



OFFICE OF THE INTEGRITY COMMISSIONER

REPORT REGARDING THE CONDUCT OF COUNCILLOR JOSH MATLOW

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Integrity Commissioner
June 18, 2018

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INTRODUCTION

On November 13, 2017, Andy Byford, then-CEO of the Toronto Transit Commission (the "TTC"), filed a complaint alleging that Councillor Josh Matlow contravened the *Code of Conduct for Members of Council* (the "Code of Conduct") for statements he made in a radio interview on October 25, 2016, and for comments he made at the City's Audit Committee and City Council meetings in October and November 2017.

For the reasons that follow, I find that Councillor Matlow contravened Article XII (Conduct Respecting Staff) of the Code of Conduct.

THE COMPLAINT AND RESPONSE

Mr. Byford's complaint, filed on his own behalf and also that of the staff at the TTC, raised concerns primarily about the Councillor's statements made in a radio interview that occurred on the October 25, 2016 edition of the CBC's Toronto morning radio program. Mr. Byford said,

During the interview, the Councillor mentioned me by name, shortly after making introductory comments that insinuated that the advice of some staff was questionable & unable to be trusted. Councillor Matlow essentially said that what I and other TTC colleagues had said (via the briefing note) was not true and he further implied that my motives were less than honourable.

In his complaint, Mr. Byford referenced the fact that the circumstances regarding the creation and distribution of the briefing note were subsequently investigated by the Toronto Auditor General, and that, in Mr. Byford's words, her report "vindicated" he and staff. Mr. Byford alleged that Councillor Matlow continued to "insinuate and make direct comments in public forums that question" his integrity and that of the TTC staff in relation to the briefing note. In this respect, Mr. Byford referred specifically to Councillor Matlow's comments at the October 2017 Audit Committee and November 2017 City Council meetings.

In support of his assertion that Councillor Matlow's statements were contrary to the Code of Conduct, Mr. Byford also relied on an April 20, 2017 report I provided to City Council regarding Councillor Matlow's comments during the same radio interview, and its impact on another senior public servant. In that report, I found that Councillor Matlow acted contrary to Article XII with respect to that public servant.

Councillor Matlow responded to the present complaint by taking the position that "the evidence clearly demonstrates that Mr. Byford, as the CEO of the TTC, did not perform his duties to the standard that is expected in the preparation of a briefing note on the

Scarborough LRT." Most of Councillor Matlow's written response to this office's inquiry attempted to dispute the findings in the Auditor General's report. He concluded his response as follows:

The Auditor General exonerated Mr. Byford of the allegation of *deliberately* misleading Council. I do not take issue with that finding. However, the Auditor General did confirm that the TTC made a number [of] errors and did not correct a crucial error even after it was brought to their attention. Further, the Auditor General did not investigate several important facets of the briefing note that informed my public comments.

Article XII demands that councillors not "maliciously or falsely injure the professional... reputation... of Staff, and all members shall show respect for the professional capacities of Staff." However, Article XII of the Code of Conduct does not afford Staff that protection unreservedly. These protections are granted in accord with the expectation that Staff will "serve Council as a whole," and provide advice based on... objectivity."

Further the TTC's own Code of Conduct states that it is "every employee's responsibility to ensure that all information produced... is as accurate as possible," as well as the expectation of Staff to provide "objective" advice.

The evidence provided in my response clearly demonstrates that, in the preparation, dissemination, and defense of the briefing note, that the expectations of Staff were not met by Mr. Byford and TTC Staff in this instance.

My conduct in questioning the professionalism of Staff in the preparation of the briefing note on the Scarborough LRT was in accord with the level of professionalism displayed by Staff in its preparation. I have shown great respect for the professional capacities of Staff by believing they could have, and should have, done much better.

INQUIRY STEPS

Mr. Byford filed the complaint on November 13, 2017. The exchange of reply and response, in accordance with the Code of Conduct Complaint Protocol for Members of Council, was completed on December 31, 2017. I met with Mr. Byford and Councillor Matlow in December 2017 to better understand their positions regarding the issues and to assess whether an alternative resolution could be achieved.

