

**Report on the Dismissal of a Complaint Alleging a Violation of the
Code of Conduct for Members of Council**

for

Town of the Blue Mountains

November 28, 2016

Janet Leiper, C.S.

I. Introduction and Summary of Findings

- [1] This is a report to Council on a complaint that the Mayor of the Town of the Blue Mountains violated the Code of Conduct for Members of Council.
- [2] A citizen complained that the Mayor breached the requirements in Section 1 of the Code of Conduct to make honest statements and not to make statements intended to mislead Council members and the public.
- [3] The complaint alleged that the Mayor issued a misleading press release on September 23, 2016 which described a workplace harassment investigation about another member of Council, but failed to mention that the complaint had also referred to the Code of Conduct. Prior information about the matter had described the complaint against the council member as having been made under the Code of Conduct and town policies (which included the Town Policy HR.06.02 Respectful Workplace policy and Town Policy HR.06.01, Discrimination and Harassment-Free Workplace policy.)
- [4] I reviewed the complaint against the member of council, reports for the Council proceedings about the complaint against the member, communications among town representatives and advisors and the Code of Conduct and related policies. I reviewed an open letter that had raised some of the same issues that are discussed in this complaint. I spoke with the investigator, the complainant and the Mayor.
- [5] There were a number of public statements made by Town representatives, including the Mayor, in the weeks before the press release that discussed the harassment investigation and the Code of Conduct. In response to public criticism about the process, the Mayor asked for and received communications advice from external professionals. The September 23 press release was factually correct although not comprehensive. As a result of this communication, and the earlier communications, it is understandable that the public might have been confused about how the complaint was handled and under which process. However, it appears to have been the first time the Town had received a complaint against a member of Council that related to more than one piece of legislation and policy.
- [6] I concluded that the September 23 press release was not untrue and that the Mayor was not trying to mislead the public. He sought and obtained advice about what should be put into the press release. The press release could have gone farther in explaining why the choice was made to limit the investigation to the procedures under the town policies. As such, the press release was not completely responsive to some of the publicly raised concerns.

- [7] For the reasons that are described in greater detail below, I conclude that Mayor McKean did not issue the September 23 press release with the intention of misleading the public and did not breach the Code of Conduct.
- [8] This report advises Council on steps to prevent future misunderstandings about the operation of the Town policies and the Code of Conduct. This includes a recommendation to create a protocol for how complaints will be handled, particularly where multiple policies and/or legislation provides a process for handling different forms of conduct by elected officials which may give rise to complaints.
- [9] The findings outlined in this report have been reviewed with the complainant and the Mayor, who accept the findings. This report stays within the limits of this complaint and has avoided making any findings concerning the investigation into the original complaint against the member of Council which led to the communications under review.

II. Background to the Complaint

- [10] On September 26, 2016, Town Council for the Town of the Blue Mountains passed a resolution to retain a roster of Integrity Commissioners to process any complaints received in accordance with the Code of Conduct for Members of Council Policy, POL.COR.07.07, as revised August 22, 2016 and in accordance with Section 233.3 of the *Municipal Act*
- [11] The complaint in this matter was filed on October 1, 2016. I requested and received additional material from the complainant. I also received and reviewed documents from the Town, a written response from the Mayor and information from the investigator into the complaint against the member of Council. Some of the material was confidential and has not been made public. This report takes into account confidentiality and does not identify parties involved, consistent with the practices for reporting on such matters under the *Municipal Act*.

III. The Facts Leading to the Complaint

- [12] On May 9, 2016, a complaint was made by a member of Town staff that a member of Council had violated the Town's Code of Conduct for Members of Council and the Town's Workplace Harassment Program. The complaint was referred to a lawyer with experience in workplace investigations under the *Occupational Health and Safety Act (the "OHSA")*.
- [13] Under the provisions of the Code of Conduct at the time, the Mayor had the discretion to commence an investigation of any potential breach of the Code of Conduct or to respond to a written complaint. At the time the staff complaint was made, the Town did not have an integrity commissioner.

