



INTEGRITY COMMISSIONER REPORT ACTION REQUIRED

INTEGRITY COMMISSIONER ANNUAL REPORT – 2013

Date:	July 8 , 2013
To:	City Council
From:	Integrity Commissioner
Wards:	All
Reference Number:	

SUMMARY

The Integrity Commissioner reports annually to Council on the work of the office. This report is for the period from July 1, 2012 to June 30, 2013.

RECOMMENDATIONS

The Integrity Commissioner recommends that City Council:

- 1) Endorse moving to a full time Integrity Commissioner commencing with the appointment of the next Integrity Commissioner in September 2014, and request the City Manager and City Clerk to report on the financial and any other implications of this change through the 2014 operating budget process.

FINANCIAL IMPACT

This report will have a financial impact on the budget for the Office of the Integrity Commissioner beginning with the next Integrity Commissioner's term. This report recommends that the City Manager and City Clerk report on these implications during the 2014 operating budget process.

DECISION HISTORY

Section 162(1) of the *City of Toronto Act, 2006* ("COTA") requires the Integrity Commissioner to make "periodic reports to Council." Section 3.7 of the *Toronto*

Municipal Code requires that an Accountability Officer (which includes the Integrity Commissioner) report annually to Council on the activities of the office and the discharge of the officer's duties.

This report covers the period from July 1, 2012 - June 30, 2013. It is my fourth annual report to City Council.

COMMENTS

Introduction: Toronto's Ethical Infrastructure in a Transitional Year

This past reporting year, 2012-2013, has seen a period of challenges to Toronto's ethical infrastructure. At the time of last year's report, there were a total of 66 formal and informal complaints representing an increase in formal complaints by 122% and an increase in informal complaints by 187%. This past year, we had a similar experience, with fewer formal complaints, but an increase in informal complaints for a total of 67 complaints made. These numbers are higher than in any previous year and meant that more time was required to manage the complaint function over the past two years. This growth is part of the reason this report recommends that when the next Integrity Commissioner is recruited, it is for a full time Commissioner.

In another milestone, the first legal challenge to involve the *Code of Conduct* was brought to court as part of *Municipal Conflict of Interest Act* (the "MCIA") proceedings. The background to the case began with two decisions by City Council under the *Code of Conduct for Members of Council* ("*Code of Conduct*") in August of 2010 and again in February of 2012. The issues raised in the Superior Court of Justice and on appeal to the Divisional Court included the application of the MCIA to *Code of Conduct* proceedings in Council and the jurisdiction of Council over its members to take certain actions for a breach of the *Code of Conduct*. This case received widespread attention and was the first of its kind in Canada. It is discussed in greater detail within this report.

In other work undertaken by the office, a complaint was made by a media corporation that raised a novel issue: the relationship between members of council and the media, the role of the *Code of Conduct* and whether or not a corporation may be a complainant under the *Code of Conduct*. Although the complaint was ultimately dismissed, the media coverage that accompanied its filing led to it being reported to City Council under the "exceptional circumstances" provisions for such a report found in the *Code of Conduct Complaint Protocol for Members of Council* ("*Complaint Protocol*").

Finally, for the first time in a reporting period, the only complaints sustained and brought to Council in 2012-2013, involved breaches of Article XII which concerns the respectful treatment of staff members by members of Council. In all three cases, no sanction was recommended or imposed by City Council as a result of apologies which were made and accepted by those involved.

As a result of some of these "firsts" in the development of the office, this report is written to focus more attention on how the experiences of this year can strengthen and inform Toronto's commitment to its ethical infrastructure. As the first city in Canada to adopt an enforceable *Code of Conduct* and create the position of Integrity Commissioner, the principles of accountability, transparency and avoiding conflicts of interest, both apparent and real, were adopted by City Council as some of the fundamental tenets for government in Toronto.

