

NOTICE OF MOTION

Report of Integrity Commissioner on Alleged Leak of Name of Nominee to City Position on Toronto Police Services Board

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 April 12, 2005, forwarding a report on his investigation into the alleged leak of the name of the nominee for a position on the Toronto Police Services Board;

NOW THEREFORE BE IT RESOLVED THAT City Council consider the report dated April 12, 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:

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| Notice was previously given | |
| Meets Municipal Code provisions and only requires a simple majority to introduce and debate – Integrity Commissioner Reporting 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 | |

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| Recommendations are time sensitive | |
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* See Financial Implications section in the report

Date: April 12, 2005

To: City Council

From: David Mullan, Integrity Commissioner

Subject: Alleged Leak of Name of Nominee to City Position on Police Services Board

Purpose:

This is the report on my investigation into the alleged leak of the name of the nominee to the City's position on the Toronto Police Services Board. It also discusses more generally the issue of confidentiality in the conduct of the business of Council, its Committees, and Boards

Financial Implications and Impact Statement:

There are no immediate financial implications of this report

Recommendations:

It is recommended that:

- (1) Council receive this report;
- (2) Council direct that there be a review of the Policy and Processes for Citizen Nomination to City Agencies, Boards, Commissions and Corporations (ABCCs) and External Special Purpose Bodies with a view to amendments which provide specifically and in detail the confidentiality requirements which attend the operation of that policy and process;
- (3) Council direct that, in the context of the current review of the Procedural By-law, there be an assessment whether all Councillors should continue to have access to the documentation and meetings of nominating panels as defined in the relevant Policy and Processes for Citizen Nomination to City Agencies, Boards, Commissions and Corporations (ABCCs) and External Special Purpose Bodies; and
- (4) Council direct that consideration be given to including in any proposals for amendment to the *City of Toronto Act* explicit and strict confidentiality provisions governing the operation of civilian appointment and other Council processes

Background:

At its September 28, 2004 meeting, in considering the Report of the Nominating Committee recommending the appointment of Alok K. Mukherjee to the Toronto Police Services Board, Council resolved:

That the Mayor request the Integrity Commissioner to investigate the circumstances which led to the September 28, 2004, Toronto Star article respecting the candidates for appointment to the Toronto Police Services Board.

By letter dated October 25, 2004, the Mayor conveyed that request to me and I agreed to undertake the investigation.

The article in question appeared on Page B1 of the September 28, 2004 edition of the Toronto Star under the byline of Catherine Porter. The headline to the article was:

Miller ally to join board; Human rights adviser frontrunner for police services seat; Two professors also on short list to replace Alan Heisey; Advocate touted for police board spot.

In the body of the article, Ms. Porter named Mr. Mukherjee as “likely to be named as the city’s representative” on the Board and as “the frontrunner among three finalists.” She also identified the two other finalists. The information as to the identities of the three members on the short list interviewed by the Nominating Committee was accurate, and Mr. Mukherjee was indeed the choice of that Committee.

Comments:

(1) The Investigation

During the course of my investigation, I interviewed:

Seven of the Eight Members of the Nominating Committee (7 Councillors)¹

All Staff Advisers/Observers on the Nominating Committee (3)

City Clerk’s Office Staff Servicing the Nominating Committee (2)

The Mayor

Mayor’s Office Staff (2)

Chair of the Police Services Board

City Clerk

¹ The eighth was not at the relevant meeting and took no part in the process of selecting the nominee.

City Clerk's Office Staff Responsible for Preparing Materials for Council (4)

Catherine Porter, Reporter, Toronto Star

John Ferri, Editor, Toronto Star

Don Sellar, Ombudsman, Toronto Star

Romayne Smith Fullerton, Professor, Faculty of Information and Media Studies, University of Western Ontario

Short-listed applicants for the nomination (3)

In addition, I obtained copies of most of the relevant news media reports, consulted relevant policy documents (and most notably Policy and Processes for Citizen Nomination to City Agencies, Boards, Commissions and Corporations (ABCCs) and External Special Purpose Bodies ("Appointments Policy and Processes")), and obtained the distribution list for the Agendas of the Nominating Committee (with an indication of those who received the confidential agenda items).

