

Attachment to J(6)

## Heenan Blaikie

Public

**PRIVATE & CONFIDENTIAL**  
*Via courier*

July 4, 2005

Mr. David Mullan  
Integrity Commissioner  
City of Toronto  
City Hall, 15<sup>th</sup> Floor, West  
100 Queen Street West  
Toronto, Ontario M5H 2N2

Dear Mr. Mullan:

**Re: Code of Conduct for Members of the Council, City of Toronto – Scope**

You asked us to provide an opinion concerning whether the subject-matter of a particular complaint fell within the *Code of Conduct for Members of Council, City of Toronto* (hereafter, the "*Code of Conduct*"). Specifically, you asked us to consider whether the statement of principles in the *Code of Conduct* provide an independent or stand alone set of obligations the alleged violation of which can be the proper subject of an investigation by the Integrity Commissioner.

Shortly after you asked us to provide you with that opinion, you advised us that the complainants withdrew their complaint. You asked us to consider the issue of your jurisdiction in such circumstances.

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**A. The statement of principles in the Code of Conduct**

We are of the view that the statement of principles in the *Code of Conduct* do not provide an independent or stand alone set of obligations that you can deal with. In our view, your jurisdiction is limited to dealing with allegations of conduct contrary to the eleven provisions of the *Code of Conduct* that proscribe certain specific kinds of behaviour, as explained and illustrated by the Schedules to the *Code of Conduct*.

In particular, we agree with the statement in your letter to us dated May 24, 2005, that these eleven provisions "do not embrace the conduct of Councillors in relation to their private affairs even where those private affairs come within the ambit of Council's regulatory powers".

The Preamble to the *Code of Conduct* contains broad language that identifies "key statements of principle". Those statements of principle are as follows:

Members of Council are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and will bear close scrutiny; and

Members of Council shall seek to serve the public interest by upholding both the letter and the spirit of the laws and policies established by the Federal Parliament, Ontario Legislature, or the City Council.

These "key statements of principle" are expressly said to "underline" the following portion of the Preamble which sets out the general purpose of the *Code of Conduct*:

Improving the quality of public administration and governance can be achieved by encouraging high standards of conduct on the part of all government officials. To this end, adoption of the Code of Conduct for members of Council is one of several initiatives being undertaken by the City of Toronto during its first term as a unified City. The public is entitled to expect the highest standards of conduct from the members it elects to local government. In turn, such standards will protect and maintain the City of Toronto's reputation and integrity. The Code of Conduct supplements and is compatible with the laws governing the conduct of members.

The word "underline" is important. It suggests that the role of the "key statements of principle" is to underscore or identify with greater precision the *purpose* of the *Code of Conduct* and not to create additional substantive obligations.

To the extent that the "key statements of principle" inform the purpose of the *Code of Conduct* and to the extent that the purpose of the *Code of Conduct* becomes important to you when interpreting one of the eleven provisions that proscribe certain kinds of behaviour or the Schedules, you may use them. However, in our view the "key statements of principle" do not supplement the eleven provisions and the Schedules by identifying additional types of conduct over which you have jurisdiction. Council has expressly limited them to "underlining" the purpose of the *Code of Conduct*.

A contrary interpretation of the Preamble – as creating independent or stand alone obligations – would run counter to Council's clear attempt in the *Code of Conduct* to define and specify the proscribed conduct in the eleven provisions and the Schedules with a high degree of detail. These eleven provisions do not contain wording that would allow you to investigate the conduct of Councillors in relation to their private affairs. The Schedules are even more specific and are restricted to matters of municipal business. They have been carefully drafted in a very specific manner to cover specific types of conduct and nowhere in the *Code of Conduct* or the *Council Code of Conduct*

*Complaint Protocol* are you given any ability to extend the coverage of these documents. It is for Council alone to do so.

We also note that if these provisions constituted proscriptions of certain forms of conduct that you could deal with under ss. 3-5 of the *Council Code of Conduct Complaint Protocol* (the "*Protocol*"), that *Protocol* would contain language to that effect. In fact, the *Protocol* contemplates that you will not deal with such conduct. While the Preamble to the *Code of Conduct* states that Members of Council "shall seek to serve the public interest by upholding both the letter and the spirit of the laws and policies established by the Federal Parliament", under s. 2(3)(a) of the *Protocol* you are not to deal with allegations under the *Criminal Code*, a law established by the Federal Parliament. Similarly, other portions of s. 2(3) instruct you not to deal with alleged non-compliance of certain provincial and municipal laws and policies.

