

COMMITTEE OF THE WHOLE DECEMBER 7, 2010

**INTEGRITY COMMISSIONER'S OFFICE COMPLAINT INVESTIGATION REPORT
FILE #04.27.10**

Recommendation

Integrity Commissioner Recommendations:

That the attached report be received by Council for information.

Contribution to Sustainability

N/A

Economic Impact

N/A

Communications Plan

Members of Council have received copies of the attached report. In addition, this report will be placed on the public agenda of the Committee of the Whole meeting scheduled for December 7, 2010.

Purpose

To report to City Council the findings and recommendations of complaint investigation 04.27.10.

Background

The Office of the Integrity Commissioner received a complaint filed under the Code of Ethical Conduct on April 27, 2010. Upon a preliminary review, the Integrity Commissioner determined that the requirements of a formal complaint were met and an investigation of the complaint was initiated.

The final complaint investigation report was submitted to the parties on August 23, 2010. Under the Code of Ethical Conduct Complaint Protocol (the "Protocol"), a report that is not completed prior to the beginning of the hiatus period, may not be submitted to Council until following the date of the inaugural meeting.

Section 16 of the Protocol states:

No Reports Prior to Election

16. Notwithstanding section 12 or any other provision of this Protocol, the Integrity Commissioner shall not make any report to Council or to any other person after the last Committee of the Whole meeting of June in any year in which a regular municipal election is to be held, until following the date of the inaugural meeting.

Relationship to Vaughan Vision 2020/Strategic Plan

N/A

Regional Implications

There are no Regional implications to the recommendations contained in this report.

Attachments

Appendix A - Integrity Commissioner Complaint Investigation Report #04.27.10.

Report prepared by:

Suzanne Craig
Integrity Commissioner

Respectfully submitted,

Suzanne Craig
Integrity Commissioner

RE: COUNCILLOR BERNIE DIVONA
File: 04.27.10

Background

[1] Two complaints were received by the Office of the Integrity Commissioner regarding allegations of contraventions of the Code of Ethical Conduct (the “Code”) by Councillor Bernie DiVona. One complaint was received by an employee of the City of Vaughan, Mr. Paul Compton (hereinafter referred to as “Complainant 1”) and was filed on April 27, 2010. The second complaint was filed by the Chair of CUPE 905 Vaughan Municipal, Mr. Steve Moreland (hereinafter referred to as “Complainant 2”) on behalf of an employee of the City of Vaughan. This second complaint was filed on May 21, 2010. Both of these complaints were received after the resolution by Vaughan City Council through which the Complaint Form/Affidavit was amended to include the disclosure of the name of the Complainant. In these complaints, the Complainants asked the Office of the Integrity Commissioner to investigate into alleged breaches of Rules 3, 7, 14, 15 and 16 Code. The first complaint cited Rules 3, 14, 15 and 16. The second complaint cited Rules 7, 14, 15 and 16.

[2] The Office of the Integrity Commissioner confirmed receipt of the formal complaints and advised the complainants and the respondent that one complaint file would be opened to deal with both complaints based on the fact that after a preliminary review of the affidavits and interviews with the Complainants, the subject of the complaints were found to be substantively the same. As the Complaint Protocol is silent on the procedure that is to be followed where two complaints deal with matters that are substantively the same, I exercised my discretion and made the decision to undertake one complaint investigation to deal with both complaints.

[3] I communicated to all the parties my decision to undertake one investigation for both complaints. I did not receive any objections from any of the parties on this decision.

[4] This complaint is governed by the Complaint Protocol which was adopted by Vaughan City Council at its meeting held on June 23, 2008, in addition to the Code of Ethical Conduct for Members of Council, City of Vaughan, which came into force on November 2, 2009.

[5] Further, pursuant to section 14 of the Code, an independent Human Resources investigator was engaged to complete an independent investigation in relation to staff issues and the City’s Respectful Workplace Policy that would apply in the circumstances associated with “personal harassment”.

The Complaint

[6] In the complaint, the Complainants alleged that the Councillor breached Rules of the Code, which require an elected Member of Council to not disclose or release by any means to any member of the public, any confidential information acquired by virtue of their office, except when required by law or authorized by Council to do so; not use confidential information for personal or private gain; not permit any persons other than those who are entitled thereto to have access to information that is confidential; not access or attempt to gain access to confidential information in the custody of the City unless it is necessary for the performance of their duties and not prohibited by Council policy; not to use the influence of her or his office for any purpose other than for the exercise of her or his official duties; to adhere to the City's Respectful Workplace Policy and refrain from harassment under the terms of the Policy; conduct themselves with appropriate decorum at all times; refrain from using or attempting to use their authority for the purpose of intimidating, threatening, or influencing any staff member with the intent of interfering in staff's duties, including the duty to disclose improper activity; and refrain from maliciously or falsely impugning or injuring the professional or ethical reputation or the prospects or practice of staff.

