

NOTICE OF MOTION

Report of Integrity Commissioner on Complaint of Violation of Councillor’s Code of Conduct (Complaint 2)

Moved by: Mayor Miller

Seconded by: Deputy Mayor Bussin

“**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 April 6, 2005, in response to a complaint of Violation of the Councillor’s Code of Conduct;

NOW THEREFORE BE IT RESOLVED THAT City Council consider the report dated April 6, 2005, from the Integrity Commissioner, and that the recommendations contained in the recommendations section of 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 April 12, 2005.”

April 12, 2005
Attachment

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	(v)
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	
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* See Financial Implications section in the report

Date: April 6, 2005
To: City Council
From: David Mullan, Integrity Commissioner
Subject: Report on Complaint (2)

Purpose:

To report on the rejection for want of jurisdiction of a citizen complaint that a Councillor violated Parts VIII (Conduct at Council) and 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:

- (1) Council receive this report (including the attachment).
- (2) in the current review of the City's procedural by-law, consideration be given to including a protocol under which members of the public and staff have the right to complain to Council that the behaviour of Councillors in Council or Committee has violated the Code of Conduct, and providing that Council, either of its own initiative or on the complaint of a citizen or a staff member, may refer to the Integrity Commissioner issues of Code of Conduct violations in Council or in Committee.

Background:

A member of the public complained about the behaviour of a Councillor in the course of Council's consideration of a notice of motion. The citizen alleged that the Councillor behaved inappropriately and in a discriminatory manner in opposing and trying to persuade other Councillors to oppose the motion. It was claimed that these actions constituted discreditable conduct in terms of Part XI, and a failure to act with decorum at Council in terms of Part VIII of the *Code of Conduct for Members of Council* ("Code of Conduct").

Under section 2(3) of Part B (“Formal Complaint Procedure”) of the Council Code of Conduct Complaint Protocol (“Complaint Protocol”), the Integrity Commissioner is directed not to undertake an investigation where another body has jurisdiction to deal with the subject matter of the complaint. Under section 2(4), I do, however, have the power to report to Council on a complaint not within my jurisdiction.

In this instance, I had immediate doubts as to whether I had jurisdiction to deal with citizen complaints about the behaviour of Councillors at City Council. I therefore proceeded to determine whether those doubts were justified. I determined that they were but decided not only to instruct the City Clerk to convey that ruling to the complainant (as required by section 2(3) of the Complaint Protocol) but also to report to Council on this issue with recommendations.

Comments:

For reasons identified in greater detail in the attached report sent to the complainant, the Integrity Commissioner does not have authority under the Code of Conduct to review complaints about the behaviour of Councillors at Council and Committee meetings. The behaviour of Councillors at Council, while regulated by the Code of Conduct, is the responsibility of Council (acting primarily through the Mayor or his deputy). Absent a resolution of Council requesting the Integrity Commissioner to become involved, this self-policing is part of the statutory rights and privileges of Council.

However, Council should give consideration to amending the procedural by-law to provide for review of civilian and staff complaints about the behaviour of Councillors in Council or in Committee by Council itself or by the Integrity Commissioner at the request of Council. I see two main arguments for moving in that direction. Misconduct (and, in particular, discriminatory behaviour) in Council may not always be immediately apparent to the Mayor, his deputy or to other members of Council. Indeed, it may only be the civilian or staff victims of that misconduct who will be aware of it or its full ramifications. That suggests that there should be some mechanism for raising these matters after the event. Secondly, there seems to be support for taking steps to improve the behaviour of Councillors both in Council and Committees – even on the part of Councillors themselves. The possibility of being subject to a complaint from staff or a member of the public may have an impact on the way in which Councillors conduct themselves. Indeed, even in situations where seeming misconduct is apparent at a meeting to the Mayor, his deputy, or other Councillors, there may be times where the issue can be more satisfactorily dealt with after the event by the Integrity Commissioner than immediately by the Mayor, his deputy, or Council as a whole.

Conclusions:

Council should receive the report to the effect that the Integrity Commissioner does not have jurisdiction over citizen complaints about the behaviour of Councillor at Council meetings.

However, Council should also give consideration to whether provision for such complaints should be included in the procedure by-law and, if so, authorizing Council to assign the investigation of such complaints to the Integrity Commissioner.

David Mullan
Integrity Commissioner

Date: April 6, 2005
To: Ulli Watkiss, City Clerk
From: David Mullan, Integrity Commissioner
Subject: Report on Complaint

Nature of Complaint:

A member of the public complained about the behaviour of a Councillor in the course of Council's consideration of a notice of motion. The citizen alleged that the Councillor behaved inappropriately and in a discriminatory manner in opposing and trying to persuade other Councillors to oppose the motion. It was claimed that these actions constituted discreditable conduct in terms of Part XI and a failure to act with decorum at Council in terms of Part VIII of the *Code of Conduct for Members of Council* ("Code of Conduct").

Summary of Findings:

On the basis of my consideration of the relevant statutory provisions, by-laws, and resolutions, set out below (and consultation with the City Clerk's Office and the Legal Services Division), I have determined that I do not have jurisdiction over this complaint.

Relevant Statutory Provisions, By-laws, and Resolutions:

The *Municipal Act, 2001*, S.O. 2001, c. 25, s. 225, provides that the head of Council (the Mayor) is to preside over Council. Section 238 goes on to mandate that every municipality is to pass "a procedure by-law for governing the calling, place and procedure of meetings".

The City of Toronto has passed such a procedural by-law (Municipal Code Chapter 27, Council Procedures). Section 27-14 of that by-law specifies:

§ 27-14. Chair to maintain order.

