

NOTICE OF MOTION

Report of Integrity Commissioner on Complaint of Violation of Councillor’s Code of Conduct

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 (November 28, 2005) 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 (November 28, 2005) from the Integrity Commissioner, and that the report be received for information.”

January 31, 2006

Attachment

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

Notice was previously given	
Meets Municipal Code provisions and has been introduced for 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.

Note: City Council on December 5-7, 2005, introduced this Motion and subsequently postponed consideration to its special meeting on December 14 and 16, 2005.

Council on December 14 and 16, 2005, postponed consideration of this Motion to its next regular meeting on January 31, 2006.

Date: November 28, 2005

To: City Council

From: David Mullan, Integrity Commissioner

Subject: Report on Complaint of Violation of Councillors' Code of Conduct

Purpose:

To report on the upholding of a complaint that a Councillor violated Section IV ("Use of City Property, Services and Other Resources") of 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 receive this report.

Background:

A member of the public complained that a Councillor had violated Section IV of the Code of Conduct by including in promotional material for her/his family company his City business card bearing the corporate logo for the City of Toronto. It was alleged that this was an improper use of the intellectual property of the City and one that would give rise to an appearance of conflict of interest in that the Councillor was not maintaining a clear demarcation line between her/his private affairs and her/his responsibility to the City.

I investigated the complaint under Part B ("Formal Complaint Protocol") of the Council Code of Conduct Complaint Protocol ("Complaint Protocol").

Comments:

On the basis of my investigation, I concluded that there had been a violation of Section IV of the Code of Conduct. The City of Toronto corporate logo is clearly part of the intellectual property of the City and, as such, owned by the City. It is the subject of a patent, a registered trade mark, and an assertion of copyright. As well, the Corporate Identity Program Principles for the Use of City of Toronto Corporate Logo, Coat of Arms and Official Flag, adopted by City Council at its meeting of July 4, 5 and 6, 2000, provides that the City corporate logo may "only be used to specifically identify officially endorsed City business".

Including a City Business card as part of promotional material for a Councillor's private business constitutes improper use of City property. It also can give rise to a reasonable perception that the Councillor is using her/his elected office to influence potential customers. This brings the conduct within the prohibitions contained in Section IV, particularly when that Section is interpreted in the light of two of the key statements of principle in the Preamble to the Code of Conduct: those pertaining to the improper use of influence and arranging one's private affairs in such a way as to promote public confidence and to bear close public scrutiny.

In so concluding, I rejected the Councillor's contention that I should not pursue this investigation because, in terms of Section 4 of the Complaint Protocol, it was "frivolous, vexatious and not made in good faith". The issue was far from trivial. My investigation revealed that at least one other person had expressed concerns about it to another Councillor. The complaint was fully and articulately developed. Given all that and the absence of other evidence of vexatiousness or bad faith, I determined that I should not decline jurisdiction solely on the basis that the complainant was identified with a political party different than the one to which the Councillor belonged.

I also determined that it was no defence to the allegations that the Councillor had not charged her/his office account for the printing of the card and not used City Hall facilities in producing it. Similarly, I rejected the contention that there was no breach because the Councillor's purpose in including the card in the promotional material was to demonstrate the high quality of business cards produced by a particular printing process used by her/his family company.

I did, however, accept that the distribution of the cards in this manner was "an error of judgment made in good faith" in terms of Section 5 of the Complaint Protocol. As a consequence, I am precluded from recommending any penalty in my report to Council.

All of these matters are more fully developed in my decision which I distributed to the parties and which constitutes Appendix A to this report.

Conclusions:

In distributing her/his City Council business card with samples of her/his family company's printing work, the Councillor violated Section IV of the Code of Conduct by using the intellectual property of the City of Toronto without permission and in a manner that reasonably created the impression that he/she might be using that property of the City to further her/his business interests. However, I have also concluded that the Councillor's conduct amounted to an error of judgment made in good faith. I therefore am simply moving that Council receive this report and not recommending that it impose any penalty.

