

COMMITTEE OF THE WHOLE MAY 11, 2010

REPORT OF THE INTEGRITY COMMISSIONER IN RELATION TO COMPLAINT FILE #11.17.09(A)

Recommendation

Integrity Commissioner Recommendations:

That the attached investigation report that concludes with a finding that Councillor Carella did not violate the Code of Ethical Conduct, be received and adopted by City Council.

Contribution to Sustainability

N/A

Economic Impact

N/A

Communications Plan

The Complainant and the Member of Council have received copies of the attached investigation report. In addition, this report has been placed on the public agenda of the Committee of the Whole meeting scheduled for May 11, 2010.

Purpose

To report to City Council the findings from the investigation of complaint File # 11.17.09(a)

Background

In this complaint, the Complainant alleged that Councillor Carella breached rules 1(a), (b), (g), (h), 9(1), 13(1), 15(1) and 18(1) of the Code of Ethical Conduct.

The rules of the Code that were raised by the Complainant require an elected Member of Council to serve and be seen to serve their constituents in a conscientious and diligent manner, perform their functions with integrity and transparency, perform official duties and arrange their public affairs in a manner that promotes public confidence and respect and that will bear close public scrutiny, uphold the letter and spirit of the laws of Canada. Further, the rules require an elected Member of Council to encourage public respect for the City and its by-laws and conduct themselves with appropriate decorum at all times.

As a result of the investigation and findings, the Integrity Commissioner will be meeting with the City Manager and other appropriate staff to discuss the development of further protocols to address the matter of Members of Council responding to questions from members of the public.

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 for File 11.17.09(a)

Report prepared by:

Suzanne Craig
Integrity Commissioner

Respectfully submitted,

Suzanne Craig
Integrity Commissioner

RE: COUNCILLOR TONY CARELLA
File: 11.17.09(a)

[1] On November 17, 2009, a complaint by a private citizen was received by the Office of the Integrity Commissioner. In the request, the private citizen (the "Complainant") asked the Office of the Integrity Commissioner to investigate into alleged breaches of Rules 1(a), (b), (g), (h), 9(1), 13(1), 15(1) and 18(1) of the Code of Ethical Conduct (the "Code").

[2] The complaint relates to allegations that the Respondent did not respond with clear and understandable information to email correspondence relating to taxpayer and resident issues.

[3] On November 18, 2009 the Office of the Integrity Commissioner confirmed receipt of the formal complaint and advised the Complainant and the Respondent that a complaint file had been opened.

[4] This complaint is governed by the interim 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.

The Complaint

[5] In the complaint, the Complainant alleged that Councillor Carella breached Rules of the Code, which require an elected Member of Council to serve and be seen to serve their constituents in a conscientious and diligent manner, perform their functions with integrity and transparency, perform official duties and arrange their public affairs in a manner that promotes public confidence and respect and will bear close public scrutiny, uphold the letter and spirit of the laws of Canada, encourage public respect for the City and its by-laws and conduct themselves with appropriate decorum at all times.

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

[6] Sections 3 and 5 of the interim Complaint Protocol (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

[7] The Complainant forwarded an email to the Respondent on May 17 and 20, 2009 requesting access to their personal information contained in the Respondent's constituency records.

[8] The Complainant had previously made a request to the City through the Freedom of Information process for their personal information contained in the constituency records of his elected official for the period of January 1, 2004 to March 5, 2009.

[9] The City Clerk's Office responded to the Complainant's access request by advising that the personal information contained in constituency records is exempt from the access provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) as the records are not in the custody and control of the City of Vaughan.

[10] On May 20th and May 25th, 2009, the Respondent answered the Complainant's May 17th and 20th email by stating that he didn't maintain any files on non-constituents and that any email he had received or responses he gave to the same are held in the City of Vaughan's email archives.

