol, custom or social obligations. This leaves a lot of wiggle room and has led to the existence of a wide range of views among Members of Council as to what is acceptable. Also, the concept of a gift or benefit that is accepted as a matter of “custom” has the potential to cement existing practices which are now very questionable such as attendance at lavish

functions paid for by developers and other private sector organizations with which the City does business.

My recommendation is that the Clause be amended to include (as previously) a reporting obligation for all gifts and benefits above a token amount (\$25), that it also specify an upper limit (\$200(?)), and that the word “custom” be removed. I also believe that the provision should include a clause dealing with ownership of “gifts” and, in particular, to require Members of Council to identify at the time of receiving any gift whether it is intended as a personal gift or one to the City. In the event that it is a gift to the City, that fact should be specified in the registry entry. Any such gift should remain the property of the City even if retained in the Member of Council’s office.

Involvement of Members in Matters Arising in Other Members’ Wards

In my April 2005 interim report, I referred to the matter of Members of Council becoming involved in issues arising in another Member’s Ward. At that point, Council had already referred that issue to me and I reported to Council on that in September 2005. In that Report, which Council adopted, I accepted that there should be no general prohibition on Members of Council intervening on a ward matter in another Member’s ward. However, I did call for the City Manager in consultation with me to prepare a Protocol on how Members of Council should conduct themselves when intervening on any such matter. I also recommended that the standards of any such Protocol be included as a provision in the Code of Conduct. Those standards are, by and large, ones under which the intervening Member of Council should exercise restraint where the Ward Councillor is actively engaged in the matter. They also call for ongoing notification between the intervening Member of Council and the Ward Councillor as to the conduct of the matter in question.

I continue to believe that this would be a desirable course of action.

Lobbying

The current provision on Lobbying (Clause X) simply warns Members of Council to be “vigilant in their duty to serve public interests when faced with lobbying activity”. As I pointed out in my interim report, this is too vague and does not provide a sufficiently precise standard by which Members of Council can sensibly self-regulate their interactions with lobbyists.

The issue of lobbying was, of course, central to many of the recommendations of the Bellamy Commission. Bill 53 also contains provisions for a compulsory lobbyist registrar. Between them, they open the door to a whole new regime respecting lobbying in the City of Toronto. Out of that process will presumably emerge rules applicable to both lobbyists and Members of Council as to what constitutes appropriate behaviour in the conduct of lobbying, and safeguards for ensuring that those standards are observed. When that complex exercise is concluded, I would expect that Clause X will require extensive amendment, amendment which will achieve far greater clarity as to the lines that cannot be crossed without triggering Code of Conduct consequences. Conscious of the fact that these matters are being actively pursued in other contexts, I have no specific recommendations or comments to make at this time. However, I will certainly observe those developments with interest and reserve the right to intervene in that process to provide my perspectives on any new protocol on lobbying.

Conflicts of Interest

At present, the only direct regulation of conflict of interest on the part of Members of Council is in the provincial *Municipal Conflict of Interest Act* and various provisions of the *Criminal Code*. The reach of the *Municipal Conflict of Interest Act* is confined to pecuniary interests. As well, save for providing general advice to Members of Council, Clause 2(3)(b) of the Complaint Protocol prohibits me from dealing with complaints of conflict of interest under that Act. Members of Council are expected to seek independent legal advice when conflict of interest issues arise and the only vehicle for making a complaint that a Member of Council has violated the Act is an application by an elector to a judge of the Ontario Court (General Division) under sections 8 and 9 of the Act.

There are serious questions as to whether this should be the only vehicle for dealing with allegations of a conflict of interest, particularly as it puts the onus for the carriage of any complaint on individual electors. Given the cost of bringing legal proceedings of this kind (including the almost inevitable hiring of a lawyer), this is a path which few will be willing to pursue.

However, that aside, what is also clear is that modern conceptions of what constitutes a conflict of interest go well beyond purely pecuniary interests, direct or indirect, as specified in the Act. Thus, being involved in decision-making which might result in an advantage to one's friends, business partners and, indeed, a broad range of relatives would at least colloquially today attract the conflict of interest label – and justifiably so.

At various points in her Report (see Recommendations 20-22 and Recommendation 33), Justice Bellamy also warns against creating “apparent” conflicts of interest.

All this suggests that the Code of Conduct is currently deficient in having no provisions dealing with these broader categories of conflict of interest and apparent conflict of interest. Thus, at the very least as part of the response to the Bellamy Commission Report, the Code of Conduct should be expanded to deal with this problem and proscribe a broader range of conflict than is currently covered by the *Municipal Conflict of Interest Act*. At an appropriate moment, assuming that this will not be accomplished under Bill 53, Council should be proactive in trying to secure amendments to the current legislation to expand its definition of conflict of interest and to provide for mechanisms other than or in addition to an application to a judge of the Court of Justice (General Division) for the bringing of conflict of interest complaints or otherwise raising conflict of interest issues. Also, to the extent that the City maintains its current position that the City Solicitor and the Integrity Commissioner should not be giving advice to Members of Council on conflict of interest issues, consideration should be given to creating a fund on which Members may draw when they need advice. As I have pointed out in my April 2005 Interim Report, when Members of Council have to pay to obtain legal advice on such matters, there will be tendency to avoid that by either declaring a conflict too readily or becoming careless as to one's responsibilities. Neither is desirable in the public interest.

