

City of Dryden Integrity Commissioner Files 2018-01 and 2018-02

REPORT ON COMPLAINTS

The Complaints

Two Complainants allege that several Members of Council breached the following provisions of the Council Code of Conduct, City Policy MU-CO-11:

- 4.3.2 (Impartiality)
- 7.2.1, 7.2.2 and 7.2.3 (Conduct Respecting Others)
- 7.3.5 (Conduct Respecting Staff)

Summary

The actions of the Mayor and Councillors did not breach the Council Code of Conduct. The issue involves a public policy debate, not a breach of the Code. Unless the Code has been contravened there is no role for the Integrity Commissioner.

Background

I received two Code of Conduct complaints, on April 12 and April 18, respectively. Each complaint was submitted by a different Complainant.

The first complaint (2018-01) alleged contraventions by Respondents Councillor Beyak, Councillor Carlucci, Councillor MacKinnon and Mayor Wilson.

The second complaint (2018-02) alleged contraventions by Respondents Councillor Beyak, Councillor Bush, Councillor Carlucci, Councillor MacKinnon and Mayor Wilson.

In late 2017 and early 2018, City Council had examined various models for providing fire services in the community. In part, this involved examining whether the City of Dryden would be most effectively served by a volunteer, paid, or a mixed model of firefighting services. It is not my place to evaluate this public policy issue and I take absolutely no position on it.

The complaints both relate to Council Members' conduct in relation to the Fire Service. In particular, both allege a pattern of behaviour that amounts to "collusion," "bullying," "intimidation," and "harassment," to list a few used by the Complainants. The Complainants also believe that Council failed to act in a transparent or democratic manner when it made changes to the provision of fire services in Dryden.

The provision of fire services in the City of Dryden is an important matter of public policy that is beyond the scope of my investigation. The issue lies outside my jurisdiction. My only authority is to consider whether the Code was contravened.

Typically, complaints filed by separate Complainants are handled separately. In this case, however, as the complaints raised similar issues arising from essentially the same subject matter, and involved the same Respondents (except that Councillor Bush was named in complaint 2018-02 and not 2018-01).

I asked the Complainants whether they would consent to me investigating and reporting on the complaints at the same time. I asked this as a matter of efficiency in my investigation and economy for the City, as this would avoid unnecessary duplication of communications. Both Complainants agreed.

Process Followed

I first review a complaint to ascertain whether the allegations pertain to specific sections of the Code that are capable of being breached. For obvious reasons, I will only investigate (and invite Respondents to address) a complaint or portion of a complaint that is clear and may give rise to a breach of the Code. It is fair that a Respondent only be asked to respond to allegations that would, if upheld, amount to a contravention of the Code.

In this case, I determined that three of the provisions cited in the complaints (1.1 Policy Statement, 2.6 Purpose, and 5.0 Principles) cannot be contravened and therefore cannot give rise to complaints. I informed the parties that I would not be investigating these matters. I explain my reasoning under the heading "A. Preliminary Issue," below.

Once I have determined that allegations in a complaint pertain to specific Code provisions that are capable of being contravened, I follow a process that ensures fairness to both the individuals bringing complaints (Complainants) and the Council Members responding to the complaints (Respondents).

The fair and balanced process I normally use is consistent with the requirements of the Code. The process includes the following elements:

- A Respondent receives notice of the complaint and is given an opportunity to respond.
- A Respondent is made aware of the Complainant's name. I do, however, redact personal information such as phone numbers and email addresses.
- The Complainant receives each Respondent's Response and is given an opportunity to reply.

- A Respondent receives the Complainant's Reply.
- The process is transparent in that each party generally is given access to the other parties' communications with me.
- After the Reply stage, I accept supplementary communications and submissions from the parties, typically sharing them among all parties.

Aside from the fact that I considered two complaints simultaneously, this investigation was conducted in the open and transparent manner described above.

Positions of the Parties

The following is a brief summary of the positions of the parties. The Complainants and Respondents provided detailed submissions and I have taken into account everything they communicated to me, not just what appears in the brief summary below.