In looking ahead, this report sets the following goals for 2013-2014. First, the ongoing "Integrity by Design" project will continue in 2013 - 2014, in conjunction with the City Clerk's Office, the City Manager's Office and the City Solicitor. We will consider a number of questions. How can the City's ethical infrastructure be more effective? What practical steps, small and large, are available to model and demonstrate City Council's commitment to improving and embedding the principles and values from the *Code of Conduct* into our governance? This project will include starting a review of the *Code of Conduct* as well as the *Complaint Protocol*.

Second, the election year in 2014 will necessarily have an impact on advice, education and complaints. This office will work collaboratively with the office of the City Clerk to provide members with advice and guidance on carrying out their responsibilities within the legal and ethical frameworks that apply during an election period.

Third, I recommend that City Council endorse moving to a full time Integrity Commissioner commencing with the appointment of the next Integrity Commissioner in September 2014, and request the City Manager and City Clerk to report on the financial and any other implications of this change through the 2014 operating budget process. The demands of the position have grown as the profile and understanding of the role has grown. In addition to responding to the growth in complaints over recent years, a full-time Commissioner will have the resources to develop and enhance ethical education programs for councillors and boards. The reality of the growth in advice contacts means that even a part-time Integrity Commissioner must be readily available most of the time in any event. After 8 years as a part-time role, it will be a natural progression to move to a full-time Integrity Commissioner when my term is completed.

Overview of the Year

A Judicial Milestone: *Magder v. Ford*

During this past year, the *MCIA* case involving Toronto citizen Paul Magder and Mayor Rob Ford was heard in the Superior Court of Justice, decided and then appealed to the Divisional Court, which overturned the decision of the Superior Court of Justice. In February, 2013 a joint report from the City Solicitor and the Integrity Commissioner was made to City Council on the application of the appeal decision. A link to that report which explains the case in greater detail may be found at:

<http://www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-56203.pdf>

The Divisional Court held that the Mayor had a pecuniary interest in a motion that rescinded Council's earlier decision to require repayment of amounts donated by lobbyists to the Mayor's personal charity. However, section 5(1) of the *MCI*A was not contravened because Council did not have jurisdiction to require repayment of the donations. This was based upon the Court's interpretation of the sanctions provided under the *COTA* and the provisions in the *Code of Conduct*, which give council authority to take "other actions" such as requesting an apology, ordering repayment or reimbursement of moneys received, or removal as chair of a committee.

The Court also considered a number of questions of broader application to members of Council. For example, the Court considered whether a pecuniary interest under the *MCI*A is engaged any time a report of a violation of the *Code of Conduct* is dealt with by City Council. This is because Council has jurisdiction in *Code of Conduct* cases to impose a financial penalty under s. 160 of the *COTA*.

The Court found that unless the Integrity Commissioner recommends that Council impose a financial sanction, or there is some "real likelihood" that such a penalty is contemplated, a member may speak to a report on his or her conduct, as a matter of procedural fairness. The Court specifically noted, "There is no reason to preclude a member from speaking to a report recommending a reprimand or requesting an apology."

The Work of the Office This Year

Advice

The provision of advice has continued to be a core service to members of Council, Local Boards and City Adjudicative Boards in 2012-2013. In the Toronto Computer Leasing Inquiry Report authored by Justice Denise Bellamy in 2005, one of Justice Bellamy's recommendations was that the City should encourage staff and Councillors to consult the Integrity Commissioner when necessary. Justice Bellamy noted that there is no stigma attached to a request for advice because ethical matters arise "naturally and inevitably" and are not the problem. Issues arise when there is a failure to address those ethical matters.

The advice function of the office has continued to be a source of support that has been used frequently and consistently throughout the past year. During this period, requests for advice were diverse and involved such issues as taking positions on community matters that could affect family members, travel and expense policy questions, receipt of donations for community events, conflict of interest issues, responding to informal complaints and writing letters of support for City-funded community agencies. Some requests for advice delved into the broader questions such as the role of Councillors or how to communicate effectively as a politician while demonstrating respect for the public service. The number and nature of advice contacts throughout the year are listed in Appendix 1, Part B.