The Relevant Provisions of the Complaint Protocol for the Code of Ethics and Conduct for Members of Council

[7] Sections 3 and 5 of the Complaint Protocol, in addition to the Council direction of June 11, 2007, provide the Integrity Commissioner's jurisdiction to investigate into the alleged contraventions of the Code:

Part A: Informal Complaint Procedure

3. Individuals (including City employees, members of the public, Members of Council or local boards) who identify or witness behavior or activity by a Member of Council that appears to be in contravention of the Code of Conduct for Members of Council – (the “Code of Conduct”) may address the prohibited behavior or activity themselves as follows.

Part B: Formal Complaint Procedure

5. Individuals (including City employees, members of the public, Members of Council or local boards) who identify or witness behavior or activity by a Member of Council that appears to be in contravention of the Code of Conduct for Members of Council, may file a formal complaint with the required information on the prescribed affidavit.

Facts

[8] Upon receipt by the Office of the Integrity Commissioner of the two complaints subject of this investigation, I consulted with the Human Resources department and the Purchasing department to determine if the City had a roster of independent investigators as required by Rule 14 of the Code.

[9] Adhering to City policy, my office engaged the independent investigation services of WorkGroup Designs Inc. on May 28, 2010 to conduct the investigation into alleged contravention of the City's Respectful Workplace Policy.

[10] The independent investigator conducted preliminary interviews with witnesses on June 7th and 8th, 2010 and a final report concluding the independent investigation regarding the City's Respectful Workplace Policy was submitted to my office to be utilized in my investigation.

1. Community Centre Silent Auction

[11] One of the events subject of the complaints was in relation to an incident that took place at the Al Palladini Community Centre ("APCC"). A silent auction was held in January 2010 at the APCC for which exercise equipment was being made available to members of the Community centre through a silent auction bid.

[12] Through an investigation by the City of Vaughan's Human Resources ("HR") department, it was later proven that some of the items at the auction were successfully bid on by an employee of the City who was not in attendance at the time of the auction. The HR investigation concluded that an employee of the APCC had convinced another employee of the same Community Centre to place her name on some of the bid sheets with a slightly higher bid than the last noted bid, after the close of the auction.

[13] A member of the APCC complained to the Director of Recreation and Culture about the assertion that although his name was the last on the bid sheet at close of the auction, the pieces of equipment for which he had bid, were awarded to another individual.

[14] Mr. Compton, who is the Area Recreation Manager and whose responsibility includes the APCC, conducted an initial investigation into the allegations made by the member of the public regarding the irregularities of the silent auction.

[15] A subsequent investigation was conducted by the HR department, the outcome of which found that an employee of the APCC had convinced another employee of the same centre to sign their name with a \$1-2 higher bid on some of the bid sheets after the close of the silent auction.

[16] The HR investigation found that there were four employees involved in the irregularity of the silent auction. Employee #1 had instigated the irregularity by requesting employee #2 (the employee represented by Mr. Steve Mooreland in the 2nd complaint subject of this investigation) sign their name to the bid sheets after the closing of the auction. Employee #1 had initially stated to management that they had not attended the silent auction but rather had had a family member (employee #3) sign their name to the bid sheets. The HR investigation found that Employee #1, 2 and 3 had not been truthful insofar as employee #3 had not attended the APCC silent auction and had not signed employee #1's name on the bid sheets. Employee #4 was led to sign employee #1's name to the bid sheets after the close of the silent auction, on the request of employee #2 (Local 905 member). Employee #2, stated that, fearful of having their handwriting recognized, they engaged employee #4 to sign employee #1's name to the silent auction sheets after the close of the auction.

[17] After the HR investigation, employee #1 requested a meeting with Councillor DiVona, purportedly to request assistance for her daughter in relation to the auction incident.

[18] Councillor DiVona met with employee #1, #2 and another employee (employee #5) of the APCC on March 23, 2010.

[19] Upon conclusion of the HR investigation, disciplinary action was taken in relation to 3 employees of the APCC.

2. Confidential Information

[20] Mr. Compton alleged in his complaint that Councillor DiVona “exposed a file containing a document labeled ‘confidential’ to [employee #1, 3 and 5 at the March 23, 2010 meeting,] in an attempt to discredit [the Complainant]... The document was signed by the Commissioner [of Community and Recreational Services] and the former Director of Recreation and Culture”.