Subject to being overruled by a majority vote of the members, which vote shall be taken without debate, or comment, the Chair:

A. Shall maintain order and preserve the decorum of the meeting.

Clause 2(3) of Part B of the Code of Conduct Complaint Protocol for a City Integrity Commissioner (“the Complaint Protocol”) is to the effect that the Integrity Commissioner is without jurisdiction over complaints with respect to matters not covered by the Code of Conduct or “covered by other legislation or a complaint procedure under another Council policy”.

Part VIII of the Code of Conduct stipulates:

Members shall conduct themselves with decorum at Council in accordance with the provisions of the Council Procedural By-law.

Part XI of the Code of Conduct proscribes discrimination and harassment on the part of members of Council and references not only the *Ontario Human Rights Code* but also the Human Rights, Harassment and Hate Activity Policy Framework, adopted by Council at its meeting of December 16 and 17, 1998.

Analysis:

This complaint raised a difficult jurisdictional issue.

The Code of Conduct covers failing to act with decorum at Council, and the Code’s condemnation of discriminatory and harassing conduct on its face extends to the conduct of Councillors at Council. It is also the case that neither the *Municipal Act, 2001* nor the City of Toronto’s procedural by-law creates any mechanism for complaints by members of the public against Councillors with respect to their conduct at Council. That might be seen as indicating that, in terms of the Protocol, there being no other complaint procedure, the Integrity Commissioner has jurisdiction to entertain such complaints.

However, there is another important dimension to the issue of jurisdiction. As a creature of statute, Council does not possess the same rights and privileges as Parliament and the provincial Legislative Assemblies, right and privileges that are constitutionally protected. Indeed, while the proceedings of Parliament and the provincial Legislative Assemblies are not subject to the *Canadian Charter of Rights and Freedoms* and relevant federal and provincial human rights legislation, the meetings of Council are: *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 395 (C.A.); *Freitag v. Penetanguishene (Town)* (1999), 47 O.R. (3d) 301 (C.A.); and *Hudler v. London (City)*, [1997] O.H.R.B.I.D. No. 23.

Nonetheless, both the *Municipal Act, 2001* and the City’s procedural by-law make it clear that responsibility for what transpires at meetings generally and the keeping of order in particular is the primary responsibility of the Mayor or whosoever is presiding over Council in his place. This is, however, subject to the right of Council itself to override any ruling made by the Mayor (or his deputy) on matters of order and decorum.

In my opinion, that structure makes it clear that initial responsibility for determining whether a member has failed to act with decorum or engaged in harassing and discriminatory conduct **during a meeting** rests with Council itself. This power is exercised primarily through the Mayor or his deputy. It takes the form of either unilateral intervention or by way of response to a complaint or motion by another Councillor. Thereafter, Council may choose to take issue with any ruling made

by the Mayor or his Deputy. In other words, the thrust of the relevant *Municipal Act, 2001* provisions and the procedural by-law is that, at least internally, Council is responsible for the conduct of its meetings and the behaviour of its members during those meetings.

Indeed, subject to the rights that members of the public have under the *Charter of Rights and Freedoms* and the *Ontario Human Rights Code*, I have grave doubts whether individual citizens have any status as of right to complain about the behaviour of Councillors at meetings of Council. More pertinently, given Council's responsibility for self-policing in these matters, it is my position that I do not have jurisdiction to deal with a complaint that has not been put to and considered by Council itself.

Conclusions:

(a) The behaviour of Councillors at Council, while regulated by the Code of Conduct, is the responsibility of Council (acting primarily through the Mayor or his deputy). Absent a resolution of Council requesting the Integrity Commissioner to become involved, this self-policing is part of the statutory rights and privileges of Council.

(b) This ruling does raise the policy issue whether Council should make any provision for citizen complaints about the behaviour of Councillors in Council or in Committee, for that matter. I see two main arguments for moving in that direction. Misconduct (and, in particular, discriminatory behaviour) in Council may not always be immediately apparent to the Mayor, his deputy or to other members of Council. Indeed, it may only be the civilian or staff victims of that misconduct who will be aware of it or its full ramifications. That suggests that there should be some mechanism for raising these matters after the event. Secondly, there seems to be support for taking steps to improve the behaviour of Councillors both in Council and Committees – even on the part of Councillors themselves. Given that, I would suggest that there is justification for subjecting Councillors to complaints from members of the public and staff, or at least from those who are the targets or victims of such misconduct. The possibility of being subject to a complaint from staff or a member of the public may have an impact on the way in which Councillors conduct themselves. Indeed, even in situations where seeming misconduct is apparent at a meeting to the Mayor, his deputy, or other Councillors, there may be times where the issue can be more satisfactorily dealt with after the event by the Integrity Commissioner than immediately by the Mayor, his deputy, or Council as a whole.

It is therefore recommended that:

in the current review of the City's procedural by-law, consideration be given to including a protocol under which members of the public and staff have the right to complain to Council that the behaviour of Councillors in Council or Committee has violated the Code of Conduct, and providing that Council, either of its own initiative or on the complaint of a citizen or a staff member, may refer to the Integrity Commissioner issues of Code of Conduct violations in Council or in Committee.

Summary of Main Points:

In general, the Integrity Commissioner does not have authority under the Code of Conduct to review complaints about the behaviour of Councillors at Council and Committee meetings. The behaviour of Councillors at Council, while regulated by the Code of Conduct, is the responsibility of Council (acting primarily through the Mayor or his deputy). Absent a resolution of Council requesting the Integrity Commissioner to become involved, this self-policing is part of the statutory rights and privileges of Council. As discussed in the Conclusions, Council should give consideration to amending the procedural by-law to provide for review of civilian and staff complaints about the behaviour of Councillors in Council or in Committee by Council itself or by the Integrity Commissioner at the request of Council.

David Mullan
Integrity Commissioner