Please note that the statements contained in this summary are not my findings. They are the positions of the parties. Everything in this section is something that a party has stated. My findings are in a different section.

Complainants' Position

The Complainants allege a series of bad faith efforts, by Council, to discredit the volunteer Dryden Firefighter Association (DFFA) in order to support the shift to a new model of service. The following are the allegations set out in the complaints:

Allegations in File 2018-01

- The City staff was acting on the direction of Council even though there is no record of a vote on the matter.
- Numerous Members of Council implied the volunteer firefighters were only concerned about "booze," which I understand to be a reference to a practice of consuming alcohol in the fire hall.
- Members of Council threatened volunteer firefighters with termination if they refused to work with replacement firefighters.
- In making the case for a new model of fire service in the city, various Members of Council attempted to paint all of the volunteer firefighters with the same brush while using disrespectful language.

- Council refused to hold a town hall meeting on the issue, despite requests by the DFFA to do so; and
- Council ultimately voted on the fire service issue on March 19 without adequate or fair public discussion.

Allegations in File 2018-02

- The City adopted a new alcohol policy for municipal buildings, including the fire hall, but did not apply it evenly and sent police officers only to the fire hall.
- A Councillor informed the news media that the shift in the fire service model was related to the alcohol policy.
- Council Members systematically ignored, and refused to acknowledge, the concerns of the DFFA.
- Council did not disclose the costs of a shift in the fire service model, despite the Complainant's suspicion that figures are available.

Respondents' Positions

The Respondents categorically deny that they were a part of a collective effort to target the volunteer firefighters. They take the position that, as members of City of Dryden Council, they have an obligation to consider how to best provide the residents of the community with municipal services, including effective and safe fire services. For a number of reasons, they assert that this is exactly what they were doing.

With respect to policy on alcohol in municipal buildings, one Respondent notes that this is an operational issue and that the City is fully competent to create and apply these policies. Another Respondent notes that Council was approached by a group of volunteer firefighters who were asking for another suitable space where they could consume alcohol. After seeking legal advice, Members of Council declined to entertain "any idea of sanctioning alcohol use by firefighters on City property." The same Respondent states that for decades there has been an unhealthy culture of drinking on City property. To support this position, the Respondent refers to Mothers Against Drunk Driving statistics.

Another Respondent notes that the decision to ask the police to enforce the alcohol policy in the fire hall was an operational decision made as a safety precaution at the request of the Fire Chief. One Respondent states that, while two police officers were initially dispatched to attend, two more officers arrived as backup out of fear of the volatile situation.

Numerous Respondents point to a pattern of aggressive, angry statements from supporters of the volunteer firefighters on social media as cause for concern. They state that this was part of the reason for conducting some of their deliberations in private, even though, according to these Respondents, they had the legal right to consider the matter in a closed meeting.

The Respondents also state that their opinions on this matter of important public policy were well-formed and that their votes on this issue were in the best interest of the community. While they believe that a different model for the provision of fire services may be in the best interest of the community, they are grateful for the work of the volunteer firefighters. To that end, one Respondent also points out that many of the volunteer firefighters did, in fact, return to work.

Several Respondents observe that, while the Complainants are disappointed by the Council's decision on fire services, it was a decision on which Council has voted.

Analysis and Findings

I have considered the following issues:

- A. Preliminary Issue: Is it possible to contravene the "Policy Statement," "Purpose" or "Principles" of the Code? Do these provisions create substantive obligations that Council Members must follow?
- B. Did the Respondents breach section 4.3.2 by granting any special consideration, treatment or advantage in matters related to their position on Council to any citizen beyond which is available to any other citizen?
- C. Did the Respondents breach section 7.2.1, 7.2.2 or 7.2.3 by using indecent, abusive or insulting words towards each other, the public or staff, or otherwise communicate in a manner that is discriminatory to any individual?
- D. Did the Respondents breach section 7.3.5 by using authority, intimidation, threats or coercion to influence any member of the staff?

A. Preliminary Issue

Is it possible to contravene the "Policy Statement," "Purpose" or "Principles" of the Code? Do these provisions create substantive obligations that Council Members must follow?

No.

