

Date: January 31, 2006

To: City Council

From: David Mullan, Integrity Commissioner

Subject: Report on Complaint of Violation of Councillors' Code of Conduct (3)

Purpose:

To report on the rejection of a complaint that a Councillor violated Section XI ("Discreditable Conduct") 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 candidate to fill the vacant Council position in Ward 41 (Scarborough-Rouge River) caused by the election of former Councillor Bas Balkissoon to the provincial Legislative Assembly has complained that a Councillor acted improperly at Scarborough Community Council by supporting and voting for his Executive Assistant as Councillor Balkissoon's replacement. In effect, the complainant has asserted that the Councillor treated the complainant unfairly and thereby engaged in discreditable conduct contrary to Part XI ("Discreditable Conduct") of the Code of Conduct for Members of Council ("Code of Conduct").

Comments:

On the basis of my investigation and for the reasons stated more fully in my report to the parties (Appendix A), I concluded that the Councillor did not violate Part XI of the Code of Conduct by supporting and voting at Scarborough Community Council for his Executive Assistant as the replacement for Councillor Bas Balkissoon.

Conclusions:

The provincial legislation and the City of Toronto's general Policy and relevant by-law prescribing the procedure to be followed in filling the vacancy in Ward 41 (Scarborough-Rouge River) do not contain any explicit prohibitions on a Councillor supporting and voting for the candidacy of a member of his or her staff. I could also find no indications in those instruments suggesting any implicit limitations on the right of Councillors to approach their participation in the process strategically or politically. The "political" dimensions of the whole process also make it clear that Members of Council are not subject to the rules prohibiting "bias", rules which in judicial or adjudicative contexts would disqualify someone from participating where an employee's interests are at stake. The filling of a vacancy caused by the election of a Member of Council to the provincial Legislative Assembly is not an adjudicative process. I therefore conclude that the Councillor did not treat the complainant unfairly by participating in this process and by supporting and voting for his Executive Assistant as Councillor Bas Balkissoon's temporary successor. This was not discreditable conduct in terms of Part XI of the Code of Conduct.

In so ruling, I do not want to give the impression that I am totally out of sympathy with the position taken by the complainant. It is easy to see how those who participate in this kind of exercise could form the impression that it is designed to be an objective, detached, open process in which the "best qualified" should prevail. Particularly if the outcome of that process is preordained, the presentations and questioning become a charade, a waste of everyone's time, and a discourtesy to those who have been public-spirited enough to become candidates. Given that, it may be that Council should reevaluate this whole process for the appointment of replacements for vacant Council seats. Suffice it to say, however, that my investigation into this matter, albeit conducted in a somewhat rushed manner, gave me no cause to believe that this particular process was a mere charade.

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**Appendix A: Report on Complaint**

Date: January 31, 2006

To: Ulli Watkiss, City Clerk

From: David Mullan, Integrity Commissioner

Subject: Report on Complaint

Nature of Complaint:

Eden Gajraj is a candidate to fill the vacant Council position in Ward 41 (Scarborough-Rouge River) caused by the election of former Councillor Bas Balkissoon to the provincial Legislative Assembly. He has complained that Councillor David Soknacki acted improperly at Scarborough Community Council by supporting and voting for his Executive Assistant, Paul Ainslie as Councillor Balkissoon's replacement. In effect, the complainant has asserted that Councillor Soknacki treated the complainant unfairly and thereby engaged in discreditable conduct contrary to Part XI ("Discreditable Conduct") of the Code of Conduct for Members of Council ("Code of Conduct").

Summary of Findings:

Councillor Soknacki did not violate Part XI of the Code of Conduct by supporting and voting at Scarborough Community Council for his Executive Assistant as the replacement for Councillor Bas Balkissoon.

Facts:

When Councillor Bas Balkissoon was elected to the provincial Legislative Assembly, Council declared his office as Councillor for Ward 41 (Scarborough-Rouge River) vacant as required by section 262(1) of the *Municipal Act, 2001*. Under section 263(1) of that Act, Council was obliged to fill the vacancy. It decided to do this by "appointing a person who has consented to accept the office if appointed" (section 263(1)(a)) rather than by holding a by-election (section 263(1)(b)). In doing so, it followed the Policy on Filling Vacancies that it had adopted at its meeting of February 1, 2 and 3, 2000.