- [14] The Mayor engaged an employment lawyer to investigate the allegations under the *OHS*A, who in turn retained an investigator to determine the facts. An investigation report was issued on July 7, 2016. At a meeting with the staff member who had raised the complaint, and in reviewing the results of the workplace investigation with the complainant, the Mayor advised the staff complainant that Council was planning to appoint an Integrity Commissioner to investigate complaints under the Code and recommend sanctions. The Mayor suggested that after that had taken place, that the complaint should be re-submitted to the integrity commissioner once appointed.
- [15] The staff complainant wrote to the Mayor and pointed out the Town was obliged to follow its policies for workplace matters and the provisions of the *OHS*A. The staff complainant asked the Mayor to follow through on that portion of the complaint.
- [16] On August 24, the employment lawyer reported in writing to the Mayor and the Manager of Human Resources on the application of the *OHS*A to the complaint. The report addressed the question of the two ways to enforce workplace conduct. The advice to the Mayor was that the protections available under the *OHS*A were in addition to any Code of Conduct provisions and that in any event, the municipality was planning to amend its Code of Conduct and appoint an integrity commissioner for the purposes of addressing Code of Conduct concerns.
- [17] On August 19, 2016, in a media report about the allegations, the Mayor did not comment on the investigation. The Manager of Human Resources confirmed that there had been a complaint received under “the Harassment Policy, the Respectful Workplace Policy and the Code of Conduct for Members of Council.”
- [18] On August 22, 2016, Town council approved amendments to the Code of Conduct which included a process for investigation of complaints by an integrity commissioner along with some changes to the definition of harassment and the inclusion of protection from retaliation for staff.
- [19] On September 12, 2016, Council directed the Manager of Human Resources to prepare a staff report to be considered in open session regarding potential sanctions for violations of the *OHS*A and Town Policy by the member of Council who had been the subject of the *OHS*A investigation.
- [20] On September 15, 2016, Town council met to consider the staff report on the subject of the *OHS*A investigation. The report, filed publicly, asked for a number of sanctions under the *OHS*A and the Workplace Violence and Harassment Program, the Discrimination and harassment-free Workplace and Respectful Workplace policies.

- [21] The basis for the sanctions sought were the *OHSA* and the policies. The background to the report, described the original complaint as alleging “violations of the Code of Conduct for Members of Council and Town Policies” However, there was no request for a finding of a breach of the Code of Conduct, or for any sanctions available under the *Municipal Act* for a breach of the Code of Conduct.
- [22] It is clear that on September 15, 2016, Council received a recommendation and imposed sanctions related only to the *OHSA* and workplace harassment policies on September 15, 2016 and not under the Code of Conduct. It is also clear that the original complaint made reference to both sets of policies.
- [23] In a media release, entitled, “Mayor’s comments regarding Councillor sanctions” the Mayor made a statement which repeated much of what had been in the public report to Council from the Manager of Human Resources. The statement noted that the complaint had alleged breaches of the code of Conduct, the Workplace Harassment Program and the *OHSA*. It described the referral to a “third-party legal counsel for investigation and provided a summary of the steps taken in that investigation. The press release noted that the process under the *OHSA* requires treating information as confidential and that the Town was obliged to follow these provisions.
- [24] On September 16, 2016, a resident wrote to the Manager of Human Resources, and copied the Mayor. The resident asked for confirmation that the complaint against the member of Council was not a Code of Conduct investigation and was not covered by the public disclosure requirements of section 223.6(3) of the *Municipal Act*.
- [25] The Manager of Human Resources responded to the resident and confirmed that the Town received legal advice concerning the complaint under the *OHSA* and the Town’s Harassment and Workplace Violence Policies.
- [26] On September 19, 2016, the resident sent an open letter to the Mayor reviewing the history of the matter and expressing concern that “secrecy” surrounding the complaint against the member of Council was eroding public confidence in elected officials. The writer asked the Mayor to respond to a number of questions including whether there would be a public report dealing with the Code of Conduct complaint, and if there was to be no such report, if the complaint had been dismissed or found to be without merit.
- [27] The Mayor forwarded a copy of the open letter to the Town’s lawyer and asked for advice on how to respond. The lawyer in turn engaged a communications firm to provide advice on the content of the press release. The email communications among staff, the Mayor, the lawyer and the communications firm during the period from September 19-23, make it clear that there was an urgent need to respond to citizens who were confused about the complaint because it had been made under two different processes: the Code of Conduct and the workplace

harassment policies. A press release was drafted to attempt to respond to this confusion. It was drafted by the communications firm and sent to the Town's lawyer on September 21. The Mayor approved it on September 22 and it was issued on September 23.

- [28] The press release of September 23, 2016 is the subject of the current complaint and for that reason, it is set out here in full:

Town Statement On Investigation

Your Town Council and staff are committed to protecting the best interests of our community. Every day, it is our goal to provide great public service and leadership to our community, in a way that upholds the law and instills public confidence in our civic administration.

Recently, we have had to address circumstances which arose when a formal complaint was filed against [member of Council]. The purpose of this letter is to provide more information about how that matter has been resolved.

The complaint was made under the Town policies and Ontario's Occupational Health and Safety Act. This Act addresses harassment in the workplace and the obligation to investigate. It also includes provisions addressing confidentiality to protect all those involved. This is the process required by provincial legislation and the town, like all employers, is required to follow it.

In response to the complaint, and further to our statutory obligations and policies, an independent, unbiased objective investigator conducted a full investigation. Findings were made and recommendations were presented to Council in a written report from external solicitors.

The report concluded that [the member of Council]'s conduct was in breach of both the Town's policies and the Occupational Health and Safety Act.