In the year ahead, we can anticipate that there will be an increase in advice on election-related activities, as well as greater scrutiny of councillors in the period leading to the nomination date of January 1, 2014. The *Code of Conduct* applies during the nomination period and has a number of areas which are of particular application, in addition to the provisions in the *Municipal Elections Act*. Councillors are also reminded of Article VII of the *Code of Conduct* which applies to election campaign work (Appendix 2: attached). In addition, the Lobbying By-law continues to apply. A joint interpretation bulletin on this subject issued this year with the Lobbyist Registrar is attached as Appendix 3.

The Role of Councillors

Councillors have a number of roles and responsibilities but no specific job description. It has been observed by one commentator that there is no single “clear, concise and comprehensive listing and consideration of the duties of a municipal councillor.”¹ The role is defined by law, common law and policy. For example, the *COTA* speaks to the need for Council and by extension, its members:

- (a) to represent the public and to consider the well-being and interests of the City;
- (b) to develop and evaluate the policies and programs of the City;
- (c) to determine which services the City provides;
- (d) to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;
- (e) to ensure the accountability and transparency of the operations of the City, including the activities of the senior management of the City;
- (f) to maintain the financial integrity of the City; and
- (g) to carry out the duties of council under this or any other Act.

A 1991 judgment from the Supreme Court of Canada written by the late Mr. Justice Sopinka, recognized that there is a degree of prejudgment that is part of the role of municipal Councillor, because the role is both political and legislative.² For this reason, the court did not find that Councillors must meet the same standards for the rule against bias when they are considering a by-law in council, so long as they are open to persuasion on the merits. In other words, they are not treated like judges who have a stronger rule against bias when serving on courts or tribunals.

However, with the passage of the *COTA*, and the creation of an enforceable *Code of Conduct*, members of Council are also being asked to wear something more like an adjudicative “hat” when considering *Code of Conduct* reports. Council from time to time may be asked to approve, dismiss or sanction fellow members and apply the *Code of Conduct* consistently and fairly. In creating an integrity regime, Toronto City Council, like any municipality which takes this step, added to its responsibilities. On the floor of

¹ “Duties of a Municipal Councillor” Leo F. Longo, Aird & Berlis LLP IMLA Conference, September 19, 2006.

² *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* 2 M.P.L.R. 288 (SCC)

Council, it is not always straightforward to switch between these various roles. These observations are included here for two reasons: the first, to acknowledge that it is not always easy for members of Council to juggle these three roles (legislative, political, and adjudicative). Second, it will become increasingly important when Council is acting in a more adjudicative capacity, to remind itself that this is taking place. Deliberations and questions are an opportunity for Council to demonstrate to the public and to its members that it takes this role seriously and carefully.

Respectful Challenges to Staff

This year there were a number of public challenges to the reputations of staff members by elected officials that led to complaint reports. Article XII of the *Code of Conduct* details both the rule and the rationale for treating staff with respect. It is simply unfair to impugn the professional competence of staff for political reasons. The public service does not function as an “official opposition” to members of Council. When negative personal comments are made in the media about staff by members of Council, this has an impact on the individual member of staff, but it also sends an insidious message to other members of staff that they could be the subject of similar denigrating comments, merely for doing their jobs. As was noted in one report delivered to City Council this year, “Public name-calling and/or personal attacks on staff can have a chilling effect on the public service to make good faith recommendations... .” The role is expected to be non-partisan and when this boundary is recognized by elected members of Council, both the individual members of staff are respected, but also the public interest is served.

In the outcomes for each of the sustained reports to Council, a positive outcome was achieved. In all three cases for this reporting period, and for the two reports that are before Council along with this annual report, five different public officials have been prepared to apologize, to acknowledge their ill considered words and thus, work to repair the unfair impressions left by those words.

A related issue involves communications with the Integrity Commissioner as one of Council's four Accountability Officers. These offices report directly to Council and their relationship is to Council as a whole. The Integrity Commissioner observes a policy of not commenting on reports that are before Council for consideration. This reflects the reporting relationship to Council and the confidentiality provisions found in the *COTA* around the work of the office.