David Mullan
Integrity Commissioner

Contact:

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Integrity Commissioner
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Date: November 28, 2005

To: Ulli Watkiss, City Clerk

From: David Mullan, Integrity Commissioner

Subject: Report on Complaint

Nature of Complaint:

The Executive Assistant to an MPP, acting in her/his personal capacity, brought a complaint against a City Councillor alleging a violation of Section IV of the Code of Conduct for Members of Council ("Code of Conduct"). More particularly, he/she alleged that the Councillor had improperly used City property by distributing her/his City business card (bearing the City of Toronto corporate logo) as part of a mail distribution promoting her/his outside business interests. In support of these allegations, the complainant also relied on two of the key statements of principle in the Preamble to the Code of Conduct: those pertaining to the improper use of influence and arranging one's private affairs in such a way as to promote public confidence and to bear close public scrutiny.

Summary of Findings:

I have concluded that the Councillor did violate the Code of Conduct by using his City business card as part of the distribution of promotional material for her/his family business. The corporate logo is the property of the City and should be used for City Council purposes only. Section IV of the Code of Conduct makes this clear. That conclusion is also reinforced by the purposes on which the Code of Conduct is based: that Councillors should not use the influence of their office to achieve personal gain and that, on assuming office, they should ensure that there is a separation of business and personal interests from their City responsibilities in such a way as to promote public confidence.

I have also concluded, however, that the Councillor's actions constituted an error of judgment made in good faith in terms of Section 5 of the Council Code of Conduct Complaint Protocol ("Complaint Protocol"). I will therefore be recommending in my report to Council that it impose no penalty.

Facts:

In February 2005, MPPs and others received a package of promotional material in the mail from a printing company. That promotional material consisted of samples of labels, stickers, decals, seals and tags produced by the company. That company is the family business of a City Councillor. Included in the material was that Councillor's City business card bearing the City of Toronto corporate logo.

Shortly thereafter, the Executive Assistant of one of the MPPs to whom this package had been sent, made a formal complaint under the Complaint Protocol asserting that the inclusion of the City business card in the package of material constituted a violation of Section 4 of the Code of Conduct.

As this was a matter clearly within my jurisdiction and as it raised a potentially significant issue concerning the use of City resources, I forwarded the complaint to the Councillor. Thereafter, I met with her/him to discuss the nature of the allegations and eventually received a formal response to the complaint which I then shared (as required) with the complainant. This then led the complainant to provide further elaborations of her/his concerns. As part of my investigation, I also met with another Councillor who had received a communication from a member of the public complaining about receipt of the same package of promotional materials.

In my initial interview with the Councillor, he/she urged me not to proceed any further with the complaint on the basis that it was politically motivated. He/she pointed to the fact that the complainant was the Executive Assistant to an MPP representing a political party other than the one to which the Councillor professed allegiance. Under Section 4 of the Complaint Protocol, I am instructed not to conduct an investigation where a complaint is “frivolous, vexatious and not made in good faith”.

The Councillor did not, however, contest responsibility for the distribution of the promotional material. Rather, he/she provided the following justifications:

1. The inclusion of her/his City business card in the package of promotional materials was for the purpose of providing a sample of the effectiveness of a particular printing process.
2. He/she had arranged for her/his business cards printed at her/his own expense and not through the printing services offered to Councillors at City Hall.

In her/his response, the complainant asserted that all of this was beside the point. There were clear rules establishing the uses to which City Hall business cards and the City’s corporate logo could be put and they did not include anything to do with a Councillor’s private or business interests.

Relevant Provisions:

Section IV of the Code of Conduct provides as follows:

No member of Council should use, or permit the use of City land, facilities, equipment, supplies, services, staff or other resources (for example, City-owned materials, web sites, Council delivery services and Council global budgets) for activities other than the business of the Corporation. Nor should any member obtain financial gain from the use or sale of City-developed intellectual property (for example, inventions, creative drawings, and drawings), computer programs, technical innovations, or other items capable of being patented, since all such property remains that of the City.

The key statements of principle in the Preamble to the Code of Conduct include the following:

[N]o 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 personal scrutiny.

The City of Toronto has registered the City Hall logo under the Patent Act, R.S.C. 1985, c.T-10. Subsections 9(d) and (m) of that Act prohibit its adoption “in connection with a business”. It has also been trademarked (Application Number 1009551, filed March 24, 1999).

The City further asserts copyright over the logo. Section 3 of the Copyright Act, R.S.C. 1985, c. C-42, requires the permission of the City to produce or reproduce the logo.

The Corporate Identity Program Principles for the Use of City of Toronto Corporate Logo, Coat of Arms and Official Flag, adopted by City Council at its meeting of July 4, 5 and 6, 2000, provides:

The City of Toronto logo represents the corporation of the City of Toronto, its departments and associated bodies across all facets of municipal business. The logo, as an Official Mark, may only be used to specifically identify officially endorsed City business.