To complete this inquiry, I reviewed: the detailed responses of the parties; the audio recording of the media interview at issue; the October 13, 2017 report of the Auditor General; video of the October 27, 2017 Audit Committee; and, video of the November 7, 2017 City Council meeting.

On May 29, 2018, I provided Councillor Matlow with my proposed statement of findings in this matter. He made written submissions in response and we spoke on the phone. His position is set out in the report below.

This inquiry did not consume significant investigation time. The delay in the issuance of this report is attributable to the volume of work and finite resources of the Office.

FACTS

On October 24, 2016, the *Toronto Star* published an article about various issues with respect to the Toronto transit network file that described (among many other things) the circulation of a "misleading briefing note produced by the TTC" in advance of a July 2016 City Council meeting that was to consider the TTC's Scarborough subway extension. Councillor Matlow appeared on the CBC's Toronto morning radio program the next day to react to the *Toronto Star* article, and made the following comments in the course of that interview (emphases added):

Interviewer: Walk us through this briefing note that dealt with the Scarborough TTC expansion just as plainly as possible... what did it say?

Matlow: ..., I'd be happy to, I want to make a point though of saying that the vast majority of our public servants do their job with integrity every day. But this investigation that the Star demonstrates is that there are a handful of staff that I think there are some significant questions about the objectivity of their advice.

...

Matlow: So the briefing note that the Star, kind of exposed as untrue, made an argument or actually gave evidence that the price of the LRT, in a nutshell, the price of the LRT, was inflated and would go up to roughly the same price – over 3 billion dollars as the one stop subway proposal – and it also suggested that there is no way to get work started until 2021 because they had to wait for the Eglinton Crosstown works to be completed at Kennedy.

...

Matlow: I actually did a lot of research into that question and what I was able to find, in you know just some basic research was that that just wasn't true that there was no reason why they couldn't have started Sheppard rather than Kennedy. I actually asked that question on the floor of Council and Andy Byford of the TTC admitted as much, and the maintenance costs that they suggested would go up, in fact if one takes the time to read the Master Agreement with Metrolinx clearly states that that's covered by Metrolinx, not the City, and it wouldn't have been an issue for our budgets. So the point is that, I actually wrote a 2,000-word open letter back before the vote that was shared with many

of my colleagues and the public, if anyone had just done the research they would have seen that that briefing note was untrue. Now the bigger concern is not only was the briefing note untrue, but then it was shared directly and solely with the Mayor's office their communications staff and the Chair of the TTC's office. The code of conduct for staff is that that information, business-related information needs to be shared with all of Council at the same time.

Interviewer: The vote is over and I mean it's not going to be revisited, I can't imagine although anything's possible in this city so don't hold me to that, but if you look at this from a broader perspective, why does something like this matter if the information that came out is you say perhaps was not necessarily factual?

Matlow: My view about the Scarborough transit debate is well known. This isn't about that. This is a much bigger and much more concerning issue. Whenever council is making decisions, whether they be small or in this case spending billions of tax dollars and public policy decisions that impact our lives for generations to come, no matter what your opinion is on one side or another of the debate, it should be based on factual information, objective independent advice of staff. And I've seen a pattern here, where one time after another City staff, some City staff not all, some City staff provide information that certainly seems to be, and in this case exposed to be, influenced by the politicization of City Hall rather than just their objective advice.

Interviewer: What do you mean the politicization of City Hall?

Matlow: Well you know far too often, it's not just this Mayor's office it's probably every Mayor's office that's ever been, and even individual councillors at times will put pressure on City staff to write reports in a way that either put the information in there that will support their argument or the destination they're trying to arrive at, or put pressure on them to admit information that conflicts with their arguments. In the Scarborough transit case it is evident that happened. But there are other examples....

...

Interviewer: I think that those of us who live here and rely on elected officials to help guide the City hope that you are making evidence-based decisions. Is that the case, or is this decision-based evidence-making?