(2) Chronology

On the basis of the interviews, a document prepared by a member of the City Clerk's staff, and news media reports, I developed the following chronology of the events leading up to Council's consideration of the relevant report of the Nominating Committee. (As to precisely what occurred between September 24 and the Council Meeting of September 28, what follows represents my best assessment.)

Following the call for applications for membership on bodies under the jurisdiction of the Nominations Committee, there is an information meeting, which all applicants are expected to attend. That occurred in the case of this particular appointment. Thereafter, the process became confidential.

The critical stages, dates, and events in that process were as follows:

1. July 29, 2004 (Agenda dated: July 23)

Committee met, reviewed all applications, and short-listed seven applicants for interview.

2. August 26, 2003 (Agenda dated: August 18)

The Committee interviewed six of the seven short-listed candidates and carried out some tentative ranking. (Two of the Councillor members of the Committee were not at this meeting.)

The media staked out the doors to the Committee Room where the interviews were scheduled to take place. As a consequence, the interviews were moved to another location and the candidates

were told when they reported to reception to go to that other location. The media did not converge on that other location.

3. August 27, 2003

An article appeared at Page B.1 of the Toronto Star under the byline of Bruce DeMara and Paul Maloney, entitled "Police board list looks tilted to the left." In that article, the reporters named seven persons as the short-listed candidates who had been interviewed the previous day. That list of names was accurate. However, it was not the case that the Committee had interviewed all the candidates that day. Mr. Mukherjee was out of the country and was not interviewed until his return. That same day, in the Globe and Mail (Metro) at Page A10, Inside City Hall identified the names of five of the seven candidates, but not that of Mr. Mukherjee.

4. September 16, 2003 (Agenda dated: September 13)

The Committee interviewed the final candidate on the long short list, Mr. Mukherjee. (One of the Councillor members was not present.) The Committee then decided on a short-list of three for final interviewing. There were no signs of the media in the vicinity of the location of this meeting.

5. Friday, September 24, 2003 (Agenda dated: September 21)

That morning, the Committee interviewed the three remaining candidates and voted to put Mr. Mukherjee's name forward. (One of the Councillor members was not present nor was one of the Staff advisers/observers.) Once again, there was no visible media presence. Following the meeting, a member of the City Clerk's staff servicing the Committee prepared the report of the Committee on its nomination.

Thereafter, the staff member who had prepared the report (after review by the Chair) sent it electronically to the person in the City Clerk's Office who acts as the production coordinator for Council Agenda items. (In its electronic form, it is password secure.) This was followed by a hard copy version of the report.

That afternoon or on the morning of Monday, September 27, the Chair of the Committee briefed a member of the Mayor's staff as to the outcome of the process. That staff member conveyed the information to the Mayor.

6. Monday, September 27, 2003

At that morning's briefing meeting on the next day's Council meeting involving the Mayor, Deputy Mayors, the City Clerk, and various members of her staff, the matter of the report of the Nominating Committee was discussed (without the name of the successful candidate being revealed). It was accepted that the City Clerk's staff would follow the normal course of action for items for the Supplementary Agenda: it would be processed, sent to the Printing and Distribution Unit for printing, and distributed the next morning as part of the Supplementary Agenda.

However, as a result of concerns with preserving the confidentiality of the report, the Mayor contacted the City Clerk early that afternoon and directed that the report not be printed and

distributed that day, but rather be printed at Council the following day. (By now, five members of the Mayor's staff were aware of the contents of the Report.)

In fact, the production coordinator had already assigned an agenda number to the report and sent it (by another member of the City Clerk's staff) to the Printing and Distribution Unit. However, as a consequence of the Mayor's intervention, it was retrieved immediately and held for printing at Council the next day.

That evening, on City TV, Adam Vaughan reported the name of the allegedly successful candidate. That report was not accurate. However, it was the name of one of the two other candidates on the short-list.

7. Tuesday, September 28, 2003

Council met. Prior to Council meeting, the Toronto Star article appeared. In a Toronto Sun article that same morning at Page 4, SueAnn Levy and Rob Granatstein, under the headline "New board seat is anti-Fantino: Mayor denies he played a role in selection", reported that the recommended appointee was the only one on the short-list who had indicated during the interview process that he or she was in favour of getting rid of the then Police Chief. The journalists did not identify this candidate by name. The report then went on to identify two "front runners". Only one was in fact on the short-list.