[21] Councillor DiVona brought a file on the APCC to the meeting of March 23, 2010 and referred to contents of the file during the course of the meeting. The letter that was contained in the Councillor’s file was not the same letter as Complainant #1 references in his complaint. The facts brought forward during this investigation point to a letter authored by Councillor DiVona and forwarded to the City Manager. This letter does not contain the signatures of either the Commissioner of Community and Recreational Services or the former Director of Recreation and Culture. This letter is marked confidential. There are two signed statements which state that Councillor DiVona brought a confidential letter that referenced Mr. Compton to the March 23, 2010 meeting. This has not been substantiated through additional information brought forwarding during this investigation.

3. Consultation with the Office of the Integrity Commissioner

[22] The Code states under the heading Framework and Interpretation that:

2. As long as all the facts known to the Member are disclosed to the Integrity Commissioner and there is no change to these facts, then the Member may rely on any written advice provided by the Integrity Commissioner.

[23] Councillor DiVona contacted the Office of the Integrity Commissioner verbally to request guidance on a matter of concern to him. Based on the information provided at that time and prior to the above mentioned complaint being filed, I advised the Councillor that any concerns that a member of staff may bring to his attention regarding staff performance should be brought to the attention of the City Manager or the City Commissioner responsible for the administrative matter. All of the facts regarding this matter were not disclosed to me at that time.

[24] No written advice was provided to the Councillor from my office on this matter.

Analysis

[25] As a general proposition, a Complainant who alleges that a Member of Council has contravened the Code must establish the allegations asserted in the complaint and bears the onus of proving that the breaches put forward in the complaint took place.

[26] In making a determination of findings of the facts brought forward, I can accept all of the information brought forward, some of the information or none. I may also draw reasonable conclusions based on the information that I accept.

[27] A question of the rules of the Code may be defined as a question involving the interpretation and application of one or more provisions or principles established in the Code. A question of fact involves the statement of the occurrence of an event, the existence of a thing or a person, as well as the statement of an opinion about them.

[28] In this investigation, both Complainant #1 and 2 invoked Rule 14 as an alleged contravention by the respondent. Rule 14 refers to Harassment. The City of Vaughan's Respectful Workplace Policy ensures a safe and respectful workplace environment and appropriate management of any occurrences of harassment and discrimination as defined by the policy.

[29] Rule 14 states that Members shall be governed by the City's Respectful Workplace Policy. However, given the fact that Code governs the ethical behaviour of Members of Council Rule 14 contains a 2-step process to ensure independence and transparency for both matters relating to the Respectful Workplace Policy and matters of ethical behaviour under the Code. Step 1 requires the complaint received by the Integrity Commissioner to be given to an independent investigator to conduct an investigation in relation to adherence to the City's Respectful Workplace Policy and that the independent investigator provide their findings to the Integrity Commissioner. Step requires the Integrity Commissioner to utilize the findings of the independent investigator's report in her determination on the application of the Code and the merits of the investigation on the ethical conduct of the Member.

[30] The intent behind Rule 14 of the Code is ensure adherence to the City's Respectful Workplace Policy which covers both Members of Council and City staff, is a determination made independently by HR professionals in order to be then utilized by the Integrity Commissioner in the complaint investigation into ethical behaviour. Further, when a complaint is received by the Integrity Commissioner, the investigation of an alleged contravention of the City's Respectful Workplace Policy is conducted by an independent investigator and the investigation of an alleged contravention of the Code by the Member is conducted by the Integrity Commissioner utilizing the findings of the independent investigator.

Contravention of Rules of the Code

Rule 3, 7, 14, 15 and 16

[31] As I have stated in previous reports, I understand the rules of confidentiality contained in the Municipal Act in relation to the Office of the Integrity Commissioner, relate to the need to prevent attention to be drawn to allegations of wrongdoing unless and until the Integrity Commissioner has completed her investigation and submitted a report of her findings to City Council. This reflects an important principle of procedural fairness and I take the confidentiality of the investigation very seriously. There is often a significant amount of time between when a complaint is filed and when I make a final determination that there are no grounds for an investigation or I have completed an investigation and submit the report to City Council. In this particular file, although every effort was made to expedite the investigation with a view to submitting the final report to the last Committee of the Whole meeting of June, thoroughness of the investigation required me to allow all witnesses an opportunity to bring information forward and this took time. As previously stated, speculation on an ongoing investigation and the mere fact that a complaint has been filed against a Member can be damaging to the reputation of a Member. This is especially the case in an election year. I respect the work of Members of Council and how hard they work for their constituents and the Office of the Integrity Commissioner treats all complaints fairly.