Matlow: Well far too often the latter is the case. Now listen, again City staff more, more times than not provide great information, the system is supposed to work that way and we hire experts to provide advice to admittedly lay people to make policy decisions. But, far too often either City staff provide information that is either tainted or politically motivated for one reason or another, or Councillors will deliberately decide to ignore factual information to make policy that suits their political need, as I would submit was the case in the Scarborough transit debates.

...

Matlow: ... So there is a pattern, it's not just this Mayor, it probably goes back many mayors and other councillors too. But far too often they want, they know that actual city staff are so powerful that at council meetings sometimes they don't need to even say anything. If you've been to council meeting, you'll know that the councillor will ask a City staff member a question, and they simply have to nod, just sort of move their head up and down and that will influence the outcome of the vote. So we need to know with certainty that their advice, that their opinion is based on factual independent evidence rather than any persuasion one way or another, and in the Scarborough case if you actually read through the briefing note, and if you read through, you know all the evidence to the contrary that disputes – not only what the TTC said, but even what the City Manager's staff Peter Notaro said at the City Council meeting during the vote – you'll know that there were factually untrue statements made, or misleading suggestions left that swayed the votes, and many councillors will say that was the information that they relied on... even the Mayor yesterday said I have a right, to quote him, 'I have a right to rely on City staff's advice.' And my retort would simply be, and respectfully, we have a right to do so, but if the math doesn't add up and the advice doesn't seem to make sense, we also have a duty to respectfully challenge and to make sure that we have the right facts in front of us before we make a huge decision.

Following this interview and the *Toronto Star* article, the Auditor General extensively examined the creation and distribution of the briefing note at issue. The Auditor General concluded in a report released in October 2017 that there was no political interference and that no public servants at the TTC misled City Council. With respect to the briefing note, the Auditor concluded in her report:

In our view, the briefing note estimate was within an acceptable range given the stage of the project, the nature of a briefing note and the caveats contained therein. The briefing note highlights that figures are "*estimates only*," intended for a "*high level cost comparison*". After evaluating the reasonableness of the figures, it is our view that even if construction on the SLRT could have begun several years earlier, the potential difference between the briefing note figures and our calculated escalated cost is within an acceptable range for estimates at that stage of completion.

At the October 2017 Audit Committee meeting, Councillor Matlow questioned the Auditor General regarding the investigation. In his speeches at the Audit Committee and at City Council, and now in his response to this complaint, he appears to accept the Auditor's findings that Mr. Byford and his staff did not deliberately mislead City Council.

During the debate at City Council regarding the Auditor General's report, Councillor Matlow was asked to apologize to Mr. Byford. He refused to do so. After the Auditor General's disposition and before filing this complaint, Mr. Byford personally asked Councillor Matlow to apologize. Councillor Matlow refused to do so.

ANALYSIS

The Code of Conduct and the Toronto Public Service Bylaw

Article XII of the Code of Conduct (Conduct Respecting Staff) addresses the relationship between members of Council and City staff. Of relevance to the circumstances of this case, Article XII affirms that all City staff serve Council as a whole. The Code states that,

Only Council as a whole has the authority to approve budget, policy, Committee processes and other such matters. Accordingly, members shall direct requests outside of Council-approved budget, process or policy, to the appropriate Standing Committee.

Under the direction of the City Manager, staff serve the Council as a whole, and the combined interests of all members as evidenced through the decisions of Council. Members shall be respectful of the role of staff to provide advice based on political neutrality and objectivity and without undue influence from any individual member or faction of the Council. Accordingly, no member shall maliciously or falsely injure the professional or ethical reputation, or the prospects or practice of staff, and all members shall show respect for the professional capacities of staff.

No member shall compel staff to engage in partisan political activities or be subjected to threats or discrimination for refusing to engage in such activities. Nor shall any member use, or attempt to use, their authority or influence for the purpose of intimidating, threatening, coercing, commanding, or influencing any staff member with the intent of interfering with that person's duties, including the duty to disclose improper activity.

