

**NOTICE OF MOTION**

**Report of Integrity Commissioner on Complaint outside the Commissioner’s Jurisdiction (Complaint 4)**

**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 dated July 8, 2005, in response to a complaint against a Councillor that did not come within the Integrity Commissioner’s jurisdiction, as set out in the Code of Conduct for Members of Council;

**NOW THEREFORE BE IT RESOLVED THAT** City Council consider the report dated July 8, 2005, from the Integrity Commissioner, and that the recommendations contained in the report be adopted;

**AND BE IT FURTHER RESOLVED THAT**, in accordance with the provisions of Chapter 27 of the City of Toronto Municipal Code, leave be granted to introduce and debate this Notice of Motion at the meeting of Council on July 19, 2005.”

July 19, 2005

Attachments

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

Notice was previously given	
Meets Municipal Code provisions and only requires a simple majority to introduce and debate – Integrity Commissioner Complaint 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: July 8, 2005

To: City Council

From: David Mullan, Integrity Commissioner

Subject: Report on Complaint outside Integrity Commissioner's Jurisdiction (4)

Purpose:

To report on a complaint against a Councillor that did not come within the Integrity Commissioner's jurisdiction as set out in the Code of Conduct for Members of Council ("Code of Conduct").

Financial Implications and Impact Statement:

There are no financial implications arising from this report.

Recommendations:

It is recommended that Council:

- (1) Approve in principle inclusion in the Code of Conduct of a provision dealing with the improper use of influence by City Councillors, and direct the City Manager to draft such a clause, in consultation with the Integrity Commissioner, for submission to Council in the form of an amendment to the Code of Conduct;
- (2) Refer to the City Manager for further consideration, in consultation with the Integrity Commissioner, the issue whether the Code of Conduct should contain any provision dealing with misconduct by Councillors in the conduct of their private affairs and, if so, what form that provision should take; and
- (3) Approve in principle inclusion in the Council Code of Conduct Complaint Protocol of provisions conferring on the Integrity Commissioner discretion to continue to investigate a complaint which has been withdrawn and to initiate an investigation of her or his own initiative, and direct the City Manager to draft such clauses, in consultation with the Integrity Commissioner, for submission to Council in the form of amendments to the Council Code of Conduct Complaint Protocol.

Background:

A resident of the City of Toronto made a formal complaint that a Councillor had violated the Code of Conduct in the conduct of his personal affairs. It was alleged that the Councillor had failed to adhere to City by-laws. (The complaint was in fact subsequently withdrawn with a formal apology to the Councillor.)

While the complaint did not make specific reference to any particular provision of the Code of Conduct, it contained language that indicated that the complainant was relying on one of the “key statements of principle” contained in the Preamble to the Code of Conduct. More particularly, reference was made to the admonition that

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** [emphasis added].

Given that the Code of Conduct contains no specific provision on which the complainant could rely, the issue became whether any or all of the “key statements of principle” in the Preamble to the Code of Conduct can provide the basis for a complaint.

It was my judgment that this was a question of law on which I required independent legal advice. Having informed both the Councillor and the complainant of that fact, I then sought a legal opinion on this matter. However, before the lawyer whom I instructed provided that opinion, the complainant notified me that he/she was withdrawing the complaint. I therefore informed my lawyer of this along with a further request to consider as a general matter the ramifications for my jurisdiction of the withdrawal of any formal complaint.

In providing the opinion letter, the lawyer came to the following conclusions:

1. While they may be used to give meaning or content to the eleven specific provisions of the Code of Conduct, the “statements of principle” in the Preamble do not contain independent or stand alone obligations.
2. None of the eleven specific provisions in the Code of Conduct contains any basis for the Integrity Commissioner investigating a Councillor’s conduct in connection with her or his purely personal affairs even where those personal affairs come within the reach of the City’s regulatory powers.
3. As a consequence, the Integrity Commissioner had no jurisdiction to investigate the allegations made in this matter.
4. Indeed, even if he did, that jurisdiction would have ceased with the complainant’s formal withdrawal of the complaint. The Council Code of Conduct Complaint Protocol (“Protocol”) contains no warrant for the Integrity Commissioner continuing to investigate a complaint once it has been withdrawn.