(3) Sanctions

Neither the Code of Conduct nor the Complaint Protocol specifies the nature of the sanctions that Council might impose for a violation of the Code of Conduct. Clause 3(5) of the Complaint Protocol talks of the Integrity Commissioner issuing a report to Council that includes

“recommended corrective action”. Clause 3(6) then goes on to provide that the recommended corrective action “must be permitted by law and shall be designed to ensure that the inappropriate behaviour or activity does not continue”. However, that begs the critical question: What kinds of corrective action does the law permit Council to impose on one of its Members who has violated the Code of Conduct?

There seem no clear answers to that question. Indeed, I have heard doubts expressed as to whether Council has the power to even censure, let alone suspend or expel one of its Members. I was hoping that Bill 53 would alleviate these problems by including specific sanctioning powers. Indeed, it does so in its present form but disappointingly refers to only two sanctions and then in such a way as to indicate that they are exclusive and that the City does not have any further authority to discipline. The two sanctions contemplated by the new Act are a reprimand and a loss of remuneration for up to ninety days. Other possibilities such as a direction to repay money or compensate the City, or to apologize are seemingly excluded as is loss of other privileges including membership on or chairing of a Council Committee or Agency Board or Commission. The new Act also explicitly withholds from the City the power to enact a by-law making violation of the Code of Conduct an offence.

Assuming that is how the Bill remains, the situation with respect to sanctions will have improved somewhat with the express recognition of two sanctions. However, the range is quite limited and this perhaps suggests a situation where the major impact of any finding of a violation of the Code of Conduct will in most instances continue be the attendant publicity and the potential for repercussions at the ballot box.

(4) Procedure

As mentioned earlier, one of the more controversial aspects of my jurisdiction has been my handling of complaints under Clause XI that a Member of Council has engaged in discreditable conduct by failing to treat a citizen fairly or by engaging in harassing and discriminatory conduct. At the July 2005 meeting of Council, this gave rise to a debate as to whether the threshold for the Integrity Commissioner to conduct a formal investigation was too low. There were also questions as to the obligation of the Integrity Commissioner to report to Council on all complaints whether justified or not. In that context, Council passed a motion referring these matters to a special Advisory Task Force consisting of Members of Council and the Integrity Commissioner.

That Advisory Task Force evaluated the concerns that had given rise to its creation and issued a report in December making recommendations for changes to the Complaint Protocol. Those recommendations involved changes to the Complaint Protocol emphasising the right of the Integrity Commissioner to decline to investigate a complaint or to discontinue an investigation at any time if the complaint was seen to be frivolous, vexatious, made in bad faith, or otherwise without substance. The Report also recommended that the Integrity Commissioner not be obliged to report to Council on complaints that he has dismissed either after a full investigation or because the complaint was frivolous, vexatious, not made in good faith, or otherwise without substance. Rather, the decision to report should be a matter of discretion for the Integrity Commissioner and reserved for exceptional circumstances. (Ultimately, at its April 2006 meeting, City Council adopted the Report and the changes to the Complaint Protocol are now in place.)

One issue of procedure that was not before the Advisory Task Force was the troubling problem of access to my reports. On a number of occasions, concerns about the possible application of the privacy provisions of the *Municipal Freedom of Information and Protection of Privacy Act* meant that I filed two versions of a report on a complaint. In one version, all information from which individuals might be identified is removed, and this will be for consideration in open Council. The second and fuller version that either contains names or information from which identification is readily possible will go to Council *in camera*. Making the judgment as to when that is appropriate is not easy but I take my guidance in these matters from the Director of Corporate Access & Privacy. Provisions in Bill 53 may well alter the position and allow much more scope legally for the consideration of full, unexpurgated reports in open Council.

Samples of Advice Provided

Question: Am I permitted to hire a relative of another Member of Council to work in my office?

Answer: No. The June 2000 Council policy on Members of Council hiring staff prevents not only Members of Council hiring their own relatives (as defined) but also hiring the relatives of other Members of Council.

Question: Am I permitted to accept an invitation to an event in another country when the organizers are paying some or all of my expenses including the cost of flights and accommodation?

Answer: It depends. If you are attending the event as a representative of the City of Toronto and if the inviting body is governmental in nature, the payment of your expenses will be permissible under the exceptions to the ban on the receipt of gifts and benefits found in Clause II of the Code of Conduct. Depending on the circumstances, it will amount to “food, lodging, transportation and entertainment” provided by a foreign government within a foreign country” or benefits that “normally accompany the responsibilities of office and are received as an incident of protocol, custom or social obligations”. On the other hand, if the invitation comes from the private sector and the inviting organization is doing business with or seeking to do business with the City, the payment of your expenses would be inappropriate though there is generally no problem with accepting the invitation and paying your own expenses.

