

COMMITTEE OF THE WHOLE JUNE 15, 2010

REPORT OF THE INTEGRITY COMMISSIONER IN RELATION TO COMPLAINT FILE #12.08.09

Recommendation

Integrity Commissioner Recommendations:

That the attached investigation report that concludes with a finding that Mayor Linda Jackson 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 June 15, 2010.

Purpose

To report to City Council the findings from the investigation of complaint File # 12.08.09.

Background

In this complaint, the Complainant alleged that Mayor Linda Jackson breached rules 1(a), (b), (c), (d), (e), (g), (i), 2, 3, 4, 5, 7, 9, 10, 14,16, 18 and 19 of the Code of Ethical Conduct.

The rules of the Code that were raised by the Complainant require an elected Member of Council to demonstrate respect for members of the public, to not participate in activities that grant, or appear to grant, any special consideration, treatment, or advantage to an individual which is not available to every other individual, follow the rules of the Councillors' Expense Policy, not to accept a personal benefit that is connected directly or indirectly with the performance of his or her duties of Office, except as specifically contemplated and to conduct and convey Council business and their duties in an open and transparent manner.

As a result of the investigation and findings, the Integrity Commissioner recommends that the City consider making publicly available how the City Council adopted recommendations of the external auditor were implemented to the satisfaction of the Audit Committee and the established accounting principles employed by the City Auditor. This would provide to the public the clear policies against which the Mayor's submissions were measured to satisfy the requirement of supporting documentation in compliance with the direction of City Council.

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 #12.08.09

Report prepared by:

Suzanne Craig
Integrity Commissioner

Respectfully submitted,

Suzanne Craig
Integrity Commissioner

**RE: MAYOR LINDA JACKSON
File: 12.08.09**

Background

[1] A complaint was received by the Office of the Integrity Commissioner from a private citizen. This request was received prior to the resolution by Council through which the Complaint Form/Affidavit was amended to include the disclosure of the name of the Complainant in the complaint investigation report to Council. 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), (c), (d), (e), (g), (i), 2, 3, 4, 5, 7, 9, 10, 14, 16, 18 and 19 of the Code of Ethical Conduct (the “Code”).

[2] The complaint relates to allegations of contraventions of the Code in relation to comments and responses by Mayor Linda Jackson regarding her office expenses and compliance with the Council adopted recommendations of the external auditor report of Ernst and Young (the “external auditor report”).

[3] 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. By request of the Complainant, in February 2010, this complaint was put on hold. As the Complaint Protocol is silent on the procedure that is to be followed if a complainant makes a request to suspend a complaint, I exercised my discretion and provided the Complainant with an opportunity to withdraw the complaint.

[4] I was later advised by the Complainant that they did not wish to withdraw their complaint and I therefore, continued with the investigation of this complaint.

[5] 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.

The Complaint

[6] In the complaint, the Complainant alleged that Mayor Linda Jackson breached rules of the Code, which require an elected Member of Council to demonstrate respect for members of the public, to not participate in activities that grant, or appear to grant, any special consideration, treatment, or advantage to an individual which is not available to every other individual, follow the rules of the Councillors' Expense Policy, not to accept a personal benefit that is connected directly or indirectly with the performance of his or her duties of Office, except as specifically contemplated and to conduct and convey Council business and their duties in an open and transparent manner.

The Relevant Provisions of the Complaint Protocol for the Code of Ethical 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] A complaint was filed with the Office of the Integrity Commissioner during the tenure of the previous Integrity Commissioner. Following my appointment to this Office in February 2009, I took carriage of the file and a decision was rendered to the Complainant. Subsequent to the Integrity Commissioner Report submitted to the Committee of the Whole meeting of September 8, 2009, the City Auditor submitted a report to City Council in February 2010 and a new Councillor Expense Policy was adopted by City Council by resolution at the March 9, 2010 meeting.

[9] Although some of the issues brought forward by the Complainant in this complaint appeared to be related to the issues subject of investigation file # 9.25.08, a preliminary review and subsequent investigation determined that there were issues that were separate from those of file# 9.25.08 and those have therefore formed the basis of the

current investigation.