In practical terms, there are distinct and specialized roles carried out by Council as a whole and by Councillors when performing their other roles. The key requirements of these roles include dealing with constituents and the general public, participating as Standing Committee members, participating as Chairs of Standing Committees, and participating as Council representatives on agencies, boards, commissions and other bodies. Similarly, there are distinct and specialized roles expected of City staff in both the carrying out of their responsibilities and in dealing with the Council.

[Emphasis added.]

An important companion to Article XII is the Toronto Public Service Bylaw (the "TPS Bylaw").¹ The TPS Bylaw: mandates that all employees conduct themselves with "personal integrity, ethics, honesty and diligence in performing their duties;" specifies the political activity rights of all employees; and, contains mechanisms for dealing with allegations of wrongdoing. The TPS Bylaw entrenches the characteristics of political neutrality and professionalism in the public service—it is City Council's expression of its requirement that it be served by a professional, politically-neutral public service.

The relationship between any municipal council and its professional public service is critical to the overall success of local government. Michael Fenn and David Siegel have helpfully examined the nuances of the relationship between municipal councils and a professional public service, and I have found their commentary on this topic to be useful in analyzing the issues in this complaint.²

Fenn and Siegel highlight that municipal councils are elected by popular vote, and therefore accountable to an electorate, which requires members of councils to be in tune with local issues and able to explain and answer for their actions. This can be referred to as political accountability³ and is a legitimate and a critical component of our democratic system of government.

Fenn and Siegel remark that while the public service must be aware of local concerns, they bring a different perspective than Council: "Senior staff members derive their legitimacy from specialized professional expertise." The tension between political accountability and professional expertise that sometimes results between the Council and staff is a "healthy dynamic", and one that can lead to good public policy. Fenn and Siegel say at page 5 of their paper:

The best public policy comes about not when one side defeats the other and gets its way, but when a policy resides at the intersection of the two interests. The mayor and councillors have an obligation to ensure that all decisions made by council reflect the prevailing local culture. Ignoring this requirement will cost them their jobs at the next election. Staff members have an obligation to ensure that decisions also take into account of rationally determined professional values. The two groups need to find solution that reflect both the local culture and rational professional values. This will mean that both sides must be willing to accept something less than ideal.

As I have previously commented, the health of the relationship between Council and staff is a matter of public interest. Members of Council and staff each have separate

¹ Chapter 192 of the Toronto Municipal Code.

² Michael Fenn and David Siegel, "The Evolving Role of City Managers and Chief Administrative Officers," IMFG Papers on Municipal Finance and Governance (2017: No. 31)

³ Former Integrity Commissioner Janet Leiper referred to it this way in outreach materials.

and important roles to play. It is for this reason why I have repeatedly advised members of Council that they should not treat public servants as *political adversaries* or *political allies* when debating matters of public policy.⁴

Against this backdrop, Fenn and Siegel advise that elected officials should not "air dirty laundry in public," so as to encourage retention of public servants and to meet the public's expectations. But, there are certain realities of municipal government that need to be taken into account. Fenn and Siegel state at page 19:

Municipal government operates in a political arena, with all that that implies. As a result, a councillor may quite properly – or even simply for political reasons – accuse staff of being incorrect, lacking in research or creativity, being insensitive to community concerns, or being too slow to deal with an issue. Staff may not like it, but they have broad shoulders and it is the right of the democratically elected representative to say such things if they are warranted.

But there are limits that should not be exceeded. Best practice says it is the duty of the head of council and the CAO to act decisively when these limits are exceeded. A councillor should never accuse a staff member publicly of stupidity, unethical behaviour, or incompetence. If an elected representative feels that way about a member of staff, he or she should take it up with the CAO [...], in private. Likewise, if a staff member feels his or her integrity or honesty is being questioned, or if workplace interactions with a councillor are inappropriate or demeaning, he or she should take the matter up with the CAO and take advantage of protections afforded to all employees, including in serious cases, access to the municipal integrity commissioner.

The TPS Bylaw provides assurance to City Council and the public that the Toronto public service is neutral and professional. Importantly, it contains mechanisms to raise concerns about serious misconduct or concerns about partisan behaviour.

