

NOTICE OF MOTION

Report of Integrity Commissioner on a Complaint that a Councillor Violated the Code of Conduct by Revealing Confidential Information to the Press

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 a report (April 12, 2006) forwarding a response to a complaint of Violation of the Councillor’s Code of Conduct;

NOW THEREFORE BE IT RESOLVED THAT City Council consider the report (April 12, 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 – 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

Note: City Council on April 25, 26 and 27, 2006, postponed consideration of this Motion to its next regular meeting on May 23, 2006.

Date: April 12, 2006

To: City Council

From: David Mullan, Integrity Commissioner

Subject: Report on a Complaint that a Councillor Violated the Code of Conduct by Revealing Confidential Information to the Press

Purpose:

To report on a complaint by Councillor David Shiner that Councillor Howard Moscoe violated Clause III of the Code of Conduct for Members of Council ("Code of Conduct") by providing to a newspaper reporter confidential material from and information about a closed meeting of the North York Community Council.

Financial Implications and Impact Statement:

There are no financial implications arising from this report.

Recommendations:

It is recommended that Council receive this report.

Background:

On October 19, 2005, Councillor David Shiner submitted a motion to the North York Community Council. He was of the view that the subject matter of this motion involved "personal matters about an identifiable individual". Before distributing the motion, Councillor Shiner alerted the members of North York Community Council to his belief and asked that the matter be dealt with *in camera*. The lawyer servicing the Committee, who had seen the motion, confirmed Councillor Shiner's position that the matter should be dealt with *in camera* and the Chair of the Committee indicated that that was her view as well. At that juncture, North York Community Council went *in camera* for the purpose of dealing with Councillor Shiner's motion. He then distributed the motion. It did not have the words "*in camera*" on it nor was it on purple paper.

The item in question was controversial and Councillor Moscoe questioned vigorously the propriety of it. Eventually, he left the meeting and, in the course of doing so, warned the Councillors as to the consequences of passing the Shiner motion.

By his own admission, Councillor Moscoe then phoned Paul Maloney, a reporter with the “Toronto Star”, provided information as to what was going on at the meeting, and sent him a copy of Councillor Shiner’s motion. Paul Maloney then contacted Councillor Shiner while the *in camera* meeting was still in progress and basically sought Councillor Shiner’s version of events. Councillor Shiner declined to be interviewed. However, he then informed the members of the Community Council that Councillor Moscoe had provided the Press with a copy of the notice of motion. Subsequently, at the end of the day, Councillor Shiner himself was interviewed by Alicia Kay Markson, a reporter from CFTO, who had also learned of the matter. This interview, in which he provided his version of events, was aired that evening. Councillor John Fillion was also part of that interview. The next day, October 20, there was an article under Paul Maloney’s byline in the Toronto Star with the headline “Councillors spar over adjustment committee”, in which he outlines the nature of the Shiner motion and Councillor Moscoe’s reaction to it as well as the information that Councillor Shiner would not speak to him the previous afternoon as it was a “personnel” matter that was being dealt with in secret.

On November 8, 2005, Councillor Shiner lodged a formal complaint with my office alleging that Councillor Moscoe had violated Clause III (“Confidential Information”) of the Code of Conduct. I commenced an investigation into his complaint.

In responding to Councillor Shiner’s complaint, Councillor Moscoe advanced a number of justifications for his actions in going to the Press:

1. That the matter should never have been dealt with *in camera* in the first place as it concerned not a specific individual but a group of individuals with collective responsibilities.
2. That the motion was not marked *in camera* nor was it on purple paper.
3. That Councillor Shiner had in effect manipulated Community Council into going *in camera* to consider a motion that was totally out of order, a position that was confirmed when the Mayor ruled the motion (which had ultimately passed at Community Council) out of order at the November meeting of Council.
4. That the real culprit was Councillor Shiner since the public first became aware of the matter through the Alicia Kay Markson interview, an interview that aired on CFTO on the evening of October 19, before the Maloney article appeared in the “Toronto Star” the next morning.

(These were also arguments that he put forward at City Council in the context of a motion to censure him and to refer the matter to my office, a motion that currently stands adjourned until the Auditor General completes an investigation and reports to Council on related aspects of this whole matter.)

Relevant Provisions:

Section 239 of the *Municipal Act, 2001*, S.O. 2001, c. 25, provides that meetings of Council (including Community Council)

...may be closed to the public if the subject matter being considered is,....

(b) personal matters about an identifiable individual, including municipal or local board employees.

This is reiterated in the City's Procedural By-law, § 27-10.

Clause III of the Code of Conduct provides:

No member shall disclose or release by any means to any member of the public, any confidential information acquired by virtue of their office, in either oral or written form except when required by law or authorized by Council to do so.