In the Report from the Administration Committee that formed the basis of that Policy, the decision to proceed by way of appointment or by-election was described as "ultimately a political decision". Appendix "A" to the Policy established the procedures to be followed for filling a Councillor's vacancy through an appointment. Council adopted a notice of motion adopting those procedures in the case of the vacancy in Ward 41. (By-law 1073-2005 was enacted on December 7, 2005 to confirm the proceedings of Council). This involved the placing of advertisements in newspapers

detailing how to apply for consideration, the holding of an information session, attendance at which was mandatory for all candidates, and a consideration of applications by the Scarborough Community Council. At Scarborough Community Council, candidates were allowed to make a presentation of no more than five minutes and Members of Council were allowed to ask one question of each candidate. Thereafter, the vote was to take place in accordance with detailed rules prescribed in the Policy and Appendix "B" to the notice of motion.

Under section 30(1) of the *Municipal Elections Act, 1996*, employees of City Council are eligible to be a candidate for election as a Member of Council. However, to do so, they must take a leave of absence beginning as of the day on which they are nominated and ending on voting day. If elected, section 30(4) provides that candidates are deemed to have resigned from their employment from the date of making the statutory declaration provided for in section 232(1) of the *Municipal Act, 2001*. Section 30(2) requires that any employee must give advance, written notice of an intention to take unpaid leave for the purposes of becoming a candidate for election to Council. While these provisions read literally do not address the situation of Council filling vacancies by an appointment process, the City Clerk (through the Director of Elections and Registry Services) treats them as applicable. (It should be noted that under section 258(1) of the *Municipal Act, 2001*, an employee is not eligible to hold the office of a Member of Council. Accordingly, it could be argued that in order to be considered for appointment, a person must meet all the eligibility qualifications prior to such consideration taking place.) For these purposes, the information sessions at which the applicants file consent and eligibility forms is treated as the nomination date and the election date is the date on which Council makes the appointment.

Eden Gajraj was one of twenty-five applicants to fill the vacancy in Ward 41. He has been active in the community for many years. Paul Ainslie, Councillor Soknacki's Executive Assistant also applied to fill the vacancy. (Councillor Soknacki is the member for Ward 43 (Scarborough East) and, as such, a member of Scarborough Community Council.)

The information session was held on January 9, 2006 and, prior to that session, Paul Ainslie gave advance written notice of his intention to seek the appointment and to take unpaid leave for that purpose. In the period leading up to the meeting of Scarborough Community Council on January 17, 2006, both Eden Gajraj and Paul Ainslie lobbied members of Scarborough Community Council for their support. As of January 9, 2006, Eden Gajraj was aware that Paul Ainslie was a candidate and that he was Councillor Soknacki's Executive Assistant.

In the period leading up to the January 17 meeting of Scarborough Community Council, Councillor Soknacki sought advice from the Director of Elections and Registry Services and the City Clerk as to whether his participation (including voting) in the process would bring him into a conflict of interest as defined in the *Municipal Conflict of Interest Act*. In each instance, the opinion was that it would not though both of these officials reminded the Councillor that they were not entitled to give a firm opinion on this matter and that he should seek independent legal advice. This he did by contacting his own solicitor, an acknowledged expert in Municipal Law. The solicitor also advised the Councillor that participation would not involve a conflict of interest as defined in the *Municipal Conflict of Interest Act*.

On January 17, 2006, Scarborough Community Council considered the applications for filling the vacancy in Ward 41 in the manner prescribed in Appendix B to the relevant notice of motion. Most

of the applicants exercised their right to make a presentation before Scarborough Community Council and many of the members of the Community Council asked a question of the candidates. Eden Gajraj and Paul Ainslie were among those who made presentations. Councillor Soknacki was present but did not question either of these candidates. Eden Gajraj was aware of Councillor Soknacki's presence and participation but did not raise any issue with that.