(3) Access to and Confidentiality of Relevant Information

The front cover page of the agenda for meetings of the Nominating Committee is a public document available on the release of the agenda to the media and members of the public. The confidential portions of the agenda materials for meetings of the Nominating Committee are distributed under a purple cover sheet to not only the Councillors serving on that Committee but also to all Councillors, as well as the Staff advisers/observers. Councillors, who are not members of the Committee, by virtue of section 27-114B of the Procedural By-law, may also attend meetings of the Nominating Committee and thereby become privy to further confidential information. (As I understand it, no non-member Councillor exercised that privilege during the current process.) That possibility aside, it is only the members, advisers/observers, and staff members servicing the Nominating Committee who are aware immediately of the content and the outcome of its deliberations. However, in the case of a report to Council, the group of those with knowledge of the contents of that report expands (as demanded by the exigencies of processing and managing Council's agenda), and will include City Clerk's staff (on a need to know basis) and the City Solicitor, and also all members of Council if the report is distributed in advance of the Meeting at which Council considers the report, something that did not happen in this instance. Not only was the report part of the Supplementary Agenda but also the report was not printed and distributed until the Meeting was under way.

The Appointments Policy and Processes stipulates that the Nominating Panel "shall meet in private to review applications from qualified candidates, in order to short-list candidates for interview." From that point on at least, the Nominating Committee carries out its responsibility in private or on

a confidential basis,² save, of course, to the extent that there are specific rights of access to the Committee and its work (as detailed above).

In this particular instance, the Chair made it clear at each meeting of the Nominating Committee that the members and those present³ were bound by obligations of confidentiality with respect to the identities and evaluation of the candidates. However, it is quite unclear to me how those constraints were meant to operate in relation to communications between Councillors who were members of the Committee and Councillors who were not but who, *ex officio*, received the agenda for each meeting (including the confidential portions) and who were entitled to attend should they so choose.

As far as Councillors are concerned, Part III of the *Code of Conduct for Members of Council* (“Code of Conduct”) contains a general prohibition on the disclosure or release of confidential information:

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.

This reinforces the Procedural By-law, section 27-15.B (6) of which provides:

Where a matter that has been discussed in-camera, and where the matter remains confidential, [no member shall] disclose the content of the matter, or the substance of the deliberations, of the in-camera meeting.

As well, the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* may place external legal constraints on Councillors and their release of information about an identifiable individual, especially where that information is provided to the City on a confidential basis or understanding. There are also confidentiality constraints in the *Municipal Act*.

Staff are also bound by these legislative constraints. As well, the Staff Conflict of Interest Policy provides:

Employees may not disclose confidential information about the property, or affairs of the organization, or use confidential information to advance personal or others’ interests.

As for members of the media, they apparently do not operate under any ethical obligation to refrain from trying to obtain information from those who are obliged legally to keep it confidential. Similarly, they are not constrained from using that information, save that most media organizations have safeguards or procedures in place with respect to the reporting of anonymous information or information that is not for attribution.

² See, however, *RSJ Holdings Inc. v. London (City)* (2004), 70 O.R. (3d) 612 (S.C.J.), leave to appeal denied [2004] O.J. No. 2700 (Q.L.) (S.C.J.), at paras. 17-18, to the effect that the proceedings of *in camera* meetings of Councils and their Committees do not necessarily oblige Councillors attending to an obligation of confidentiality. However, the judge did note (at paras. 21-22) that the obligation of confidentiality could arise out of the provisions of the City’s Code of Conflict by-law.

³ He and/or a member of the City Clerk’s staff servicing the Committee made it clear to the three persons on the final short-list that they should not talk about the process or the fact that they were on the short-list.

(4) Was There a Leak in This Instance and, If So, By Whom?

In the course of my interviews, I encountered some speculation but no concrete information as to the source of any leak of the Nominating Committee's report or the name of the candidate who emerged from the process. Indeed, I am not sure whether there was a leak in the sense of the direct provision of information that Mr. Mukherjee was the successful candidate.

Most of the members of the Committee spoke of the media buzzing around in the wake of the meeting trying to pry out information. The same was true for some staff, and the media contacted two of the three short-listed candidates. However, no member of the Committee admitted to providing the relevant information nor did any of the contacted members of staff. Also, aside from the knowledge that they were on the short-list, the two candidates did not know at that stage which of them had prevailed.