It further states:

Under the Procedural By-law (authorized by s. 55 of the *Municipal Act*), where a matter that has been discussed at an in-camera (closed) meeting remains confidential, no member shall disclose the content of the matter, or the substance of deliberations, of the in-camera meeting.

Analysis:

When Councillor Shiner formally distributed and introduced the controversial motion, North York Community Council was *in camera*. As a result of Councillor Shiner's warning, the lawyer's advice, and the Chair's expressed opinion, the Community Council had resolved to close this part of the meeting. No one called for a reconsideration of this decision once the Councillor distributed the motion. Moreover, Community Council was still *in camera* on this item when Councillor Moscoe left the meeting and contacted Paul Maloney. This was a clear breach of Clause III of the Code of Conduct.

Councillor Moscoe argues that the matter was *in camera* improperly. However, I doubt that since the motion arose out of concerns about the conduct of a group of individuals. The fact that it involved the collective conduct of five individuals rather than just one cannot change the fact that the matters in issue involved personal matters (in the sense of possible wrongdoing or incompetence) on the part of individuals. (By virtue of the *Interpretation Act*, R.S.O. 1990, c. I-11, section 28(j), the singular ("individual") in a statute also includes the plural.)

Ultimately, Councillor Moscoe placed little reliance on the strained argument that the document was a public one because it was not on purple paper or marked *in camera*. These are administrative safeguards, not mandatory requirements. They cannot be urged in defence of the release of a document that was formally introduced as an integral part of a meeting that the Councillor was fully aware was *in camera*. Indeed, it is clear from the relevant newspaper report that Councillor Moscoe also revealed to Paul Maloney at least some of the substance of what had occurred at the *in camera* meeting prior to his departure.

In any event, all of that is beside the point. Councillors cannot find justification for releasing confidential information to the Press in their own conviction that their colleagues have erred in going *in camera*. This is particularly so when Council or one of its committees, acting on legal

advice, has determined by resolution that a matter can justifiably be dealt with *in camera* by reason of one of the exceptions to open meetings created by the relevant legislation.

The same is true of the claim (said to be justified by the Mayor's subsequent ruling in Council itself) that the motion in question was beyond the authority of the North York Community Council. Just because a motion may formally be out of order does not permit the disclosure of its contents and details of any discussion of it *in camera*. The harm that the legislation seeks to avoid can be just as likely to occur in the case of an out of order motion, as for example in this very case – public revelation of questions about the conduct of identifiable individuals in both a motion and the debate at a Community Council's *in camera* meeting.

Councillor Moscoe justified his actions in part on his wish to save the individuals concerned from exposure to an out-of-order motion. However, what his actions did ensure was that the concerns about the conduct of those individuals in fact became known publicly. Without the breach of the confidentiality provisions, that might never have happened.

I have also rejected the contention that Councillor Moscoe's actions were excused by the fact that Councillor Shiner appeared on television discussing aspects of the matter before Paul Maloney's article appeared next morning in the "Toronto Star". It was Councillor Moscoe's release of information and the motion to Paul Maloney that set this whole course of events in motion. Moreover, the offence lies in the release of information to any unauthorized person. It is not excused by virtue of the fact that the recipient of that information may not have disseminated the news more broadly until after aspects of it were otherwise in the public domain.

I also want to record that I found no evidence to support any possible claim that Councillor Shiner was acting in bad faith in raising this matter. Indeed, there is no doubt that he was genuine in his sense that the legislation justified an *in camera* meeting in order to protect at that stage the reputational interests of the individuals who were the subject of the motion. That is in no way undercut by the fact that the motion itself was not within the capacity of the North York Community Council. Indeed, it is clear that, on the facts available to him at the time, Councillor Shiner was not acting unreasonably in having concerns about the events that had given rise to the motion that he introduced.

Conclusions:

Councillor Moscoe violated the Code of Conduct by contacting a newspaper reporter about an *in camera* meeting of North York Community Council and in supplying that same reporter with a copy of the motion that was before that closed meeting. Just because (with justification) he felt that the motion was out of order was not a basis for taking the law into his own hands. As subsequent events proved, there was ample opportunity for making that very point in a proper forum (City Council itself). It did not call for a breach of confidentiality and the public revelation that Community Council was dealing with a motion that raised concerns about the conduct and competence of five individuals.

Subsequently, Councillor Moscoe was quite unrepentant about what he had done and perhaps this might indicate a recommendation for formal censure by Council. However, I suspect that Councillor Shiner, the other aggrieved members of North York Community Council, and the five individuals

would be content with a formal apology from the Councillor and I would hope that he would offer that.

Whether to observe the obligations of confidentiality should not generally be a matter of choice. While the law and conscience might on rare occasions dictate otherwise, this was not such a situation.

David Mullan
Integrity Commissioner

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