5. Nonetheless, the Protocol does confer on the Integrity Commissioner the power to report to Council on a complaint over which he has no jurisdiction either on a stand alone basis (s. 2(4)) or as part of his annual report (2(5)).

I have accepted the advice contained in this opinion letter and have closed the file on the complaint. However, given the significance of what the letter says about the limits of my authority, I have also determined that this is a matter on which I should report to Council under s. 2(4) of the Protocol.

Comments:

*“Statements of Principle”*

Accepting that the “key statements of principle” do not constitute standards of behaviour that are the proper subject of a complaint under the Code of Conduct, Council may wish to consider whether any or all of them should be.

Their full text is:

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 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.

Of these four, the one that most obviously raises issues of ethics and integrity is the second, inappropriate use of the influence of a Councillor’s office. At present, aspects of this are in fact dealt with in various specific provisions of the Code of Conduct, and particularly sections IV (“Use of City Property, Services and Other Resources”), VII (“Conduct Respecting Current and Prospective Employment”), IX (“Conduct Respecting Staff”), VII (“Conduct Respecting Lobbyists”), and XI (“Discreditable Conduct”). At the extremes, this kind of conduct also engages the Criminal Code. However, there is clearly room for inclusion of a provision in the Code of Conduct dealing very specifically with improper use of the influence that the office of Councillor generates or is perceived to generate.

Whether it would be desirable to translate any of the other three principles (or aspects of them) into specific provisions of the Code of Conduct is a more difficult question.

It is easy to assert that the ethical responsibilities of Councillors include serving their constituents conscientiously and diligently. However, to simply make that a specific provision of the Code of Conduct would almost certainly create major problems. In particular, it would open up the

possibility of the Integrity Commissioner having to investigate and Councillors having to respond to constituent complaints that their particular issue deserved more time and attention than the Councillor was prepared to give it or a different view of the merits of that issue than the Councillor happened to take. Such reengagement with the political judgment of Councillors would not only be time-consuming but also bring into question the legitimacy of the work of the Integrity Commissioner. For the most part, responsibility for such judgments and assessments are best left to the political process and ultimately the ballot box. Moreover, to the extent that a Councillor's conduct in relation to matters such as this goes beyond the proper domain of political judgment, section XI of the Code of Conduct ("Discreditable Conduct") and its provisions for dealing with the public in a fair, non-discriminatory and non-harassing manner provide an ample basis for the involvement of the Integrity Commissioner. Its standards also probably represent the limits of what a Code of Conduct should be proscribing in this domain.

The third principle (organizing one's affairs, both Council and private, in a manner that instills public confidence) is the kind of general guiding principle that is included appropriately in a preamble or statement of principles, and not as a specific provision in a Code of Conduct. It also feeds some of the specific provisions in the Code of Conduct such as section IV ("Use of City Property, Services and Other Resources") and section VI ("Business Relations"). I do not see any justification for transferring it to the specific provisions of the Code of Conduct. However, to the extent that improper use of influence destroys public confidence, this principle also justifies inclusion of a specific provision on that matter. There is also the controversial question whether the Code of Conduct should build on this principle by containing a specific provision on Councillors' conduct in relation to their private affairs that bring into question their commitment to ethical standards. Putting it bluntly, are the private affairs of Councillors any business of a Code of Conduct? Are there species of private misconduct that should be included within an ethical code such as this and by extension the jurisdiction of the Integrity Commissioner?