The way in which the media reported this development also suggests that there might not have been a direct leak of the name of the successful candidate. After all, one member of the media, who was reported to have been trying to secure the name, got it incorrect, possibly on the basis of the misinterpretation of a gesture or a word. Also, the one who named the successful candidate did not do so definitively but by reference to Mr. Mukherjee as a frontrunner. However, it may be that the Toronto Star's constraints on the publication of unattributed information may have prevented any direct leak being reported in any other form. (Not surprisingly, Ms. Porter would neither confirm nor deny that there had been a leak, and also made it clear that, even if there had been, she would not have revealed her source. The editor to whom she reported and the paper's Ombudsman reinforced this.)

The possibility therefore exists that, at the end of the day, Ms. Porter made an educated guess at which name happened to be correct. However, even if true, that does not mean that the process was not tainted by some form of leak. The fact that her guess was educated in itself speaks to some level of breach of confidentiality. Ms. Porter (though apparently not the other reporters who filed stories on this) clearly knew the names of all those on the short-list. Her report also contained details of the successful candidate's résumé. The successful candidate also reported that he was surprised when Ms. Porter and other members of the media who contacted him were aware of the detail of that document, and, in some instances, of the contents of his covering letter applying for the position, as well as the questions that were asked of him at the final interview and the answers he provided. This clearly points to a leak but, at least in the case of the candidates' names, the list of possible sources expands of necessity to include all members of Council, given that they all received advance notice of the names on that final short-list.

Indeed, the accuracy with which the Toronto Sun reporters earlier identified all seven names on the long short-list is also strong evidence of a prior leak. However, the fact that the reporters erroneously stated that the seven were all interviewed on the same day indicates that the leak was of the initial agenda list rather than the amended agenda or by word of mouth after the meeting from the committee members, advisers/ observers, or attending staff.

(4) Observations

Even if there was not a direct leak of Mr. Mukherjee's name as the successful candidate, it is regrettable that this process was tainted by some degree of breach of the obligations of confidentiality. What is also clear is that leaks of such personnel information are not uncommon in the City of Toronto. In the seven months since I have been Integrity Commissioner, there have been at least two other significant leaks of that kind of information. On November 8, 2004, a Toronto Star article revealed not only the name but also the test scores of an unsuccessful candidate for appointment to the Toronto Licensing Tribunal. This article appeared in the wake of an *in camera* Council debate of the relevant nominating committee's choice. Then, just last week, on April 7, 2005, the Toronto Star published the purported vote of the Police Services Board on the selection of the new Chief of Police. If that is accurate and was the product of a leak, it too was a major violation of the confidentiality rules.

All of this suggests that some members of Council and/or staff do not take at all seriously the strictures on holding confidential information secret. When that information is obtained on assurances (either directly or through the relevant rules and policies on applications) of a confidential evaluation process,⁴ it constitutes a serious abuse of the good faith of those who put their names forward for consideration for such important positions. That aside, it also engenders cynicism on the part of the public and, perhaps even more importantly, potential future candidates as to the probity of the process. This does not serve the City's interests well.

It might, of course, be argued that all such processes should be much more transparent and open. Indeed, some of the more general statements of principle in the 2004 Appointments Policy and Processes speak to a commitment to openness. Nonetheless, that is not the way in which it is set up at the moment and breaches of the confidentiality rules cannot be a surrogate for the direct adoption of a policy that provides for much greater transparency. That makes a mockery out of the existing rules and the promise they make to applicants.

In the course of my various interviews and particularly those with Councillors and members of the City Clerk's staff, there were a number of suggestions as to how the process might be changed to ensure greater protection of confidential information.

Some of those suggestions were about the need for greater security in the handling of confidential documents, such as the development and strict enforcement of a stronger policy on the handing back or destruction of all such documents at the end of all meetings at which they were distributed.⁵ There were also suggestions that the distribution of the confidential Committee agenda items to all Councillors should cease and perhaps even that Councillors not have an automatic right of access to meetings of Committees at which applications for appointments to City Agencies, Boards, Commissions and Corporations were being considered.