In February 2013, a number of critical comments were made to members of the press about a report from the Integrity Commissioner and City Solicitor in advance of that report being presented to Council. These questions were not posed on the floor of Council to the Integrity Commissioner. In response, a press release was issued to inform the public and the press about the limits on office communications with the media. A link to this release is found at:

http://www.toronto.ca/integrity/pdf/press_release_22feb2013.pdf

Part of the ongoing evolution of the relationship between the Office of the Integrity Commissioner and members of Council has been the recognition that complaints are but a small aspect of the role. Advice, education and policy work is a far larger proportion of the office activity, but because it is often confidential and far less contentious, it receives little to no media attention. Nevertheless, the office functions far more often as a support for members and a resource for the City than as a "watchdog." Members of Council can support that role by dealing directly with the office whenever questions and concerns arise. When those concerns relate to a public report, I invite members to pose their questions directly during a meeting, rather than indirectly via the media.

Finally, relating back to the role of Councillors to consider their adjudicative function, the role of Integrity Commissioner is non-political, as are all of the Accountability Officers. Each of these offices follow protocols and the relevant legislation to advise council on investigations and policies on accountability and transparency from a position of strict political neutrality. The Accountability Framework adopted by Council supports the work of the offices and the reporting relationships value independence and fair processes along with the role of Council when applying the *Code of Conduct*. Public comment to the contrary by members is incorrect and can mislead the public. This is a reminder that we all play a role in instilling confidence in these aspects of the accountability framework in the City of Toronto.

Confidentiality and Media Comment By Members

Councillors are subject to obligations of confidentiality around certain items that come to Council. Over this past year, one investigation referred by Council to this office was dismissed when the source of a leak to the press could not be ascertained.³ In recent months, there have been media reports of other confidential Council material. Beyond stating the obvious that City Councillors have ethical obligations not to provide confidential material to the public or the press, a related issue is when a leak takes place and members of the media request comment from elected officials. In order to emphasize the importance of confidentiality, it is my advice to Council that it refrain from discussing or commenting upon confidential matters in the press, to send the clear message that confidentiality is more than a formality, but a legislative requirement. In this way, Council upholds the rules and the spirit of those rules.

Complaints

In spite of the increase in complaints over the past two years, the number of advice contacts have continued to be proportionally higher. This is an important feature in how Toronto's ethical infrastructure is operating and has operated since its beginnings. This means that more preventive measures are being taken relative to reactive measures.

³ Integrity Commissioner Report to Council –Sept 5, 2012:
<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.CC26.2>

However, when a complaint is made, it often arrives with an opportunity for a resolution. Complainants are often seeking a reasonable solution: an apology, an explanation or merely the chance to say their piece to their member of Council. In both the informal and formal settings, addressing the issue early can resolve matters efficiently and to the satisfaction of everyone. This avoids formal protracted proceedings, distraction from other commitments and the stress of public sanction.

Appendix 1, Part B (III) contains tables showing the number of complaints received, dismissed and reported to Council over the past year. Like last year, the informal complaints and formal complaints are well into double digits and occupied a significant amount of time. At this past year's budget meeting a request was made and adopted by Council, to increase the support for the office from a part time Administrative Assistant to a full-time Assistant. This additional level of staff support has been vital to the continuity of services and the ability of the office to carry out its mandate.

Sustained Complaints

During this reporting period, I completed 4 investigations which resulted in reports to Council on the *Code of Conduct*. Three of these involved breaches of the *Code of Conduct* provision that applies to the treatment of City Staff. All three were reported to Council in public and resolved by way of apologies. Links to these reports are available on the Office of Integrity Commissioner website at <http://www.toronto.ca/integrity/integrity-reports.htm>. A fourth complaint, which was dismissed, is discussed below.

Dismissed Complaints

Not every complaint leads to a finding that there has been a breach of the *Code of Conduct*. The threshold for an investigation in the *Complaint Protocol* ensures that Councillors are not called upon to respond to complaints that are groundless or outside the jurisdiction of the office. In cases where the Councillor's explanation is sufficient, the complaint may be closed without any investigation. Where there is additional information and material required, the case may still be dismissed if it is found that there has been no breach of the *Code of Conduct*.