[10] The Mayor met with the Chair of the Audit and Operational Review Committee (the “Audit Committee”) and the City Auditor to discuss outstanding issues that arose out of the Council adoption of the external auditor report recommendations contained in the Mayor’s City Related Expenses supplemental report. The Mayor provided all documentation requested by the City Auditor and other City staff.

[11] A review of telephone use expenses for the Mayor’s office incurred in 2009 that were alleged to be disproportionately high in relation to similar expenses of other Members of Council shows that 2 members out of the 9 Members of Council had office telephone expenses below the \$1,000.00 amount cited by the Complainant and that the expenses incurred were substantiated by reasonable duties of office.

[12] Following the completion of the external auditor investigation and submission of the final report by Ernst and Young, the City Auditor completed a review of outstanding issues and receipts relating to the Mayor’s office expenses. Both the City Auditor and the Audit Committee of the City of Vaughan determined that the Mayor had provided responses to their satisfaction in relation to the issues that remained outstanding following the external auditor report.

[13] The Complainant alleges that the Mayor refused to submit receipts to the City Auditor. In relation to this issue, the information received in this investigation demonstrates that although the Mayor may not have provided all the receipts recommended by the external auditor report, the Mayor provided the information in lieu of the receipts which met the requirements of the City Auditor in compliance with standard accounting principles.

[14] The Complainant alleges that the Mayor made statements that constituted a breach of public trust. Although the complaint infers that the Mayor’s actions and comments were predicated on the Complainant having exercised their right to seek an external investigation of the Mayor’s Office expenses, the Mayor’s assertion that her comments reflected what she believed to be true has been substantiated by the information obtained in this investigation.

[15] The complaint included an issue separate from that of the Mayor’s Office expenses and submission of receipts. The Complainant alleges that the Mayor made false statements to the Committee of the Whole at the meeting of September 8, 2009 regarding the collective wish of residents who signed a petition to have the petition received as a separate from the comments of a deputant. From the information gathered in this investigation, it appears as though a group of residents did request that their petition be submitted to the Committee of the Whole as a separate item for consideration and there did not appear to be any connection between their desire to have the petition be considered separately before the Committee.

Findings

[16] 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.

[17] 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.

[18] 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.

[19] In this investigation, the issue of whether the matter subject of the complaint had already been determined in the disposition of report of the Integrity Commissioner's report #38, item 27, was relevant.

[20] Section 6(f) of the Complaint Protocol provides the Integrity Commissioner with the authority to advise a complainant to pursue the matter subject of the complaint either under another policy or with the appropriate body and/or in his/her sole discretion, suspend any investigation pending the result of the other process. Although neither the Code nor the Complaint Protocol contain a specific dismissal authority similar to what lawyers call "res judicata" (already decided), a short discussion around this principle may be useful for the purposes of understanding the reasoning employed in this investigation in relation to the decision to investigate, in part, the complaint based on the finding that another investigation of this office had appropriately dealt with the substance of some parts of the complaint.

[21] The normal "res judicata" principle, widely recognized in law, is that where a cause of action or issue between parties has been previously resolved by a tribunal (or court), that it may not be re-litigated there or elsewhere between any of the same parties. (Spencer, Bower and Turner in the 2nd edition of *The Doctrine of Res judicata*)

[22] Several administrative tribunals have incorporated the principle of "res judicata" into the rules of procedure. In essence, the principle is invoked to avoid the abuse of process to prevent litigants from relitigating causes of action and issues.

[23] One leading case on a species of "res judicata", issue estoppel, is *Carl Zeiss Stiftung v. Raynor & Keeler Ltd., (No. 2)* [1967] 1 A/C/ 853, [1966] 2 All E.R. 536 (H.L.) states:

...it may be convenient to describe res judicata in its true and original form as “cause of action estoppel”...Within recent years the principle has developed so as to extend to what is described as “issue estoppel”, that is to say, where in a [...] decision between the same parties some issue which was in controversy between the parties and was incidental to the main decision has been decided ...

and:

The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised...
finally:

It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgement...The question out of which the estoppel is said to arise must have been “fundamental to the decision arrived at” in the earlier proceedings...

[24] The preliminary task at hand in this complaint was to determine whether the issues in the complaint investigation 9.25.08 concluded with Integrity Commissioner report #38, item 27 were the same as the issues alleging breach of the Code raised by the Complainant in the complaint currently before this Office.