City Council has considered the application of Article XII to councillors' public statements about members of staff on five previous occasions.⁵ Based on the prior

⁴ Integrity Commissioner Report Regarding the Conduct of Councillor Josh Matlow (April 20, 2017), *infra*, at page 6-7 and see outreach letters to Council in April 2016 and December 2015, included in the Office of the Integrity Commissioner's Annual Reports for 2015 and 2016.

⁵ Integrity Commissioner Report to Council, July 8, 2013: Councillor Mike Layton, available at <http://www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-60181.pdf>; Integrity Commissioner Report to Council, July 8, 2013: Councillor Adam Vaughan, available at <http://www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-60183.pdf>; Integrity Commissioner Report to Council, October 23, 2012: Mayor Rob Ford, available at <http://www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-56213.pdf>; Integrity Commissioner Report to Council, October 23, 2012: Councillor Michelle Berardinetti, available at <http://www.toronto.ca/legdocs/mmis/2012/cc/bgrd/backgroundfile-51455.pdf>; Integrity Commissioner Report to Council, April 20, 2017: Councillor Josh Matlow, available at <https://www.toronto.ca/legdocs/mmis/2017/cc/bgrd/backgroundfile-103131.pdf>.

cases on this Article, the helpful commentary referred to above and the TPS Bylaw in place at the City of Toronto, the following principles apply when considering whether councillors' statements about staff contravenes Article XII:

1. When questioning staff reports or actions, members of Council should ensure that their comments are in the nature of "fair comment", and related to the *substance* of the report and not the authors or their suggested motivations. This means that members of Council can raise concerns about whether information is correct, or whether staff considered certain information, such as local concerns. The Toronto public service is prepared (and expect) to respond to these kinds of questions from City Council. City Council discharges its duties when it is robustly and fairly scrutinizing the information and advice that staff provide.
2. However, members of Council should not publicly state or imply that a particular public servant, or a group of public servants, acted for political or private motivations or in a way that is negligent or that failed to meet professional standards. Serious concerns about staff misconduct should be raised with the public servant's supervisor, the City Manager, the applicable governing board, or as a last resort, the Auditor General through the disclosure of wrongdoing mechanism in the TPS Bylaw. However, these types of statements will not normally be tolerated by the Speaker or a Chair in a Council proceeding, and could result in a Councillor being found to have contravened the Code of Conduct.
3. Extra scrutiny should be applied to public statements about the public service that are broadcast in mass media. This is because staff do not have the same platform as members of Council to engage in the public arena. (They do not have a political accountability.)

Application to the Circumstances of This Case

Councillor Matlow says that his comments in the radio interview—on their face—did not refer negatively to Mr. Byford. He distinguished his reference to Mr. Byford from the reference to Mr. Notaro, which he acknowledged was improper. Although Councillor Matlow says that his public comments were not intended to disparage Mr. Byford, he also made submissions in this inquiry that he believes there was political influence brought to bear on the production and distribution of the briefing note and that this influence impacted Mr. Byford and his team.

It is, therefore, difficult to reconcile Councillor Matlow's statements that he did not intend to say what he continues to say in response to this inquiry. Nevertheless, I have reviewed the audio recording of the interview many times and make the following conclusions about the interview.

The *main topic* of the radio interview in 2016 was the briefing note that TTC staff prepared. In the interview, Councillor Matlow stated that the briefing note was "untrue" and contained misleading information. He made other statements to convey that he was concerned that public servants in the Scarborough transit debate and in relation to the briefing note did so for political reasons—that they were politicized in the advice given. Viewing the Councillor's comments in the context of the entire interview, a reasonable listener of the interview could conclude that Councillor Matlow was saying that Mr. Byford and TTC staff were improperly influenced by the Mayor's office, and that Mr. Byford (and thereby those staff assisting him) substituted their best professional advice for information and advice that was pleasing or preferred by the Mayor. This is how Mr. Byford heard the statements.