In one notable and highly publicized complaint, an investigation led to a dismissal of the complaint. The dismissal was reported to Council because of exceptional circumstances, including the publication of the original complaint by the complainant and the unique nature of the issues. At the heart of the complaint was the question of Council member interaction with the press, specifically uneven or unequal treatment of certain newspapers by the Mayor and his staff. The report which describes the reasons for the dismissal was brought to Council on April 3 and 4, 2013 and can be accessed at <http://www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-57116.pdf>.

Informal Complaints

Informal complaints include potential breaches of the *Code of Conduct*, but also conduct which may create conflict but which falls short of a breach of the *Code of Conduct*. Over this reporting period, there were a number of informal complaints in three primary areas:

- Councillors not returning calls or responding to constituents' inquiries, concerns or complaints about various ward matters;
- Using city resources for personal business;
- Interpersonal conflicts between constituents and Councillor staff.

All informal complaints are tracked and outcomes are recorded. Results for this reporting period indicate that in 31% of the informal complaints received, citizens engaged with their member and resolved the issue with finality; in 41% there was citizen engagement but the outcome was either not known or not satisfactory, and in 28% of the cases, the citizen did not pursue further engagement.

Deferred Complaints

One formal complaint made in 2010 continues to be deferred, on notice to both the complainant and the member, based on concurrent civil proceedings

Reporting of Gifts and Benefits

In this reporting period, the Integrity Commissioner's office received 19 Donor Declaration Forms from the office of the City Clerk for Council Member-Organized Community Events. These forms are required to be filed with the Office of the Clerk for "in kind" and cash donations to community events. This form is used to ensure that donations are kept within the allowable annual limit of \$10,000, to ensure that any donations received are for specific events and that Article IV (Gifts and Benefits) in the *Code of Conduct* is being followed by members of Council. When the donation does not fall within the exceptions provided by the *Code of Conduct*, the member is advised so that the donation can be returned. In the past year, one member was required to return a donation for a community event after the status of the donor as the client of a registered lobbyist was confirmed.

Members of Council are encouraged to consult with the office of the Lobbyist Registrar to check the status of potential donors prior to accepting a donation for a community event. This will avoid the problem of having to repay donations that may later be found to have been improperly received.

BUDGET

The 2013 approved budget for the Integrity Commissioner's office is \$254.9 thousand, excluding any "COLA" adjustments. In 2013, in recognition of the growth of the work of

the office, Council approved a full time Administrative Assistant. During its start up years, the office was supported by a part time Administrative Assistant. The expenses of the office during this reporting period are attached as Appendix 4.

CONCLUSION

In a year of many challenges and increased workload, I must acknowledge with gratitude the support and hard work of the dedicated professionals who support the work and role of this office. The on-site administrative support from Wendy Wilson is vital to the office. Ms. Wilson carries out her responsibilities with grace, good humour and attention to detail. We are both supported by the staff within the City Clerk's Office and its commitment to excellence. The Office of the City Solicitor is available for sage advice and joining with this office on issues that have legal and ethical implications. My fellow Accountability Officers are collaborative on matters of policy that affect all of our offices and must be acknowledged in that regard. Finally, I wish to note the efforts of City Council to continue to adapt to its evolving leadership role in being a Council that values ethics and leadership and strives to model the values found within its *Code of Conduct*.

CONTACT

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SIGNATURE

(Original signed by Janet Leiper)

Janet Leiper, Integrity Commissioner

ATTACHMENTS

- Appendix 1:** Summary of Activities of the Integrity Commissioner: July 1, 2012 – June 30, 2013
- Appendix 2:** Code of Conduct Provisions Applicable to Elections
- Appendix 3:** Joint Interpretation Bulletin: *Lobbying and Municipal Elections at the City of Toronto – July 23, 2012*
- Appendix 4:** Integrity Commissioner's Office Budget and Expenditures July 1, 2012 - June 30, 2013