As their names indicate, the “Policy Statement” (section 1.0), Purpose (section 2.0) and “Principles” (section 5.0)¹ of the Code do not contain rules. They are statements of policy and principles, but not rules.

The Code was enacted by by-law. Ordinary principles of statutory interpretation apply.

As a general matter, a statement of principle does not create an obligation. It merely states the principle(s) that may be used to interpret obligations created elsewhere in the law.²

As explained in *Sullivan on the Construction of Statutes*, 6th ed.:

Purpose statements may reveal the purpose of legislation either by describing the goals to be achieved or by setting out the governing principles, norms or policies. ... However, like definitions and application provisions, purpose statements do not apply directly to facts but rather give direction on how the substantive provisions of the legislation – that do apply to facts – are to be interpreted.³ [emphasis added]

I find that the Code’s “Policy Statement,” “Purpose” and “Principles” provide interpretive direction only, and they do not create rules or obligations on Council Members that can be the subject of a complaint. The Policy Statement, the Purpose and the Principles do not contain enforceable rules.

Another reason that I am not prepared to treat the Policy Statement, Purpose and Principles as binding rules is that they are too general and unspecific to be treated as clear, enforceable obligations. Council Members are subject to penalties if they contravene the rules in the Code; it necessarily follows that the rules must be clear, certain and unambiguous. Council Members must be able to understand clearly the conduct that is required. In this respect I refer to the observations of Integrity Commissioner Swayze in City of Brampton Report L05 IN (May 12, 2015):

In my experience members of councils in Ontario are busy people serving their community and want certainty in the interpretation of the many rules that apply to them. A code, by definition, is a set of rules of behaviour and should not be interpreted by each councillor according to subjective values. The rules need to be clear and where possible, capable of only one meaning. [emphasis added]

While I do not agree that being busy is relevant to interpretation of the Code, I accept and adopt Integrity Commissioner Swayze’s comments about the need for clarity, certainty and lack of ambiguity in the rules.

¹ The full title of section 5.0 of the Code is, “Principles upon which this Code of Conduct is Based.”

² *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 309 BCAC 124, 2011 BCCA 345 (CanLII), at para. 45: “Section 3(c) purports only to state a principle ... It is plain and obvious that s. 3(c) creates no legally enforceable obligation ...”

³ Sullivan, R., *Sullivan on the Construction of Statutes*, 6th ed. (2014), at 454, §14.39.

I find that the Policy Statement, Purpose, and Principles of the Code cannot be contravened and cannot give rise to a complaint.

For this reason, I told the Complainants that I would not consider the allegations under sections 1.0, 2.0, and 5.0 of the Code, and told the Respondents that it was unnecessary for them to address those sections.

B. Section 4.3.2

Did the Respondents breach section 4.3.2 by granting any special consideration, treatment or advantage in matters related to their position on Council to any citizen beyond which is available to any other citizen?

No.

Dissatisfaction with a policy decision does not support a complaint of differential treatment.

The Complainant in 2018-01 referred to the section 4.3.2 (Impartiality), which states:

4.3.2 Impartiality:

Every Council Member must perform his/her duties in an impartial manner.

Without restricting the scope of this rule, the following shall be considered breaches of the Code of Conduct:

(a) No Member of Council shall grant any special consideration, treatment or advantage in matters related to his/her position on Council to any citizen beyond that which is available to any other citizen.

Both Complainants feel that Council did not treat citizens in an even-handed manner, especially with respect to what they allege is the uneven application of the City's alcohol policy.

Whether people are permitted to consume alcohol on City property is a policy decision for Council to make. It is not an issue that falls under the Integrity Commissioner's jurisdiction.

I understand that the Complainants feel the policy has not been consistently applied, but that alone does not give rise to an issue under section 4.3.2. The section says, "No Member of Council shall grant any special consideration, treatment or advantage in matters related to his/her position on Council ..." [emphasis added]

A breach occurs when a Council Member grants special consideration in matters related to the Council Member's position. There is no suggestion that any Council Member has granted others the right to consume alcohol on City property. It does not seem that drinking alcohol on municipal property is related to the Council Member's position on

Council. Even if enforcement of the alcohol policy is inconsistent, the situation does not involve a breach of section 4.3.2 by Council Members.