At the conclusion of the presentation and some brief congratulatory speeches by some of the Members of Scarborough Community Council, the voting took place by ballot as required by the operative policy. After the first ballot, all but three candidates were eliminated. On the second ballot, a further candidate secured only one vote and, as provided in the procedural rules, she dropped off the ballot for the third round of voting. On the second ballot, Eden Gajraj and Paul Ainslie had each secured four votes and, when the Councillor who had voted for the candidate dropped from the ballot gave his vote to Paul Ainslie on the third ballot, Paul Ainslie secured the nomination of Scarborough Community Council by a vote of five to four. Councillor Soknacki participated in all three ballots and voted for Paul Ainslie throughout.

Subsequently, on January 26, 2006, Eden Gajraj filed with the City Clerk a complaint by way of affidavit under the Council Code of Conduct Complaint Protocol alleging that Councillor Soknacki's participation had produced an unfair and prejudiced process that was not transparent. While he did not make reference in his complaint to any particular provision in the Code of Conduct, for the purposes of assuming jurisdiction, I treated Eden Gajraj's complaint as one of violation of Part XI of the Code of Conduct ("Discreditable Conduct") and so informed Councillor Soknacki in providing him with a copy of the complaint.

In his complaint, Eden Gajraj requested that I complete my investigation and report to Council before it considered the issue of Councillor Balkissoon's successor, an agenda item scheduled for 5:00 p.m. this evening, January 31, 2006. I informed him that I could give no such guarantee and that it would require the cooperation of Councillor Soknacki to make it possible. I also informed both the complainant and Councillor Soknacki, who indicated a willingness to facilitate the timely investigation of this matter, that I would not meet the complainant's request unless I was satisfied that I had conducted a sufficient investigation. Ultimately, I was content that, in the time available, I had found out as much as I needed to decide on the complaint and report to Council.

#### Analysis:

In providing for the filling of a Council vacancy by way of Council appointment of a replacement, the *Municipal Act* places no explicit constraints on the way in which that appointment is to be made. It is left entirely up to Council. Moreover, the Act does not contain any provisions for disqualifying Councillors from participation in the process by reason of connections with a candidate for appointment or otherwise. On its face, that indicates very strongly, as the 2000 Report of the Administration Committee states, that the process does not have to be divorced from political considerations. In their participation, Councillors are free to deal with the matter by reference to the same kinds of political considerations that motivate their normal participation in Council processes and that influence or dictate their voting on issues. Provided they do not violate the *Municipal Conflict of Interest Act* by participating and voting when they have a prohibited financial interest, they are above complaint. This in effect means that Councillors are free to favour and vote for the

appointment of friends, political allies, and those with whom they have had a working relationship either within or outside the City of Toronto.

It is also the case, that the relevant legislation explicitly permits employees of municipalities to be candidates for election to Council. Indeed, in so doing, section 30(3) of the *Municipal Elections Act, 1996* pointedly states that any employee seeking election to Council “is entitled, **as of right**, to take unpaid leave [emphasis added]” for that purpose. The Act does not exclude any category of employee from this benefit.

It may be the case<sup>1</sup> that Council could impose on its Members and employees constraints that are not part of the primary legislation governing the filling of vacancies and the eligibility of employees to run for office. However, in my view, it is clear that Council has not in its general Policy or in the process that it adopted in this case by reference to that Policy accepted or imposed any such constraints. There are no explicit limitations on Members of Council in that process nor on the candidacy of City of Toronto employees including Executive Assistants to Members of Council. Indeed, the current general Policy was adopted in the context of a similar exercise in which the successful applicant was an Executive Assistant to a Councillor. At City Council, that Councillor both seconded the nomination of her Executive Assistant and voted for his appointment. If Council had believed that the process it had just adopted was meant to contain implicit disqualification of such participation, this would surely have become an issue on that occasion.

In short, the fact that the process provides for formal applications and the making of presentations before Council does not convert it into one where the rules of engagement are changed. It has not become one where Councillors are no longer free to participate and vote by reference to political considerations including the likely support that an applicant will provide to Councillors’ policies and preferences. Indeed, Eden Gajraj himself appeared to accept the political nature of the process by lobbying Councillors prior to the meeting. His failure to raise any concerns about the participation of Councillor Soknacki either prior to or at the Scarborough Community Council meeting may also be a further indication of that.