Rule 3

[32] Rule 3 of the Code requires a Member of Council to refrain from disclosing by any means (which includes through their office) any confidential information acquired by virtue of their office. Records held by the City are either public documents or confidential documents by virtue of their contents and prevailing rules contained in the Municipal Freedom of Information and Protection of Privacy Act and the Municipal Act.

Rule 3 of the Code requires Members of Council to maintain the confidentiality of City documents, including those containing information regarding:

- personal and health information about an identifiable individual; and
- labour relations or employee negotiations and personnel matters.

[33] Based on the information that my office has received during the course of this investigation, the disciplinary letter to which Mr. Compton refers in his complaint was only signed by the former Director, Recreation and Culture. Although Councillor DiVona's statements and supporting documentation point to his knowledge of the contents of the disciplinary letter, his assertion is that he was never in possession of the letter to which the first complaint refers. Further, there was no conclusive evidence brought forward in this investigation to conclude that Councillor DiVona was in possession of the letter referred to in Mr. Compton's complaint. There are signed statements purporting that a letter was shown to employees 1, 2 and 5. However, evidence presented during the investigation leads to a conclusion that the letters referenced by Complainant #1 dated August 31, 2007 was not the same letter that was referenced in the signed statements and shown to employees 1, 2 and 5. Further information gathered from witnesses supports the conclusion that some of the substance of Mr. Compton's letter was

common knowledge among staff at the APCC.

[34] What was quite troubling was the inference raised during the investigation, that there could have been tampering of a City document by the Member of Council. As I have previously stated, as a general proposition, a Complainant who alleges that a Member of Council has contravened the Code must establish the allegations asserted in the complaint and bears the onus of proving that the breaches put forward in the complaint took place. The information received through this investigation leads to the conclusion that the respondent did not possess the disciplinary letter to which Mr. Compton refers in his complaint and rather, he had a different letter. Although the issue came much closer to resolution after the Respondent provided me with a copy of a letter that he did have in his possession and admits to have had with him during a meeting with employees 1, 2 and 5, there was no conclusive evidence to definitively support a conclusion that Councillor DiVona ever had or disclosed improperly, the letter referred to in Mr. Compton's complaint. The letter subject of the first complaint only had the signature of the former Director, Recreation and Culture, with a notation indicating that a carbon copy of the letter would be sent to the Commissioner of Community and Recreational Services. Councillor DiVona's statement that he was never in possession of this letter appears to be, on a balance of information received during this investigation, a truthful one.

[35] However, Councillor DiVona did meet with employees who were subject of disciplinary action of the City. Although I can appreciate that the respondent harbored concern for the employees who requested a meeting with him on March 23, 2010, Rule 16 clearly states the principle for which it is considered inappropriate for Members to involve themselves in matters of administration or departmental management which falls within the jurisdiction of the City Manager. However, evidence in this investigation supports the assertion made by Councillor DiVona that his involvement was in response to certain employees' feelings of fear of reprisal for "sticking with to their story" and "coming clean".

[36] Rule 3 prohibits disclosing by any means, any confidential information acquired by virtue of their office. Therefore, if the respondent was privy to the disciplinary action that was discussed in the letter contained in the first complaint, he should not have brought any confidential letter, nor entertained any discussion in relation to confidential disciplinary actions to his meeting with the three employees at the March 23rd meeting. Although Councillor DiVona informs this investigation that he attended the March 23rd meeting with "his own file" and further informs that he did not disclose any letter or information to any individuals present at the meeting, statements by those in attendance lead to a conclusion that verbal comments were made that referenced some of or similar information that was contained in Mr. Compton's letter. However, it appears from information received during this investigation that some of the information contained in the 2007 letter and referenced at the meeting was subject of common knowledge among certain staff of the APCC.

Rules 7, 15 and 16

[37] Rule 7 states that no Member of Council shall use the influence of her or his office for any purpose other than for the exercise of her or his official duties. This rule embodies the principle of decision-making authority residing with Council and not individual Councillors.

[38] Rule 15 states that all Members shall conduct themselves with appropriate decorum at all times and, as leaders in the community, be held to an exemplary standard of behaviour.

[39] Rule 16 states that no Member shall use, or attempt to use, their authority for the purpose of intimidating, threatening, coercing commanding, or influencing any staff member with the intent of interfering in staff's duties, including the duty to disclose improper activity. Further, this rules states that no Member shall maliciously or falsely impugn or injure the professional or ethical reputation or the prospects or practice of staff and all Members shall show respect for the professional capacities of the staff of the City.