C. Sections 7.2.1, 7.2.2 and 7.2.3

Did the Respondents breach section 7.2.1, 7.2.2 or 7.2.3 by using indecent, abusive or insulting words towards each other, the public or staff, or otherwise communicate in a manner that is discriminatory to any individual?

No.

The situation does not amount to abuse, bullying, intimidation, discrimination or harassment under section 7.2.1.

The language used by the Respondents did not rise to the level of indecent, abusive, or insulting words or expressions under section 7.2.2.

This is not a case of discrimination under section 7.2.3.

The following is the full text of section 7.2 in the Code of Conduct:

7.2 Conduct Respecting Others:

7.2.1 - Council Members shall treat each other, the public and staff appropriately to ensure the work and volunteer environment is free of abuse, bullying, intimidation, discrimination and harassment; and shall act in accordance with the City of Dryden Policy HR-HS-69: Harassment/Bully Free in the Workplace.

7.2.2 - Council Members shall not use indecent, abusive, or insulting words or expressions towards each other, the public or staff; and shall act in accordance with the City of Dryden Policy HR-HS 70: Violence Free in the Workplace.

7.2.3 - Council Members shall not speak or otherwise communicate in a manner that is discriminatory to any individual; or that is discriminatory in regard to any individual based on that person's race, ancestry, ethnic origin, colour, place of origin, creed, citizenship, gender, sexual orientation, same-sex partnership status, age, record of offences, marital or family status, or disability.

For several months there was public disagreement about a significant policy decision. The Respondents were active participants in that debate, but debating such issues does not contravene the Code. Disagreement over policy is not a breach of section 7.2.1, 7.2.2 or 7.2.3.

Section 7.2.1 refers to abuse, bullying, intimidation and harassment. (It also refers to discrimination, which will be addressed when I consider section 7.2.3.)

The Respondents' words that are the subject of the complaint include:

- The firefighters should be “embarrassed of themselves” for refusing to work with the Fire Chief.
- Some firefighters were “bullies” and were “holding the city hostage.”
- The dispute was all about “booze.”

The Code does not define “abuse.” When words are involved, one author defines abuse as “Words that attack or injure, that cause one to believe the false, or that speak falsely of one. Verbal abuse constitutes psychological violence.”⁴

No standard definition of abuse is found in court decisions or in human rights jurisprudence, but the human rights cases reveal a consistent approach: incidents found to constitute verbal abuse almost always included one or more of the following factors: insults based on a prohibited ground of discrimination, foul language (including foul insults), and yelling (including yelling of insults).⁵ The human rights cases are consistent with the observation of Patricia Evans that, “Verbal abuse is hostile aggression.”⁶

I do not find that the (alleged) comments of the Respondents constituted “abuse” as that term has been used in Canadian jurisprudence.

Nor do I find that the language constitutes bullying.

Intimidation means frightening or overawing someone, especially to make that person do what one wants.⁷ The evidence does not support a finding of intimidation.

Typically harassment involves a *course of conduct* or a pattern. Unless the incident is severe,⁸ a single incident does not amount to a course of conduct and therefore is not harassment.⁹ I not find that the comments made by the Respondents constitute harassment within the meaning of the Code.

I find no breach of section 7.2.1.

⁴ Patricia Evans, *The Verbally Abusive Relationship: How to Recognize It and How to Respond*, 3rd ed. (Avon, MA: Adams Media, 2010), at 77.

⁵ *Tahmourpour v. Royal Canadian Mounted Police*, 2008 CHRT 10 (CanLII); *Nassiah v. Peel (Regional Municipality) Services Board*, 2007 HRTO 14 (CanLII); *MacLeod v. Lambton (County)*, 2014 HRTO 1330 (CanLII); *Bushek v. NRS Quay Pacific Management and another*, 1997 BCHRT 5 (CanLII); *Jack v. Nichol*, 1999 BCHRT 33 (CanLII); *Fiallos v. PWD-Division of Instore Focus Inc.*, 2017 HRTO 469 (CanLII).