[11] On May 24, 2009, the Complainant forwarded another email to the Respondent requesting information on legal costs incurred by the City of Vaughan. Emails were further sent by the Complainant on September 9th, November 3rd and November 4th, requesting information related to the same topic.

[12] On May 25, 2009, a named individual who was copied on the Complainant's May 24, 2009 email regarding Vaughan Legal Fees Reporting sent an email to the Respondent as a follow up to the Complainant's May 24th email. In this email, the named individual referred to and attached the Complainant's May 24th email and continued with an elaboration on the discussion and request for information relating to Vaughan legal fees reporting, initiated by the Complainant.

[13] In his May 25th email response to the named individual and the Complainant, the Respondent stated the following:

"Given the nature of your various enquiries, and the fact that they deal with operational issues, I believe Regional Councillor Rosati, as chair of the Audit and Operational Review committee, is better placed to respond. I do note that he has already requested, with Council's endorsement, a staff report on these matters."

[14] The Respondent's May 25th email response was sent to the Complainant, the named individual and Regional Councillor Rosati, in addition to copies being sent to Members of Council and other individuals.

[15] On May 26, 2009, the Respondent sent a further response to subsequent emails on the same matter stating:

"...I too am interested in full disclosure (as evidenced both by my request for detailed information on compliance audit costs and my support of [Regional] Councillor Rosati's motion for a report on all legal costs). As what you request is what I expect to see in the report on legal costs, [my requesting the same report would be redundant]."

Relevant issues that arise out of the complaint

Constituency records

[16] In Ontario at the Municipal level, MFIPPA provides a right of access to records of municipal institutions. Section 4(1) of MFIPPA states that:

Every person has a right to access to a record or a part of a record in the custody or under the control of an institution unless the record or a part falls within one of the exemptions under sections 6 to 15.

[17] However, even information originating from non-institutions may be deemed to be in the custody or control of an institution covered by MFIPPA if a number of factors are determined to exist. These factors include determining what use the creator of the records intended or whether the content of the record relates to the institution's mandate and functions.

[18] In the Information and Privacy Commission of Ontario (IPC) Order M-813, the Inquiry Officer found that the City subject of the appeal did not have custody or control of the records as they were constituency records of the Councillor and they had not been provided to City Council or integrated with records held by the City.

[19] An accepted principle of the IPC jurisprudence is that constituency records of elected officials and Members of City councils (except for the Mayor who is an officer of the corporation) are not covered by the right of access through the FOI process contained in MFIPPA.

[20] At the municipal level, there is no central body such as the Archives of Ontario, which is responsible for ensuring that all municipalities properly manage recorded information. Instead, each municipality is responsible for complying with records management provisions in various pieces of legislation.

[21] Although the term "constituency record" has not been defined in MFIPPA, directives and policy papers in Ontario and Alberta, for example, have attempted to gather criteria to identify what may be classified as constituency records. For example, a record that deals with the political activities of an elected official of a local public body, including campaign issues, may be classified as a constituency record. These records may be subject to other legislation such as the *Municipal Elections Act*. In orders of the IPC, the exclusion from MFIPPA has not been confined only to records relating to political organizing and elections. Constituency records generally relate to constituency business and this may include an inquiry about an activity in the constituency and a request for action from a public body.

Ward Councillor

[22] There is no definition of the role of a municipal Councillor in the *Municipal Act*. The Ontario Municipal Councillor's Guide states a Councillor has "...a representative, a policymaking and a stewardship role to play..." in the municipality. It goes on to say on page 3 that municipal Councillors "...were elected by [their] constituents to represent their views as closely as possible when dealing with issues that come before council." "In practice, there is no single, correct approach to the representative role..."

[23] Some municipalities have introduced protocols or policies aimed at managing, to some extent, how Members of Council assist with issues and requests regarding another Member's Ward. For example, at the City of Toronto, if a Ward Councillor will not assist a constituent for whatever reason, another Member of Council may intervene provided the Ward Councillor is given a heads up and an opportunity to assist. This is a courtesy protocol and not a requirement in legislation.