[25] It was my preliminary finding that there was no evidence to support the investigation of allegations put forward in point 3 of the complaint. It was my preliminary finding that issues raised in points 7, 8, 9 and 10 of the complaint were addressed in the Ernst & Young external audit final supplemental report and the Integrity Commissioner report #38, item 27.

[26] It was my preliminary finding that issues raised in the complaint under points 2 (b), 4, 5 and 6 of the complaint did not arise in the earlier complaint filed with this Office. The additional allegations raised by the Complainant were subject of complaint 9.25.08 of this Office and were addressed in the report by the Integrity Commissioner #38, item 27 adopted by City Council at its meeting of September 21, 2009.

[27] Therefore, there was no evidence to support the investigation or continued investigation into breaches of sections 1(d), (e), (i), 3, 5, 7, 10, 14, 16 and 19 of the Code contained in the current complaint.

Contravention of rules of the Code

Rule 1, 2, 4 and 18

[28] Rule 1 of the Code requires a Member of Council to carry out their official City activities in a way that will foster and enhance respect for government and demonstrate respect for the public. Further, this rule establishes the public's right to reasonable access to information in relation to how decisions have been made at the City. Under rule 1, Members of Council are required to avoid the improper use of the influence of their office and conflicts of interest, both apparent and real, while performing their official duties in a way that promotes public confidence and bear close public scrutiny.

[29] As in other investigations of this office to date, the findings have given practical application to the meaning, although not exhaustive, of what constitutes the ethical decision-making and behaviour with integrity for Members of City Council. The Code of Ethical Conduct for the City of Vaughan requires that Members of City Council carry out their duties with impartiality and equality of service to all, recognizing that as leaders of the community, they are held to a higher standard of behaviour and conduct.

[30] The Complainant alleges that the Mayor refused to submit and provide documentation for outstanding expenses in compliance with the Council adopted findings and recommendations of the external auditor report. Based on the information that I have received during the course of this lengthy investigation, the Mayor provided information to the Audit Committee and the City Auditor, to their complete satisfaction. In some cases, where documentation was unavailable, reasonable and satisfactory information was provided to meet the requests of Committee and the City Auditor.

[31] There is no evidence to substantiate a finding of a contravention of Rule 1.

[32] Rules 2 and 4 of the Code contain the requirements for Members of Council regarding Gifts and Benefits and the Use of City Property, Services and Other Resources. While the latter rule requires Members to refrain from the use of City property, equipment, services and supplies for personal purposes or financial gain, the former prohibits Members from accepting a personal benefit that is connected directly or indirectly with the performance of his or her duties of Office, except as specifically contemplated. Rule 18 states that Members shall adhere to such by-laws, policies and procedures adopted by Council that are applicable to them. In the commentary to the rule, Members are directed to pay special attention to, and comply strictly with the Councillors Expense Policy.

[33] The Mayor has complied with the requirements of the Audit Committee and the City Auditor to their satisfaction and according to the measures of compliance set by the same for reimbursement of expenses. In this investigation my mandate was restricted to a determination of a Member's adherence to City expense policies insofar as their adherence relates to compliance with the rules of the Code. The information that I have obtained through this investigation leads to a finding that the Mayor was in compliance

with the requirements of City Council's adoption of the external auditor report in relation to reimbursement of expenses to the satisfaction of the City Auditor.

[34] There is no evidence to substantiate a finding of a contravention of Rules 2, 4 or 18 of the Code.

Rule 9

[35] The principles of transparency and accountability in ethical decision-making at the City form the basis of the Code, in addition to, the spirit of the document itself. More specifically, the commentary to Rule 9 states that:

Various statutes, City by-laws, policies and procedures, as well as, decisions of courts and quasi-judicial tribunals form the basis of decisions made by City Council. Unless prohibited by legislation or by-law, 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.