[40] Individual Councillors do not have any decision making authority conferred in legislation, nor do they have statutory powers to direct staff. In reality however, although not listed in the *Municipal Act*, the Municipal Councillor's Guide, states on page 3 that "[a Councillor] may attract [...] inquiries because of your background and interests, or the issues in your particular ward..." However, the Guide goes on to say that "...be sure to familiarize yourself with any policies or protocols that your municipality may have in place to minimize liability or for other specific reasons. Although you may want to find some way of helping, remember to consult municipal staff." Information received throughout this investigation demonstrates that Councillor DiVona, by virtue of his role as former Chair of the Audit, Budget and Finance Committees of the City of Vaughan, was often viewed as the "go to" Member in matters of fiscal control and service delivery. Further, Councillor DiVona was both a Member of Council and an active member of the APCC. This dual role further encouraged members of the public attending the APCC and staff, to refer to Councillor DiVona as the "go to" person regarding complaints in relation to the APCC. With reference to staff inquiries directed at Councillor DiVona, regrettably, here too, he was viewed as a "go to" Councillor. This meant that some staff who believed their work environment to be less than supportive by management, would bring their issues to Councillor DiVona for his intervention. Several senior staff at the City that were interviewed during this investigation stated that Councillor DiVona would, from time to time, bring forward staff "complaints" for them to investigate. In fact, in the current investigation, there is written evidence that indicates that staff involved in the events subject of the complaint, sought out the assistance of Councillor DiVona in personnel matters.

[41] There is sufficient written and oral evidence to substantiate a conclusion that Councillor DiVona was asked by employee #1 and #2 (whose complaint was submitted by Mr. Mooreland) to meet with him to discuss matters regarding the APCC silent auction. Although a member of the APCC, the Councillor was approached by employee #1 and #2 in his official capacity. Information received during this investigation identifies these employees as having stated that they "felt fear" and that Councillor DiVona was "our last hope". Councillor DiVona stated that he was asked by these employees to intercede on their behalf to bring the matter to the appropriate management staff for resolution in a safe environment.

[42] Significant to Rule 16 is the malicious and false attack on the professional or ethical reputation of staff. Black's Law Dictionary 7th ed. defines malicious intent as the intent, without just cause or reason, to commit a wrongful act that will result in harm to another. Malicious is defined by the City's Respectful Workplace Policy as resulting from a need to see others suffer. From the information that I have received during this investigation, Councillor DiVona appears

to have taken on a de facto role of preliminary investigator in complaints brought to his attention in relation to APCC, as well as, other matter, especially in his capacity as former Chair of the City's Audit and Operational Review Committee.

Rule 14

[43] In relation to workplace harassment, the Ontario Human Rights Code defines harassment as any comment, gesture, behaviour, contact or other activity which is unwelcome, personally offensive, injurious to morale, creates a hostile, intimidating or offensive environment or which could adversely affect the work performance or work environment or psychological well-being of a reasonable person in the complaining person's situation.

[44] Based on the provision contained in Rule 14 of the Code of Ethical Conduct, the investigation of the allegation of harassment shall be conducted by an independent investigator whose report will be utilized by the Integrity Commissioner in making a determination on the application of the Code.

[45] Both Mr. Compton and employee #2 represented by Mr. Steve Mooreland state in their complaints that the Councillor's actions could be defined as harassment. However, the information that this office received during the course of the investigation, including the report of the independent investigator, points to a Councillor that is "overly engaged" and "micromanaging", more so than abusing the power of office or being a bully. The events reviewed throughout this investigation beg the question of whether any involvement by a Member of Council into the management of departmental activities, even to protect employees from potential reprisals, is improper under the Code. Of importance is the situation created where matters subject of public complaints raise issues of staff performance. The route taken by a Member of Council to assist the public in addressing issues of concern should not include the Member conducting his or her own investigation into personnel or performance matters. That being said, what process is in place for a member of the public to bring forward a complaint against the actions of staff? What process is in place for a member of staff to bring forward a complaint against the actions of another member of staff in a supervisory role?

[46] The matters subject of this complaint investigation have beginnings that go as far back as 2007. I am barred by the Code's Complaint Protocol from considering in relation to a finding of contravention, actions and/or events that took place more than 6 months prior to the filing of the 2 complaints and certainly any events that took place prior to the Code coming into force on November 2, 2009. However, I have received all information from individuals during this investigation to gain a better understanding of the context within which the complaints arose.

[47] The premise of the 1st complaint against Councillor DiVona is that he pressured staff to provide certain information that could be used to discredit Complainant #1, in addition to attempting to impugn his reputation by circulating false information. Further, the 1st complaint alleges that Councillor DiVona interfered with the Human Resources investigation and that these actions constitute discreditable conduct.