Responding to questions from members of the public

[24] Questions from members of the public inquiring about decisions made and decision-making processes of the City should be answered by the appropriate City staff. Where Members of Council require clarification from City staff on matters relating to decisions made relating to City business or Council resolutions, Members should follow the approved City processes that would bring the matter that requires clarification properly before Committee or City Council. Of note is Policy No.:03.26 "Response By City Staff Too Requests For Information From The Public". This

policy articulates the role of City staff in responding to requests for information from members of the public.

[25] Answers to questions that pertain to day-to-day City business, transactions and policy fall within the mandate of the city administration.

[26] The commentary of Rule 9 of the Code of Ethical Conduct clarifies that "...Members of Council should clearly identify to the public how a decision was reached and upon which law, procedure and policy their decision was based."

Rules of the Code

Rules 1(a), (b), (g), (h), 9(1), 13(1), 15(1) and 18(1)

[27] Rule 1(a) of the Code requires a Member of Council to serve and be seen to serve their constituents in a conscientious and diligent manner. Of assistance in better understanding the parameters of this rule, we can look at the general definition of diligent. The Webster's dictionary definition of "Diligence" is:

1. Conscientiousness in paying proper attention to a task; giving the degree of care required in a given situation.
2. Persevering determination to perform a task;
3. A diligent effort; "a job requiring serious application".

[28] Rule 1(b) of the Code requires Members of Council to recognize the public's right to reasonable access to information in relation to how decisions are made, which includes the right to receive complete and understandable information. As I have pointed out in previous report findings, a Member of Council cannot insert him or herself in the day-to-day administration and implementation of City decisions. However, Council as a whole and overseer of the legitimate interests of the City, must obtain information through the appropriate processes and pursuant to the rules of the procedural by-law and other City policies, in order to carry out its function in a conscientious and diligent manner. What this means is that in his or her role as an individual Member of Council, responses to questions about how decisions are made will generally either be sought through referral to the appropriate City staff or through the appropriate process, i.e. raising a matter before an appropriate Committee.

[29] Rule 1(g) of the Code requires Members of Council to avoid activities that grant or appear to grant, any special consideration, treatment, or advantage to an individual which is not available to every other individual member of the public. This Rule requires that Members of Council treat all members of the public and entities that come before Committee or Council with parity and due consideration according the policies of the City. A prohibition on granting special consideration to relatives or a particular company or group is central to this Rule's application.

[30] Rule 1(h) of the Code requires Members of Council to uphold the laws in force at the municipal, provincial and federal levels of government. In essence, this Rule aims at ensuring that Members understand that their obligations under the Code supplement and are applied in concert with their statutory obligations contained in other laws of Canada.

[31] Rule 9(1) requires Members of Council to clearly identify to the public how a decision was reached and upon which law, procedure or policy their decision was based. This Rule works in concert and reinforces the key principle found in Rule 1(b) that Members of Council should be committed to identifying to the public how a decision of Council was reached, upon which law or policy the decision was based, so that members of the public can view the City's decision-making processes and rationale used to reach decisions. This is an important component in the

accountability regime insofar as;

“increased access to information about the operations of government would increase the ability of members of the public to hold their elected representatives accountable for the manner in which they discharge their responsibilities” Williams Commission Report, 1980

[32] Rules 13(1) and 15(1) uphold the principles of respect of City by-laws and Members' obligation to conduct themselves in an exemplary manner.

Analysis

[33] It appears as though the primary concern raised by the Complainant is his contention that the Respondent has not responded to his email correspondence of May 24th, September 9th, November 3rd and 4th and therefore has not addressed his request for information on when and how there can be more transparent reporting of legal costs at the City of Vaughan.