[36] Often when completing a report, one must ask the question "What is the purpose of this report?" In the case before us, the purpose of this complaint investigation report is to determine whether or not the Respondent has breached rules of the Code, make recommendations on sanctions if relevant and report the findings to Council. In so doing, the purpose of this report is to comment on the application of the rules of the Code as they relate to the actions of the Respondent. The purpose is not limited to a determination of a contravention of the Code or non-contravention. With reference to the Mayor's expenses, the external auditor reports clearly identified that there were problems with the requirements or lack thereof, of supporting documentation for reimbursement of expenses. However, the problems appear to have been addressed by the rules of the new Council Member Expense Policy.

[37] I would be well within my authority to stop here. Some may suggest that my authority requires me to stop here. However, I submit that my mandate conferred by City Council and the duties contained therein are relatively broad in scope.

The City of Vaughan's website, under the heading Integrity Commissioner duties, includes:

- To provide Council with specific and general opinions and advice on the City's policies and protocols regulating the conduct of Members of Council and issues of compliance with those policies and protocols;
- To provide general advice to Members of Council and City of Vaughan staff on issues of ethics and integrity including codes of conduct, policies, protocols and office procedures, and emphasizing the importance of ethics for public confidence

in municipal government.

[38] In investigating this complaint, I have reached a conclusion that there has not been a contravention of the Code by the Mayor. However, there appears to be a disconnect between the adopted recommendations of the external auditor report and the requirements that Members of Council are required to provide when submitting office expenses for reimbursement. Comments from the Audit Committee following the receipt of the external auditor's supplemental report indicated that "[t]he recommendation is to meet with the Mayor to discuss outstanding issues. The recommendation from the auditor states if there are no receipts, the money should be paid back". From a public perception lens, trust in government institutions and their actions on behalf of municipal residents is enhanced with transparency in how decisions are made. Council adopted the external auditor's recommendations and therefore the public relied on the comments from the Audit Committee in relation to the submission of receipts.

[39] The Mayor identified that she had answered all questions and provided all information requested by the Audit Committee and City Auditor to their satisfaction. The only basis for a finding of responsibility rests on whether the facts as established by my investigation justify the drawing of an inference that the Mayor actively engaged in the improper withholding of receipts requested by the City Auditor or other City staff or actively refused to provide them information . It was my finding that there is no basis for drawing such an inference. There is no evidence to substantiate a finding of a contravention of Rule 9.

Conclusion

[40] It is my finding that the Mayor did not breach rules 1, 2, 4, 9 and 18 of the Code.

Commentary

Questions regarding how office expenses for Members of Council are justified, the requirement of reports or business cases, the standards and accounting principles used by the City to authorize reimbursement of office expenses by Members of Council and the type of back-up documentation and when this is required, remain somewhat unclear.

Much has been accomplished by the City's Audit Committee and the City Auditor in the development of a Council Member Expense Policy that applies sound accounting principles and consistent standards to allowable office expenses and reimbursement to ensure transparency, accountability and good governance.

A public reconciliation of amounts reimbursed to the Mayor was not required by the Audit Committee. The recommendations of the external auditor report that were adopted by City Council were quite clear in relation to supporting documentation and original receipts. However, the Mayor complied with Council's adoption of the recommendations

to the satisfaction of the Audit Committee and the City Auditor.

While the events relating to the implementation of the recommendations of the external auditor report were unfolding, the Complainant filed a complaint in relation to the comments by the Mayor in relation to reimbursement of office expenses. It is a serious allegation to assert that a Member of Council has used the influence of her office for the purposes of reprisal. My investigation of this complaint has not revealed any direct evidence of such wrongdoing.

I certainly want to express to the Complainant that during this investigation, I have left no stone unturned in seeking the facts insofar as I recognized the significance of the complaint and how this matter has hovered for quite some time clouding the actions of the Members of Council and, therefore the City itself.

Given that the duties of the Integrity Commissioner include providing general advice to Members of Council and the City of Vaughan staff on issues of ethics and integrity, including codes of conduct, policies, protocols and office procedures, and emphasizing the importance of ethics for public confidence in municipal government, it would be remiss of me not to comment that City Council should consider making publicly available how the City Council adopted recommendations of the external auditor were implemented to the satisfaction of the Audit Committee and the established accounting principles employed by the City Auditor. This would provide the clear policies against which the Mayor's submissions were measured to satisfy the requirement of supporting documentation in compliance with the direction of City Council.

Suzanne Craig
Integrity Commissioner

Dated: June 9, 2010