[48] The Councillor did take the matters that were brought to his attention to the Commissioner, Community Services. The Commissioner stated in investigation interviews that he told the Councillor to tell the employee seeking his assistance, to follow-up with Human Resources if they were feeling harassed by and fearful of the Area Recreation Manager. By his admission, the Councillor took the issues to senior administrative officials. However, his statement was also that the employees, staff of the Area Recreation Manager, implored him to assist them because of fear they felt and felt that the Councillor was their last hope.

[49] The second Complainant stated in the complaint filed on their behalf by Mr. Steve Mooreland, that pressure was being put by the Councillor and employee #1 to do things and “stick to the story”. Councillor DiVona contends that “stick to the story” referred to his encouragement to employees to “stick to the truth” despite their concerns of reprisal from management.

[50] During the course of this investigation, there was no evidence adduced to support the allegation that Councillor DiVona was exerting pressure on employees 1, 2 and 5 to make comments detrimental to Complainant #1 although Councillor DiVona does not deny that he did not approve of many of the professional decisions made by Mr. Compton.

Conclusions

[51] The Code is a document that was unanimously adopted by Vaughan City Council as an agreement to a common understanding of rules regarding behaviour of individual Members of Council. Based on the information that I have received during this investigation and taking into consideration the findings of the independent investigator regarding the rules of the City’s Respectful Workplace Policy, this investigation makes following conclusions:

[52]

1. Councillor DiVona is and has been a member of the APCC and as such, is approached by many of the members and City staff on a regular basis regarding administrative and service delivery matters of the centre. Members of the APCC seek out Councillor DiVona’s assistance to escalate to senior management of City staff.
2. Notwithstanding the fact that Councillor DiVona may have found himself in the situation outlined in the Municipal Councillor’s Guide, which states on page 3 that “[a Councillor] may attract [...] inquiries because of [their] background and interests, or the issues in [their] particular ward...” as the Guide recommends, a Councillor must familiarize themselves with any policies or protocols of the municipality to minimize liability and to always consult municipal staff. A question mark arose for the Councillor when he followed existing protocols and still was advised by staff that they felt uncomfortable speaking with management.
3. Although with purported good intentions and in the best interests of the City and members of the public, Councillor DiVona’s actions in relation to matters at the APCC, demonstrate that he was “overly engaged” in the administrative matters of the centre insofar as an individual Councillor’s requirements under the Code.
4. Although Councillor DiVona did bring matters and complaints made to him by

the public and staff to the attention of senior management of the City for their appropriate action, he did continue to keep files on the matters and undertake, from time to time, his own independent investigations.

5. Councillor DiVona suggested to employees #1, #2 and #5 in the complaint under investigation, that they bring their substantiated concerns, fears and allegations to him in the form of letters which he would forward on to senior City officials, alleging the need to protect staff from reprisals.
6. Employee #1, #2 and #3 were found to have lied during the investigation conducted by the HR department.

[53] In the *Commentary* to Rule 1 of the Code, it states:

Members of Council recognize that the decision-making authority for the municipality lies with Council, not an individual Councillor and that it is the role of the officers and employees of the municipality to implement Council's decisions. Members of Council recognize and respect the role of City staff and affirm that only Council as a whole has the capacity to direct staff members. Council as a whole must be able to access information, on a need to know basis, in order to fulfill its decision-making duties and oversight responsibilities. Individual Members also recognize that the information that they receive as Members of the decision-making body of Council is subject to the confidentiality and disclosure rules of Provincial and Federal statutes and City of Vaughan bylaws.

[54] Throughout this investigation, members of the public that attend the APCC, members of staff who work directly or indirectly at the APCC and members of senior administration of the City have provided me comments and information that substantiate the contention that Councillor DiVona was “overly engaged” in matters of administration at the APCC. However I have **not** received credible or substantiated evidence to conclude that Councillor DiVona has:

- compelled staff to engage in partisan political activities or subjected them to threats or discrimination for refusing to engage in such activities;
- used undue influence to “swing” a member of staff towards a particular political position;
- maliciously or falsely impugned or injured the professional or ethical reputation of the prospects or practice of staff.

[55] The difficult challenge faced in this investigation was to navigate the murky waters of the role of an individual Member of Council.