Question: Do the obligations imposed on Staff by the December 2004 Staff Protocol for Notifying Councillors apply to the staff of members of Council?

Answer: Yes.

Question: May I use my expense budget to make a contribution towards the production of a newsletter by a community group?

Answer: Yes. It is a legitimate office expense under the heading “Sponsorships and Donations”. However, there is an annual limit of \$600 per organization and it is inappropriate for your office to pay directly any bills associated with the newsletter.

Question: I am concerned as to whether I have a conflict of interest as defined in the *Municipal Conflict of Interest Act*? Will the City pay my account for seeking legal advice and, if not, can I charge the lawyer's fees against my office expenses?

Answer: The City will not reimburse you for the cost of seeking advice and you cannot charge the fees to your office account. You must pay the account out of your own pocket.

Question: If I receive a gift or benefit, am I obliged to inform anyone even if it comes within the range of gifts and benefits that are permissible under Clause II of the Code of Conduct?

Answer: No. There is currently no registry for gifts and benefits. However, if you are uncertain as to whether the gift or benefit is permissible, it is advisable to seek guidance in advance from the Integrity Commissioner.

Budget

The accounts for my office are set out in Appendix 1. They are broken down into two periods: September – December 2004 and the 2005 calendar and City fiscal year.

Council allocated \$90,000 for the first four months of operation of my office. Expenditures totalled \$50,989.75, meaning there was a surplus of \$39,010. 25. Of those expenditures, \$45, 632.35 were salary items and \$5,357.35 non-salary items (and primarily the purchase of equipment for my office).

The budget for 2005 was \$200,000. Expenditures totalled \$157,135, 69, leaving a surplus of \$42,864.31. Once again, salary items (wages for my Assistant and me) predominated and totalled \$152,052.55. Non-salary items were \$5,083.14.

These figures might suggest that Council over-budgeted for the operations of the office. However, I should point out again that, in that first sixteen-month period, there were no major investigations requiring the hiring of investigators or the incurring of associated expenses. As well, I sought independent legal advice on only one occasion. It is, of course, the nature of the position that the timing of complaints and investigations is quite unpredictable. It is also the case that, in the event of a complicated, time-consuming investigation requiring the deployment of external resources, the budget allocated to the office could very quickly be exhausted.

Conclusion

During the first sixteen months of my appointment as Integrity Commissioner, I devoted a lot of time to establishing the office both operationally and as a resource in which the various stakeholders would have confidence. Save for the fulfillment of my educational mandate, I am reasonably confident that, at least from an operational perspective, the office is functioning well. I am also encouraged by the extent to which Members of Council, during that period, were prepared to see my office as a potentially valuable source of advice on their obligations under the Code of Conduct. The fact that, during the period under review, I made only one formal finding of violation of the Code of Conduct might also be seen as evidence of a culture among Members of Council that treats

conformity with ethical standards as a matter of high priority. However, the random nature of the formal complaints that I investigated and the statistically insignificant nature of the sample should caution against the use of this fact as a strong indicator. Assurance that all is well may have to await a longer period of experience with the investigation and complaint jurisdiction.

As I have indicated in some detail in this Report, I have a number of concerns with and questions about the Code of Conduct and Complaint Protocol under which I operate. As the City continues to assess its responses to the Bellamy Commission, I am hoping that these concerns will attract attention as a significant element in the implementation exercise.

It has been a privilege and a challenge to be the City's first Integrity Commissioner. In meeting the challenge, I have received all the assistance from Staff and Members of Council that I could reasonably have hoped for. If that level of cooperation continues, I have every confidence that the office will meet the expectations that Council expressed in creating it, and that it will make a significant contribution to the maintenance and furtherance of ethical behaviour among Members of Council.

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Appendix 1 – Budget and Expenditures for Fiscal Years 2004 and 2005

Integrity Commissioner's
Office
Breakdown of expenses

	Budget	Actual	Funds Available
<u>September to December 2004</u>			
Salaries & Benefits	-	45,632.45	(45,632.45)
Non-salary:			
Materials & Supplies	-	507.93	(507.93)
Equipment	-	3,853.44	(3,853.44)
Services & Rents	90,000.00	1.35	89,998.65
Interdepartmental charges	-	994.58	(994.58)
Total	90,000.00	5,357.30	84,642.70
Total	90,000.00	50,989.75	39,010.25
<u>January to December 2005</u>			
Salaries & Benefits	-	152,052.55	(152,052.55)
Non-salary:			
Materials & Supplies	5,000.00	1,503.50	3,496.50
Equipment	3,000.00	-	3,000.00
Services & Rents	187,000.00	2,932.00	184,068.00
Interdepartmental charges	5,000.00	647.64	4,352.36
Total	200,000.00	5,083.14	194,916.86
Total	200,000.00	157,135.69	42,864.31