[34] The information that I have obtained through investigation identifies that the Respondent sent an email response on May 25th to the Complainant's request for personal information contained in constituency records. It is not within my authority to make a determination on whether the constituency records that the Complainant sought are *in the custody or under the control* of the City of Vaughan. However, it does appear as though, if the Respondent did keep email constituency records, these would not be accessible through a right of access under MFIPPA, nor would there be any instrument including the Code provisions, that compel the Respondent or any Member of Council to provide access to the Members' personal constituency records.

[35] The Respondent has stated that the Complainant is not his constituent and that he does not maintain any files on individuals who are not his constituents. The Respondent goes on further to state that emails he receives or sends are “retained in the City's email archives”. Some of the criteria that the IPC may use when considering whether a record is in the custody or under the control of a municipal institution are:

- whether the record is closely integrated with other records of the public body;
- whether the public body has the authority to regulate the record's use and disposition;
- whether the record is in the possession of the public body.

[36] The determination that I must make with reference to this complaint is not if the constituency records of the Respondent are in the custody or under the control of the City of Vaughan, but rather, whether the Respondent provided a clear and understandable response the Complainant, within the meaning of the Code.

[37] As I have pointed out in a previous report, the obligations contained in Rules 1 and 9 are not intended to be the default vehicle through which the public seeks remedy for every unanswered question asked of the City. The Code of Ethical Conduct has been adopted by Members of Council as a common understanding of their agreement and their commitment to follow rules of integrity, transparency and accountability. That being said, I note that there are some members of the public who notwithstanding my insertion of this explanation and clarification in my previous report, continue to attempt to manipulate the Code to serve purposes for which it was not intended. For clarity, the statement that I made in the previous sentence does not refer to this complaint.

[38] The issue regarding the role of Ward Councillors and how they interact with the residents in their ward as opposed to residents in another Councillor's ward is not within my authority to

determine. The question of whether there should be a protocol that sets informal guidelines for how a Councillor deals with requests for assistance from individuals from another Member's ward is a question that was touched on very briefly at a Council meeting this year. However, my comment then and now is that any discussion on that issue is not relevant to the Code until such time as there is a decision by Members of Council, in concert with advice from staff, on whether there is a need for a protocol and, if so, the pros and cons to the development of such a protocol.

[39] However, whether a member of the public is a resident of a particular ward does not preclude them from receiving guidance on where and how they can receive clear and understandable information regarding how decisions are made at the City.

[40] The Respondent appears to have provided the Complainant with an answer to the question of access to constituency records, as well as, the initial question on Vaughan Legal Fees Reporting. The Respondent's initial response referred the Complainant to the Chair of the Audit and Operational Review Committee as the appropriate area of the City within which to obtain information in relation to the query. Further, the Respondent noted and informed the Complainant that a staff report on the matter had been requested and endorsed by Council.

[41] The email sent to the Respondent on May 24th had in the subject line "Vaughan Legal Fees Reporting". The subject line in the September 9th email was "Vaughan Council Must Disclose Legal Cost To The Public". Finally in the emails of November 3rd and 4th, the subject lines had the indicators "\$150 Million Lawsuit Absent From Financial and \$225,450.60 Cost Award Also Missing" and "Vaughan Council Must Disclose Legal Cost To The Public" respectively.

[42] As I stated in my previous report, *reasonable access to information in relation to how decisions are made* does not put a requirement on individual Members of Council to directly answer every question posed by a member of the public and to the extent to which the member of the public deems the answer to be satisfactory. Further, I stated that the inclusion of the word "reasonable" in the *Commentary* to the Code reflects the fact that performing their functions with integrity and transparency does not require Members to afford any and all access to information on how decisions are made and certainly their performance must be balanced against the requirement to protect the legitimate interests of the City.

[43] Although the thrust of each of the emails subject of this complaint is the desire shared by the Complainant and other members of the public to have greater transparency in the City's reporting of costs associated with legal fees, the substance and content of each email does differ. In response, the Respondent sent an email regarding the May 24th email referring the Complainant to the Chair of the Audit Committee and the upcoming staff report dealing with the matter. He states his belief that the questions posed in the Complainant's subsequent emails would be addressed in the staff report, in addition to, subsequent discussions at Budget Committee and Audit Committee.