A citizen raised the concerns about the briefing note with the Auditor General, resulting in a full investigation. The scope of the Auditor General's report was to examine "whether there was evidence of a deliberate attempt by the TTC's CEO to mislead and misinform Council, and if so, whether there was evidence of political interference." The Auditor General's findings were that there was no evidence of:

- i. any lack of integrity on the part of CEO Byford or other TTC personnel in the briefing note's preparation.
- ii. a problem of political interference, or staff being pressured by elected officials, including the Mayor and his office, in relation to the development of the ridership numbers and the preparation and distribution of the note.

The Auditor's findings conclusively dispose of any underlying concerns that Mr. Byford or his staff prepared the briefing note to advance or prefer the Mayor's objectives at the expense of their own professional advice.

In his response to the present inquiry, Councillor Matlow emphasized that his concern was that the information provided, although not intentionally misleading, was erroneous and therefore misleading. The Auditor General also examined this concern, and found:

- iii. In our view, the briefing note estimate was within an acceptable range given the stage of the project, the nature of a briefing note and the caveats contained therein. The briefing note highlights that figures are "*estimates only*," intended for a "*high level cost comparison*". After evaluating the reasonableness of the figures, it is our view that even if construction on the SLRT could have begun several years earlier, the potential difference between the briefing note figures and our calculated escalated cost is within an acceptable range for estimates at that stage of completion.

Councillor Matlow's statements in a mass media forum suggested that the information in the briefing note was erroneous. Had he stopped there, his statements would have been in the nature of fair comment, and staff at the TTC, including Mr. Byford, are prepared and expect to be accountable for their work. However, Councillor Matlow's remarks went further to suggest that the information was erroneous not because of a mere mistake, but as a successful product of improper political intervention. In so doing, he crossed the line from fair comment to statements that were injurious to professional staff.

Drawing public servants into the debate by raising specific questions about whether their advice was politically motivated, and accordingly not to be trusted, in a mass media forum is harmful to the reputation of staff, and conduct that is contrary to the Code of Conduct. Councillor Matlow's statements in a mass media forum were contrary to Article XII of the Code of Conduct.

Councillor Matlow disagrees with decisions City Council has made in relation to the Scarborough transit file. He can continue (in accordance with procedural rules) to urge his Council colleagues to re-open the debate, revisit past votes, and/or consider new information. What he cannot do is draw Toronto's professional public service into the debate.

Remedial Action or Penalty

A report that a member of Council has contravened the Code of Conduct is significant and forms part of the public record. When City Council adopts a finding that one of its members has contravened the Code, it sends a message that it is committed to the Code's principles and standards. In addition to a public report, the Code of Conduct and the *City of Toronto Act, 2006* contemplate that contraventions may require remedial actions or sanctions. Examples of remedial measures are an apology, or a requirement to repay or reimburse moneys received.⁶ The *City of Toronto Act, 2006* enables Council to impose one of two sanctions: a reprimand or a suspension of remuneration.

Councillor Matlow disputes the findings above and accordingly is not prepared to acknowledge or apologize for his actions. Because Councillor Matlow is not willing to voluntarily apologize, I see little value in compelling him to do so.

In the absence of an apology, I therefore recommend that City Council accept the findings in this Report and reprimand Councillor Matlow as an expression of Council's commitment to the obligations in the Code of Conduct.

⁶ *Madger v. Ford*, 2013 ONSC 263 (Canlii) at para 67 (<http://canlii.ca/t/fvsgj>).

I would not recommend penalties more severe than a reprimand in consideration of the following factors: Councillor Matlow was cooperative in this matter; before the April 2017 finding, which was about the same set of circumstances, he had never before been found to have contravened the Code; and, a finding of contravention, alone, is of significant consequence to Councillor Matlow.

CONCLUSION

In summary, I recommend that City Council adopt a finding that Councillor Matlow contravened Article XII. As to penalty or remedial action, in the absence of an apology, I recommend that City Council reprimand him as an expression of its commitment to the obligations in the Code of Conduct.

Respectfully,



Valerie Jepson
Integrity Commissioner
June 18, 2018