⁶ Patricia Evans, note 4, at 24.

⁷ Oxford Living Dictionaries.

⁸ *B.C. v. London Police Services Board*, 2011 HRTO 1644, at paras. 46-48.

⁹ *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39, at para. 73.

Section 7.2.2 refers to indecent, abusive, or insulting words or expressions. The words in question were not indecent. For the reasons above, they were not abusive. While there was a spirited disagreement about a matter of policy, the Respondents' language was not insulting within the meaning of the phrase, "indecent, abusive, or insulting words or expressions ..." I find no breach of section 7.2.2.

Finally, section 7.2.3 does not apply because this is not a case involving discrimination or alleged discrimination under any of the grounds in the *Human Rights Code*.

D. Section 7.3.5

Did the Respondents breach section 7.3.5 by using authority, intimidation, threats or coercion to influence any member of the staff?

No.

Section 7.3.5 talks about using improper means in an attempt to influence someone on the staff:

7.3 Conduct Respecting Staff:

...

7.3.5 Council Members shall not use authority, intimidation, threats or coercion to influence any member of staff.

I am prepared to assume that volunteer firefighters should be considered part of the staff under section 7.3.5, but I find no indication of an attempt to influence the volunteer firefighters.

There was a significant difference of opinion about a policy decision, and the Respondents and the volunteer firefighters were on different sides of the issue. Section 7.3.5 would apply only if the Respondents *were trying to influence* the volunteer firefighters, which was not the case.

Final Observation

Government decision-making often affects different members of the public differently. According to the Supreme Court of Canada, "public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens."¹⁰ An adverse effect, *even a known adverse effect*, in and of itself, does not constitute a wrong under Canadian law; a wrong is committed when a public official acts

¹⁰ *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69, at para. 28.

in bad faith or dishonestly or deliberately contrary to the obligations of her office.¹¹
There is no evidence of that occurring here.

Conclusion

In Files 2018-01 and 2018-02, I find no contraventions of the Code.

Recommendation

I recommend that this report be received.

Respectfully submitted,



Guy Giorno
Integrity Commissioner
City of Dryden

September 19, 2018

¹¹ *Ibid.*

APPENDIX 1: RELEVANT PROVISIONS OF COUNCIL CODE OF CONDUCT

1.0 POLICY STATEMENT

1.1 Attaining an elected position within one's community is a privilege which carries significant responsibilities and obligations. Members of Council (comprised of the Mayor and Councillors) are held to a high standard as leaders of the community and they are expected to become well informed on all aspects of municipal governance, administration, planning and operations. They are also expected to carry out their duties in a fair, impartial, accountable, transparent, open and professional manner.

2.0 PURPOSE

...

2.6 Council Members hold positions of privilege. Therefore they must discharge their duties in a manner that recognizes a fundamental commitment to the wellbeing of community and regard for the integrity of the Corporation.

...

4.0 RESPONSIBILITIES

4.1 Council shall:

4.1.1 Make revisions, additions, or deletions to the Code of Conduct as may be justified under the concept of "just cause"; and,

4.1.2 Following its review of the information decide on the appropriate action in matters concerning a Councillor's ethical conduct.

4.2 Chief Administrative Officer shall:

4.2.1 Provide recommendations to Council on desirable revisions, additions or deletions to the Code of Conduct;

4.2.2 Advise of allegations and conduct inquiries relating to unethical conduct by Members of Council;

4.2.3 Ensure the administrative controls referred to in the Code of Conduct are in place;

4.2.4 Fully inform newly appointed Council Members of the ethical standards they are expected to observe. If requested, obtain clarification of the

specific ethical standards the Council member will be required to observe in a particular position; and.