⁴ See *e.g.* the City's web page "Citizen appointments to City of Toronto agencies, boards and commissions". Under the heading "How are appointments made", there is an assurance of an *in camera* process: http://w.w.city.toronto.on.ca/council/citizen_appointments.htm

⁵ None of these concerns related to the manner in which the City Clerk's Office handled reports from the Nominating Committee. For my part, that process appear well-suited to preserving confidentiality and to involve minimum access to confidential information in the period leading up to its consideration by Council.

However, these changes would not serve to prevent any illicit word of mouth communication of confidential information, such as the names on a short-list. Moreover, as far as the second suggestion is concerned, some Councillors were strongly of the view that this would interfere with their entitlement to participate effectively in an important part of Council's business. In short, they saw it as critical that, at least in theory, all members of Council have access to the agenda and meetings of all Committees of Council.

Other suggestions focussed on stronger confidentiality provisions (including sanctions for violations). Among the possibilities were the adoption of a provision to the effect that members of any such committees and Councillors receiving confidential agenda items or attending committee meetings should be required to give an oath or affirmation of secrecy. This is required of members of the Police Services Board under regulations to the *Police Services Act*, and a range of sanctions is provided for ranging from reprimand to possible removal.⁶ Indeed, this could possibly be included among the impending amendments to the *City of Toronto Act*, along with specific provisions spelling out the confidentiality obligations of Councillors and staff and making violations a provincial offence subject to prosecution in the Ontario Court of Justice. Nevertheless, in this domain, as the possible leak of the vote of the Police Services Board on the new Chief of Police makes clear, stronger laws do not necessarily lead to changes in conduct especially where the threat of detection is low.

It was also asserted that there was a lack of clarity as to the precise obligations of confidentiality that surrounded the operations of the Nominating Committee. It was not spelled out clearly enough or with sufficient detail in the Appointments Policy and Processes. My own review of that document in fact confirmed that claim. Aside from the statement that the relevant committee should meet in private to review the names of the qualified applicants and develop an initial short list, the confidential nature of the process from that point on is in fact a matter of inference, not direct statement.

In the end, what may, however, be most profitable is a gradual consensual changing of the culture with respect to such matters. In the course of my interviews with all Councillors, several first time members of Council expressed dismay at the extent to which leaks of confidential information occur. Maybe over time, these sentiments will come to be the dominant ones. In the meantime, what is clear is that the City's reputation for probity suffers when sensitive, confidential information is leaked to the media. Real change will occur only with the realisation of the harm that breaches of confidentiality can cause and the development of a sense that ultimately political advantage is not assured by such practices.

Conclusions:

My investigation did not uncover sufficient evidence to convince me that there was a leak of the name of the Nominating Committee's nominee to the vacant City appointment to the Police Services Board. However, there were almost certainly leaks at two other points at least in this process, leaks involving the names of those on the long and final short-lists. I did not come close to finding out who was responsible for those leaks. Aside from the fact that my office does not have

⁶ See O. Reg. 144/91 (amended to O. Reg. 499/95), section 1, and O. Reg. 421/97 (amended to O. Reg. 277/00), sections 7, 15.

the investigative powers and resources of the police (and maybe that is a good thing), this outcome was not unexpected given that the primary recipients of any such information, members of the media, have such a strong legal and ethical commitment to protecting their sources of information.

What is, however, clear is that there are almost certainly too many leaks of this kind in the City of Toronto. The culture of some members of Council and/or Staff is apparently not sufficiently committed to the policy of confidentiality, which forms the basis of rules constraining the release of such information. As long as Council retains a confidential process for civilian appointments to its agencies, boards, commissions, corporations, and external special purpose bodies, that will remain a problem.

It is hoped that some of the cure for that problem will come as a result of reports such as this. That and a continued institutional and leadership commitment to respect for confidentiality aside, there are some changes that might assist. In particular, I would recommend that the Appointments Policy and Processes be reviewed and amended to spell out much more explicitly the existence and precise nature of the confidentiality obligations that attend such processes. That might include more specific directions as to the distribution and retention of relevant confidential materials. Council itself may wish to review in the context of the current reassessment of the Procedural By-law whether Councillors who are not members of nominating committees or panels should have access to the confidential agenda items and meetings of those committees and panels. Finally, serious consideration should be given to including explicit and strict confidentiality provisions governing the operation of this and other Council processes in any amendments to the *City of Toronto Act*.

David Mullan
Integrity Commissioner
April 12, 2005

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