Therefore, we conclude that the statement of principles in the *Code of Conduct* do not provide an independent or stand alone set of obligations the alleged violation of which can be the proper subject of an investigation by the Integrity Commissioner.

**B. *Withdrawal of a complaint***

In our opinion, the withdrawal of a complaint ends your jurisdiction to exercise your powers under ss. 3-5 of the *Protocol*.

As you know, your jurisdiction is defined by the specific wording of the *Code of Conduct*, the *Protocol* and any later directions of Council. You do not have any inherent jurisdiction.

The *Protocol* bestows upon you a number of powers:

- s. 3 empowers you to investigate, deal with and report on a "complaint" that "has been classified as being within the Integrity Commissioner's jurisdiction";
- s. 4 permits you to terminate an inquiry under certain specified circumstances (e.g., insufficient grounds for an inquiry);
- s. 5 outlines your responsibilities when there is no contravention of the *Code of Conduct*.

All of these provisions are dependent on you having a "complaint" before you.

We base this conclusion on the specific wording of ss. 3-5 of the *Protocol* which refer repeatedly to the existence of a "complaint", s. 1 of the *Protocol* which sets out specific



requirements for a "complaint" and s. 2 of the *Protocol* which requires you to conduct an assessment as to whether the "complaint" is within the *Code of Conduct* and is compliant and properly supported. Of particular importance is s. 2(3) of the *Protocol*, which states that you shall not deal with a "complaint, including any supporting affidavit, [that] is not, on its face, a complaint with respect to non-compliance with the *Code of Conduct*...". These provisions all point to the existence of a compliant "complaint" as being a necessary prerequisite for you to have jurisdiction under ss. 3-5 of the *Protocol*.

Therefore, in our view, once a "complaint" is withdrawn you do not have jurisdiction to proceed with the subject-matter of the "complaint" under ss. 3-5 of the *Protocol*.

We point out that you have two powers available to you when you have lost jurisdiction over a "complaint". These are found in ss. 2(4) and 2(5) of the *Protocol*:

(4) The Integrity Commissioner may report to Council on complaints not within the jurisdiction of the Integrity Commissioner.

(5) The Integrity Commissioner shall report annually to Council on complaints not within the jurisdiction of the Integrity Commissioner, but shall not disclose information that could identify a person concerned.

You have the jurisdiction to interpret the meaning and scope of these provisions yourself. In our view, s. 2(4) gives you a jurisdiction to report to Council on a complaint not within your jurisdiction even though you have not been able to follow the procedures under ss. 3-5 of the *Protocol*. This would appear to empower you to make a report when, with due regard for all of your responsibilities including your responsibility to enhance integrity in municipal government and your responsibility to be fair, both in a substantial and in a procedural sense, to all affected individuals including those who are the subject of the complaint, it is advisable to do so. Section 2(5) obligates you to provide information of a general nature concerning complaints that were made that were not within your jurisdiction.

We would point out that it is conceivable that a withdrawal of a complaint could take place in suspicious or unwelcome circumstances. For example, the complainant might be subject to duress or might have been persuaded to withdraw a complaint by the person under investigation as a result of the conferral of some benefit. The *Protocol* as currently drafted does not empower you to investigate the circumstances surrounding the withdrawal of a complaint. Nor does it allow you to reject a withdrawal of a complaint. Incidentally, in raising this issue, we wish to emphasize that it is purely a theoretical possibility and is based in no way on the complaint that initially gave rise to this opinion or any other specific circumstance.

**C. Concluding comments**

To the extent that this opinion gives you a concern about the limits of your jurisdiction, you might wish to ask Council to consider whether specific provisions should be adopted in the *Code of Conduct* and/or the *Council Code of Conduct Complaint Protocol* to extend your jurisdiction.

We trust that the foregoing has addressed your questions. Please do not hesitate to contact us if we can be of further assistance.

Yours very truly,

  
L. David Roebuck

cc. David Stratas (Heenan Blaikie LLP)