4.2.5 Keep Council Members informed, on an ongoing basis, regarding the City's policy on ethical behaviour.

4.3 Council Members:

4.3.1 Integrity:

Ultimately, ethical behavior relies on the diligence of the individual. However, since a breach of ethics impacts not only on that Member of Council but also the Corporation, a code of ethics is the means by which the City acknowledges their responsibility in this area. Without restricting the scope of this rule, the following shall be considered breaches of the Code of Conduct:

- (a) Conduct of one's private life or Council activities, which render the Councillor unable to perform his or her duties satisfactorily. The moral standard a Councillor must adhere to will vary with the Councillor's relationship with other Council Members, City employees and the public;
- (b) To knowingly breach the law in the performance of his/her duties or request others to do so; and,
- (c) To intentionally falsify any of the City's records.

4.3.2 Impartiality:

Every Council Member must perform his/her duties in an impartial manner. Without restricting the scope of this rule, the following shall be considered breaches of the Code of Conduct:

- (a) No Member of Council shall grant any special consideration, treatment or advantage in matters related to his/her position on Council to any citizen beyond that which is available to any other citizen.

5.0 PRINCIPLES UPON WHICH THIS CODE OF CONDUCT IS BASED

5.1 Council Members shall serve and be seen to serve their constituents in a conscientious and diligent manner; and shall act in accordance with his or her Declaration of Office.

- 5.2 Council Members shall be committed to performing their functions with integrity, avoiding the improper use of the influence of their office and any conflict of interest.
- 5.3 Council Members shall perform their duties in office and arrange their private affairs in a manner that promotes public confidence and will bear close public scrutiny.
- 5.4 Council Members shall act upon the principle that democracy is best achieved when the operation of government is made as transparent and accountable as possible to the public.
- 5.5 Council Members shall serve the public interest by upholding both the letter and spirit of:
 - 5.5.1 The laws of Parliament, including the *Criminal Code* of Canada;
 - 5.5.2 The laws of the Ontario Legislature including the *Municipal Act, 2001*, as amended, the *Municipal Conflict of Interest Act*, the *Municipal Elections Act, 1996* and the *Municipal Freedom of Information and Protection of Privacy Act*; and,
 - 5.5.3 The By-Laws and Policies of the City of Dryden.
- 5.6 A Council Member may become disqualified and lose his or her seat by operation of law, including being convicted of an offence under the *Criminal Code* of Canada or being found to have failed to comply with the *Municipal Conflict of Interest Act*, whether or not the conduct in question involves contravention of this Code of Conduct.
- 5.7 In the case of any inconsistency between this Code of Conduct and a Federal or Provincial statute or regulation, the statute or regulation shall prevail.
- ...
- 7.0 CONDUCT
 - 7.1 Conduct at Meetings:
 - 7.1.2 Council Members shall act in accordance with the City of Dryden Procedural By-Law.
 - 7.2 Conduct Respecting Others:
 - 7.2.1 Council Members shall treat each other, the public and staff appropriately to ensure the work and volunteer environment is free of abuse, bullying, intimidation, discrimination and harassment; and shall act in accordance

with the City of Dryden Policy HR-HS-69: Harassment/Bully Free in the Workplace.

7.2.2 Council Members shall not use indecent, abusive, or insulting words or expressions towards each other, the public or staff; and shall act in accordance with the City of Dryden Policy HR-HS-70: Violence Free in the Workplace.

7.2.3 Council Members shall not speak or otherwise communicate in a manner that is discriminatory to any individual; or that is discriminatory in regard to any individual based on that person's race, ancestry, ethnic origin, colour, place of origin, creed, citizenship, gender, sexual orientation, same-sex partnership status, age, record of offences, marital or family status, or disability.

7.3 Conduct Respecting Staff:

7.3.1 Council Members shall be respectful of the role of staff to serve the Corporation as a whole under the overall direction of the Chief Administrative Officer; and to provide advice based on political neutrality and objectivity, free from undue influence.

7.3.2 Council Members shall be respectful of staff's professional capacities and responsibilities.

7.3.3 Council Members shall not maliciously or falsely injure or impugn the professional or ethical reputation of a member of staff.

7.3.4 Council Members shall not compel a member of staff to participate in partisan political activities.

7.3.5 Council Members shall not use authority, intimidation, threats or coercion to influence any member of staff.

7.3.6 Council Members shall not interfere with any member of staff in the performance of the staff member's duties, including the duty to disclose improper activity.