[56] To be clear, this investigation and my powers do not extend over the efficacy of the City’s administrative actions, i.e. whether or not City staff or members of the public who bring legitimate complaints forward to the City administration meet with clear and effective procedures to address their issues in a healthy and safe work environment. Further, this investigation and my powers do not extend to a determination of evaluation of personnel or labour relations matters. However, without clear legislative definitions of the role of an individual Member of Council, or better, in the absence of any mention of the role of an individual Member of Council in the *Municipal Act*, where a complaint is brought forward to the

Integrity Commissioner, the actions of any one Member of Council must be evaluated in application of the existing rules of the Code, utilizing the fact gathered throughout the investigation.

[57] The inclusion in the Code of terms such as *maliciously, falsely impugn, intimidating, threatening, coercing* connote the intention to differentiate between intentional and inadvertent harmful behavior. As mentioned in the Preamble of the Code, “[a] written Code of Ethical Conduct protects the public interest and helps to ensure that the Members of Council share a common basis for acceptable conduct. These standards are designed to provide a reference guide and a supplement to the legislative parameters within which the members must operate.”

[58] Let me reiterate, *a common basis for acceptable conduct...a supplement to the legislative parameter within which the members must operate*

[59] When evaluating the integrity and ethical conduct of a Member of Council, my role is to apply the rules of the *common basis for acceptable conduct* to the facts gathered throughout the investigation. When making decisions on acceptable conduct, Members of Council are to follow the rules of the Code which *provide* them with *a reference guide and a supplement to the legislative parameters within which they must operate*.

[60] Councillor DiVona has adamantly explained his actions subject of this investigation by stating that he has frequently investigated matters that appeared to be improper, or irregular and made recommendations where he felt improvements were needed. He has admitted to “testing” the system to highlight the need for more adequate financial controls to defend the interests of the public purse. He has stated that members of the public and City staff have viewed him as their “last hope” as they have perceived the existing remedies to address their administrative, maintenance and personnel issues, as inadequate.

[61] Councillor DiVona has provided as a further explanation for his actions, that many Members of Council have acted in the same way, intervened on behalf of a member of the public or a member of City staff to assist and protect from reprisals or harm in an atmosphere of “harm”. I have been advised that I “do not understand the history of the City of Vaughan” and therefore, my understanding of certain actions lacks historical context.

[62] To be clear, my evaluation of the information that I gathered during this investigation has been objective and unbiased. In addition, given that there are current and ongoing labour relations matters, it would be inappropriate for me to comment in detail on certain aspects of the evidence I received. While I have no authority or involvement in staff, personnel and/or labour relations matters, commentary that I may include in this report that would identify the basis for my determination could prejudice the outcome of matters already pending.

[63] With respect to workplace harassment, in Ontario an employer must develop, implement and maintain its workplace harassment policy to include measures and procedures for workers to report incidents of workplace harassment to the employer or a supervisor. It must also set out how the employer will investigate and deal with incidents and complaints of workplace harassment. The *Ontario Human Rights Code* defines harassment as

Any comment, gesture, behaviour, contact of other activity which is unwelcome, personally offensive, injurious to morale, creates a hostile, intimidating or offensive environment or which could adversely affect the work performance or work environment or psychological well-being of a reasonable person in the complaining person's situation.

[64] Under the City of Vaughan's Procedure For Implementation of Policy Number 05.5.23 - Respectful Workplace, harassment is defined as

*A course of vexatious comment or conduct directed toward an individual or group of individuals that is known or ought reasonably to be known to be unwelcome or unwanted. Harassment consists of comments or conduct linked to one of the prohibited grounds, which are insulting, intimidating, humiliating, malicious, degrading or offensive. **Single acts of sufficient severity may constitute harassment.***

Personal Harassment is defined in the City of Vaughan's Policy No. 05.5.23 Respectful Workplace Policy (Harassment and Discrimination) and states

Properly discharged management responsibilities are not considered to be acts of personal harassment. Personal Harassment involves patterns or repeated incidents of comment or conduct of an excessive nature that are known or ought reasonably to be known to be unwelcome/unwanted, offensive, intimidating, hostile or inappropriate, but are not related to one of the prohibited grounds as defined in the Ontario Human Rights Code. Examples include but are not limited to: repeated negative attacks on an individual's personal or professional performance, excessive criticism in the presence of others, withholding information with the impact of affecting an individual's ability to do their job or tasks, and spreading malicious rumours or making malicious allegations on a repeated basis.