This same question is raised even more starkly by the fourth principle and its expectation that Councillors will observe the laws of the land (including the laws of City Council). At present, there are a number of specific provisions that impose consequences on Councillors for violation of certain laws. For example, section 37(2) of the Municipal Act and section 17(3) of the Municipal Elections Act, 1996 provide that, if a Councillor is sentenced to a term of imprisonment, the Councillor ceases to hold office during the term of the imprisonment. Where such provisions exist, there is probably no need for the Code of Conduct to provide for separate investigation and the possibility of further sanction.

However, where these specific provisions are not engaged, are there certain violations of the general law that bring the office of Councillor into disrepute and that should attract the attention of the Code of Conduct? More particularly in relation to the City's own laws, should the Code of Conduct concern itself with situations where, for example, a Councillor in her or his private affairs engages in conduct which is in breach of municipal regulatory standards such as those pertaining to the operation of a business or makes misrepresentations to a city licensing authority? More generally, does the office of Councillor carry with it an obligation to behave with probity and respect for the law in one's private dealings and perhaps especially in interactions with the City of which the Councillor is a governor? This is not an easy issue and certainly not one to be resolved in the context of this report. Rather, it is a matter that deserves further study.

### *Withdrawing Complaints*

The opinion letter makes it clear that the Integrity Commissioner can neither continue to investigate a complaint that has been withdrawn nor refuse to accept the withdrawal of a complaint. That letter also notes that this prevents the Integrity Commissioner doing anything should a situation ever arise in which he or she had suspicions about the circumstances under which the complaint was withdrawn.

It is my opinion that this does represent a gap in the current Code of Conduct. There will undoubtedly be practical problems in investigating a complaint where the complainant has indicated that he or she no longer wishes to proceed. Nonetheless, giving the Integrity Commissioner discretion to do so would add a further dimension to the regime under which the Code of Conduct operates and provide some measure for ensuring that genuine complaints have not been withdrawn for illegitimate reasons. Indeed, there may also be some merit in conferring authority on the Integrity Commissioner to start an investigation on her or his own initiative (*i.e.* without a formal complaint). Once again, this would strengthen the operations of the integrity regime in that it would allow the Integrity Commissioner to act on anonymous complaints that raise obvious concerns or on the basis of information coming to her or him in other contexts and that points strongly to a violation of the Code of Conduct.

This is not to suggest that there will be many occasions on which the Integrity Commissioner will continue to investigate a withdrawn complaint or commence an investigation of her or his own initiative. These situations will almost certainly be comparatively rare and a matter for the cautious exercise of discretion. Nonetheless, the existence of these reserve powers would serve to enhance the current regime.

### Conclusions:

The Code of Conduct does not presently confer jurisdiction on the Integrity Commissioner to investigate complaints based solely on the terms of the “key statements of principle” contained in its Preamble. Further, none of the eleven specific provisions in the Code of Conduct deal with the conduct of Councillors in relation to their private affairs even where those private affairs intersect with the regulatory arms of Council itself. As well, aside from reporting to Council on complaints rejected for lack of jurisdiction, under the terms of the existing Protocol, the Integrity Commission can neither continue to investigate a complaint that has been withdrawn nor refuse to accept a withdrawal. These three propositions all raise concerns as to the proper scope of the City’s overall Code of Conduct regime.

While some of those concerns are groundless, there are aspects of the “key statements of principle” that qualify for inclusion in the specific provisions of the Code of Conduct or that, at the very least, should be considered for inclusion. Most obviously, there should be a specific provision on the use of influence. Council should also consider whether there are aspects of Councillors’ conduct in relation to their private affairs that should be subject to scrutiny under the Code of Conduct particularly where that conduct intersects with the regulatory authority of the City. Finally, the regime would be strengthened by conferral on the Integrity Commissioner of discretionary authority both to proceed with a complaint despite its withdrawal and to commence an investigation of her or his own initiative.

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Integrity Commissioner

List of Attachments:

1. Letter of Opinion re Scope of Code of Conduct for Members of Council,  
L. David Roebuck, Heenan Blaikie, July 4, 2005