More particularly, provision of the opportunity for applicants to make public presentations does not make this a process with judicial or adjudicative characteristics. In law and in terms of one of the key points in Eden Gajraj’s complaint, this is a critical point. The principles against biased decision-making apply to adjudicative processes. Where applicable, they would prevent a Councillor from taking a decision-making role involving the interests of his Executive Assistant. However, where the process remains essentially a political one (as here), there is no room for the operation of the constraints that the law concerning bias imposes on those taking decisions.

The most that the process might require implicitly is that applicants have an entitlement to a genuine consideration of their candidacy particularly in the sense that Community Council must be attentive to their presentations and that the outcome not be predetermined in advance of that meeting by some back room deal. Eden Gajraj told me that an executive assistant to another Councillor had told him as early as the information session on January 9, 2006 that the outcome was inevitable and that Paul Ainslie would be nominated. This certainly raised suspicions in his mind that the “fix was in”.

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<sup>1</sup> I express no firm opinion on this as a matter of law.

While this is a complaint against Councillor Soknacki, not against the whole of Scarborough Community Council, I feel obliged to say that my investigation uncovered no evidence that the outcome was predetermined. Indeed, the fact that it took three ballots to select Mr. Ainslie suggests otherwise. I also accept Councillor Soknacki's assurances that he was not party to any such prior agreement among all or any of the members of Scarborough Community Council. Indeed, while a committed supporter of Paul Ainslie's candidacy, Councillor Soknacki appears to have been very circumspect in expressing his support of Mr. Ainslie throughout this entire process. He was also careful in seeking professional advice both within City Hall and also from a solicitor as to whether his participation would give rise to a conflict of interest as defined in the *Municipal Conflict of Interest Act*.<sup>2</sup>

Eden Gajraj also had no complaint with the way in which the members of Scarborough Community Council comported themselves throughout the meeting. (He did refer to Councillor Soknacki speaking to Paul Ainslie in the Council Chamber during a short break between the presentations and the vote. However, I could see nothing wrong with this. It can scarcely provide any basis for a finding that the process was tainted. Indeed, Paul Ainslie tells me that their brief conversation was about a private, personal matter.)

#### Conclusions:

The provincial legislation and the City of Toronto's general Policy and relevant by-law prescribing the procedure to be followed in filling the vacancy in Ward 41 (Scarborough-Rouge River) do not contain any explicit prohibitions on a Councillor supporting and voting for the candidacy of a member of her or his staff. I could also find no indications in those instruments suggesting any implicit limitations on the right of Councillors to approach their participation in the process strategically or politically. The "political" dimensions of the whole process also make it clear that Members of Council are not subject to the rules prohibiting "bias", rules which in judicial or adjudicative contexts would disqualify someone from participating where an employee's interests are at stake. The filling of a vacancy caused by the election of a Member of Council to the provincial Legislative Assembly is not an adjudicative process. I therefore conclude that Councillor Soknacki did not treat Eden Gajraj unfairly by participating in this process and by supporting and voting for his Executive Assistant as Councillor Bas Balkissoon's temporary successor. This was not discreditable conduct in terms of Part XI of the Code of Conduct.

In so ruling, I do not want to give the impression that I am totally out of sympathy with the position taken by the complainant. It is easy to see how those who participate in this kind of exercise could form the impression that it is designed to be an objective, detached, open process in which the "best qualified" should prevail. Particularly if the outcome of that process is preordained, the presentations and questioning become a charade, a waste of everyone's time, and a discourtesy to those who have been public-spirited enough to become candidates. Given that, it may be that Council should reevaluate this whole process for the appointment of replacements for vacant Council seats. Suffice it to say, however, that my investigation into this matter, albeit conducted in a

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<sup>2</sup> I should, of course, note that just because a matter does not involve a conflict of interest in terms of the Act is not determinative whether it constitutes some broader type of conflict or behaviour proscribed by the Code of Conduct.

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