[65] Although I conclude that there was no credible factual evidence to support a claim that Councillor DiVona acted *maliciously* or *falsely* impugned the professional or ethical reputation or the prospects or practice of staff in relation to this complaint and although there is no credible or factual evidence to support a claim that Councillor DiVona threatened, coerced or commanded staff with the intent of interfering in staff's duties, Councillor DiVona's actions **did** have the result of an insertion into administrative practices. As mentioned above and in the City's Respectful Workplace Policy, the City's harassment policy applies to elected officials and "[e]lected representatives are also governed by the Council Code of Ethical Conduct and any complaints about an elected representative are addressed under [the Respectful Workplace Policy], but through a process defined by Rule 14 of the Code..." In short, the City's policy applies to all elected representatives, however, the City's Human Resources Corporate Respectful Workplace Policy Coordinator cannot appoint an employee or external investigator to facilitate and recommend appropriate disciplinary or corrective measures when a complaint of harassment has been substantiated in relation to a Member of Council. Appropriate corrective measures are recommended to City Council by the Integrity Commissioner following the investigation of a complaint relating to Rule 14.

[66] Members of Council are held to a higher standard of behaviour than other members of the public. This is often perceived as unfair. However, the Code, the agreed up common basis for acceptable conduct, states that City of Vaughan Members of Council “recognize their obligation to not only obey the law, but to go beyond the minimum standards of behaviour and act in a manner that is of the highest ethical ideals so that their conduct will bear the closest public scrutiny”.

[67] If a Member of Council finds fault in the efficacy of existing administrative practices, the remedy available to them is to bring such concerns to the City administration. Where a Member of Council believes that the issue has not been properly addressed and resolved by the City administration, the remedy is to bring the matter to the City Manager and the appropriate Committees of City Council. While I can appreciate the challenging situation that a Member of Council may face when a member of City staff brings complaints forward to them alleging an atmosphere of fear and actions of bullying by supervisors under the guise of strong management, the Code of Ethical Conduct prohibits Members of Council from involving themselves in matters of administration or departmental management which fall within the jurisdiction of the City Manager, even when the Members perceive internal complaint processes to be lacking or leading to unfair or ineffective outcomes.

[68] If the explanation for interference with good intentions, into the administration of the City personnel and management issues is that members of the public or City staff are fearful of reprisals by their supervisors to the point of termination, this is a problem that goes beyond my jurisdiction to evaluate or adjudicate. Further, my jurisdiction does not permit an investigation into a Member’s adherence to the Respectful Workplace Policy. This falls within the ambit of an independent investigator pursuant to the City’s harassment policy and the Rule 14 of the Code. If there is clear and compelling factual evidence contained in the independent investigator’s report that a Member of Council has contravened the harassment provision of the Respectful Workplace Policy, this would weigh very heavily in favour of a finding of a contravention by the Member of Rule 14 of the Code. However, the independent investigator’s report is utilized by the Integrity Commissioner in making a determination on the application of the Code, in addition to the merits of all other information gathered by this office

[69] There have been serious issues of credibility raised in relation to some of the statements in support of allegations made by Complainant #2 . Further, there is sufficient evidence to conclude that there have been negative remarks made by the Respondent on Mr. Compton’s professional performance and therefore, that there has been a violation in part, of the Personal Harassment section of the Respectful Workplace Policy. This was also the conclusion reached in the report by the independent HR investigator.

Findings

[70] As mentioned earlier in this report, I exercised my discretion and made the decision to undertake one complaint investigation to deal with both complaints. I find that there is insufficient substantiated or credible evidence received by this office during the course of the

investigation to conclude that the Respondent contravened Rules 3, 7, 15 and 16 of the Code.

I find that although the information that I have received throughout this investigation strongly supports the conclusion that Councillor DiVona **did not** spread malicious rumours or make malicious allegations on a repeated basis, there is sufficient evidence to conclude that there has been a contravention of Rule 14 of the Code, based on the definitions contained in the City of Vaughan's Policy No.05.5.23, in relation to Councillor DiVona having made negative remarks on the professional performance of Complainant #1.

Recommendation

[71] The Office of the Integrity Commissioner recommends the following:

With a view to clearly delineating the boundaries of appropriate and reasonable actions by a Member of Council in relation to complaints received regarding City staff,

1. That Council require the appropriate City department to clearly indicate the policy and processes currently available to members of the public and members of City staff for submission of complaints in relation to corporate matters for independent review.

2. That Council require the appropriate City department to consider the development of a protocol for Members of Council in relation to handling of complaints from members of the public and members of City staff regarding decisions and actions of the City administration.

3. That pursuant to the Procedure For Implementation of Policy Number 05.5.23 Respectful Workplace, all City individual to whom the City's Respectful Workplace Policy applies, attend mandatory training on the prevention of workplace harassment and discrimination and their rights and obligations under the policy.

Prepared by:

Suzanne Craig
Integrity Commissioner

September 8, 2010