Section 4 of the Complaint Protocol provides:

If the Integrity Commissioner is of the opinion that the referral of a matter to him or her is frivolous, vexatious or not made in good faith, or that there are no grounds or insufficient grounds for an inquiry, the Integrity Commissioner shall not conduct an inquiry and shall state the reasons for not doing so in the report.

Section 5 of the Complaint Protocol provides:

If the Integrity Commissioner determines...that a contravention occurred that was trivial or committed through inadvertence or an error of judgment made in good faith, the Integrity Commissioner shall so state in the report and recommend that no penalty be imposed.

Analysis:

Was the Complaint Frivolous, Vexatious or Not Made in Good Faith?

This is not a frivolous matter. It raises an important issue as to the uses that Councillors may legitimately make of their City business cards and, in particular, whether those cards may be linked in any way to furtherance of private or business interests.

Was the complaint vexatious or not made in good faith? Merely because a complainant is of a political persuasion other than that of the Councillor who is the subject of the complaint is not in itself sufficient to establish vexatiousness or a lack of good faith. In this instance, I have no other evidence that this was indeed the case. The complainant’s documentation was well-presented. As already noted, it raised a significant issue of principle. Also, my investigations made it clear that the

complainant was not alone in having concerns about the legitimacy of this use of the Councillor's City business card and the City's Corporate logo.

Merits

In terms of Section 4 of the Code of Conduct, there is no doubt that the corporate logo is part of the "resources" and "intellectual property" of the City of Toronto. As such, Councillors should not use that logo, even on their City business cards, "for activities other than the business of the Corporation".

That prohibition clearly covers the use of a City business card in conjunction with the promotion of a Councillor's external business activities. This interpretation of the scope of Section 4 of the Code of Conduct is underscored by the terms of the key statements of principle in the Code's preamble relating to the improper use of influence and arranging one's private affairs in such a way as to promote public confidence and to bear close public scrutiny. While these are not independent or free-standing bases for complaint, they are relevant in determining the scope of the substantive prohibitions in the Code of Conduct. In this respect, the complainant captures the problem neatly in her/his letter of complaint when he/she states:

The very presence of [her/his] business card in the package gives the appearance of the councillor using [her/his] elected office to influence potential customers.

In addition, it also could create the impression that the Councillor is available to conduct the business of her/his firm on City Council property or through the use of City Hall facilities such as telephone, Fax, and email.

I accept that the Councillor, having produced her/his own City business cards at her/his own expense, may have been of the view that there was nothing improper with sending that card out to potential customers as an example of the excellent work that her or his family company could execute, and for no other purpose. However, as the Bellamy Report makes clear in Recommendations 20-24, it is of vital importance that Councillors make sure that they do not create even an apparent conflict of interest such as "us[ing] their positions to further their private interests". Whatever the Councillor's intentions, it is not unreasonable for members of the public to draw the conclusion that this use of the City business card was calculated to enhance the prosperity of the family company by inviting them to draw a link between the fact that one of the owners is a Councillor and the business probity of the firm.

In any event and irrespective of intention or motives, this form of distribution of a Councillor's business card amounts to a use of City property (its corporate logo) without permission. The City has the right to control the extent to which materials produced incorporating the City logo can be used for promotional purposes.

The Issue of Penalty

This is a novel issue. I also accept that the Councillor believed that her/his actions were justified on the grounds that he/she asserted both at the interview and in her/his formal response. In short, I have

no basis for any finding that he/she was aware that her/his actions constituted a violation of Section 4 of the Code of Conduct.

In light of all these circumstances, I have determined that, in terms of Section 5 of the Complaint Protocol, the breach was the result of an error of judgment made in good faith. That requires me to recommend that no penalty be imposed and that will be my recommendation in my report to Council.

More importantly, however, this establishes a precedent to guide the future conduct of Councillors in relation to the use of their City business cards.

Conclusions:

I have concluded that it is an improper use of City property for a Councillor to include her or his City business card in promotional material relating to her or his outside business interests. This constitutes a violation of Section 4 of the Code of Conduct. However, I accept that, in this instance, the Councillor made an error of judgment in good faith and am not recommending any sanction. My report to Council will therefore be primarily for the information of Council and to provide guidance for the future uses of City business cards by not only this Councillor but all others.

David Mullan
Integrity Commissioner