[44] Although the information that I have obtained through the investigation of this complaint does not, in my view, lead me to conclude that there has been a contravention of the Rules of the Code by the Respondent, there appears to be a gap in the link between the public's understanding of how they may legitimately bring issues of importance before Council and how they can request certain information that they require to submit their positions and displeasure with the actions or omissions of Council, with a view to holding City Council accountable for such decisions.

[45] There appear to be two significant issues at the heart of this complaint. The first is whether the Respondent Member of Council answered the questions of the Complainant. The second is what are the appropriate avenues through which members of the public may bring

forward matters of common or general interest or application which may involve significant review or research and which may be required to be the subject matter of a deputation by members of the public so that Council is given the opportunity to determine the priority and detail of the response.

[46] Neither the question regarding access to personal information contained in constituency records nor the question regarding Vaughan Legal Fees Reporting are procedural in nature. The questions cannot be answered by pointing to a bylaw or a policy of the City or a direction of Council. With the first question, the Complainant asks the Respondent for access to his constituency records. With the second the Complainant asks the Respondent for more detail to be provided to the public in relation to City of Vaughan Legal Costs.

[47] The first question was answered by the Respondent. Although the question of access to constituency records remains a matter debated in academic and political circles across Canada, finding an answer to this substantive issue is very much beyond the purview of any one Member of Council. Whether information contained in records is in the custody and under the control of a municipal organization, is a matter to be determined by the appropriate office of the City that deals with formal access to information legislation in application of the provisions of MFIPPA.

[48] Although the second question received an email response from the Respondent, the substance of the questions in the email was not answered. However, based on the information that I obtained and the questions that I asked, the second question, or better, the questions raised in the May 24th, September 9th, November 3rd and 4th emails, could not be answered by the Respondent. An individual Member of Council does not have status as a decision-maker under the provisions of the *Municipal Act*. In fact, the *Code Commentary* captures this principle under Rule 1 page 7 states that:

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 and establish administrative practices and procedures to carry out council's decisions...

[49] In a 2003 IPC Order [PO-2128], the Commission took the position adopted in the *Maranda* case [Quebec Court of Appeal] which held that:

"[t]he mere disclosure of payment *per se* does not breach privilege. As it is considered a 'fact' and not a 'communication', the payment of fees *per se* can be dissociated from all that is inherently part of the solicitor-client relationship and which is therefore privileged", and "its disclosure does not compromise the *raison d'être* underlying privilege", namely the protection of confidential communications between solicitor and client that relate to the seeking, formulating, or giving of legal advice."

The above reference was made by way of example of how many government organizations have debated the right of access to legal fees not only through the freedom of information process but also through the courts.

[49] This takes us back to the gap in the link between the public's understanding of how they may legitimately bring issues of importance before Council and how they can request that their elected officials provide certain information that they require with a view to holding City Council accountable for decisions.

[50] Should members of the public have access to constituency records? Should municipal organizations provide more transparent reporting of the expenditure of public funds? These are certainly not questions to be debated through email correspondence but rather through

discussions at appropriate Committees of Council with the matters being brought forward through approved procedures of the City. The question of where the public can obtain a clear articulation of what procedures are to be followed for appropriately bringing forward matters of importance before Council for debate and how the processes for government decision-making and government spending are made accessible and transparent to the public are areas that need clarification.

Conclusions

[51] At the conclusion of a complaint investigation, the Integrity Commissioner may make recommendations on sanctions to Council. The sanctions that may be imposed are a reprimand or suspension of the remuneration paid to the member of Council.

[52] I conclude that in the above-noted complaint under investigation, Councillor Carella did not violate the Code of Ethical Conduct.

Suzanne Craig
Integrity Commissioner