After careful consideration, Council passed a resolution adopting the conclusions of the report and imposing sanctions designed to ensure that the conduct would not continue. The people of The Blue Mountains would not tolerate harassment or intimidating behavior in their work places. Council's own strategic plan commits to making the Town an "employer of choice." The Town administration must always be a safe and respectful workplace, which fully complies with provincial legislation.

Some have questioned why this investigation was undertaken by an independent investigator rather than by an Integrity Commissioner. This is

because the complaint was filed in part under the Occupational health and Safety Act. An integrity Commissioner has no jurisdiction over workplace harassment complaints made under that Act.

Council also approved a series of corrective measures which will ensure that Town staff will again have a proper and respectful environment in which to work.

Council also expressed its regret that the circumstances which gave rise to the complaint ever took place. Council expects that these circumstances are now at an end, and will not be repeated.

Throughout these difficult circumstances, and the investigation that followed, the public servants who work at our Town have conducted themselves professionally and respectfully. On behalf of all the members of our community, I would like to thank them for their ongoing efforts and professionalism.

I would like to assure the public that the matter has been addressed and resolved in a professional, objective and independent manner, in accordance with all legal obligations and proper proceedings.

I want to assure taxpayers that both Town councillors and Town staff remain committed to protecting the best interests of the community.

As Mayor, I look forward to putting this regrettable matter behind us, and leading the Town forward.

We look forward to your support as we continue to do the important work of Council business and serve the Town of the Blue Mountains.

- [29] The complainant alleges that the press release characterized the investigation as an OHSa matter, failed to mention the Code of Conduct complaint and that if an investigation was conducted under the Code of Conduct, it was a dishonest and misleading press release. The complainant alleges that in issuing this press release, the Mayor breached Section 1 of the Code of Conduct for Members of Council. The complainant said that the complaint was not made lightly, but because of an interest in open government and concerns, shared by others, about a lack of transparency in the way in which the complaint had been handled.
- [30] The Mayor responded in writing to the complaint. He said that before he issued the press release, he consulted with the town's municipal solicitor, employment solicitor and the Manager of Human Resources to ensure that the statements in the press release were accurate. The Mayor received advice that because the initial complaint had fallen under the OHSa, the Town was required to retain an

independent investigator under the processes outlined in the Town's Workplace Harassment Program. The Mayor also received advice that an Integrity Commissioner did not have jurisdiction over that aspect of the complaint dealing with the Workplace Harassment Program. As a result of that advice, he approved the press release. He stated that he did so without any intention to mislead members of Council or the public.

[31] I asked the Mayor about the status of the Code of Conduct portion of the original complaint. He said that at the time of the original complaint, the Code of Conduct did not authorize the appointment of an Integrity Commissioner. A decision was made to proceed under the workplace harassment program to address all of the allegations raised in the complaint. The Mayor was unaware of any further investigation of the matter. He said that the matter had been fully investigated by the workplace investigator and Council had acted upon the recommendations made as a result of the workplace policy investigation.

[32] Documents provided by the Town confirmed the Mayor's response. He had received legal advice that although the Code of Conduct had been referred to in the first complaint, the duties and protections afforded by the *OHS*A and the Town's harassment policies also applied. In addition, the Town was about to appoint an integrity commissioner to address matters under the Code of Conduct. A series of emails among Town officials and external counsel at the time of the September 15 meeting reveal that ongoing legal advice was sought on matters of process and substance concerning the report of the complaint to Council.

IV. Analysis: Did the Mayor breach the Code of Conduct by making false or misleading statements in the press release of September 23, 2016?

[33] The Code of Conduct sets minimum standards for the behaviour of Council members in carrying out their functions. The Code was developed to assist Council members to:

1. *Understand the standards of conduct that are expected of them and the law that applies in relation to these standards;*
2. *Fulfill their duty to act honestly and exercise reasonable care and diligence; and*
3. *Act in a way that enhances public confidence in local government.*
(Code of Conduct, Purpose, page 1)

[34] The Code's Procedures section includes a Statement of Principle. Within the Statement of Principle, the requirement for making honest statements is described this way:

Members are responsible for making honest statements. No member shall make a statement when they know that statement is false. No member

shall make a statement with the intent to mislead Council members and the public. (Code of Conduct, Statement of Principle, page 2)

- [35] The press release issued by the Mayor on September 23, 2016 was accurate: it described the steps taken to deal with the complaint, the legislative requirements that the Town was obliged to fulfill and the goals of the Town in becoming an “employer of choice.” It was drafted in consultation with an external lawyer and a communications advisor, who were trying to assist the Town in clearing up the confusion around the two sets of processes for dealing with one complaint.
- [36] The Mayor acted on this advice and approved a press release drafted by his external advisers. There is no suggestion in any of the communications leading up to his approval of the press release that he was trying to mislead the public or acting in bad faith. Accordingly, I find that the Mayor did not release the press release with any intent to mislead. The press release, as far as it went, did not contain any false statements. On this basis, I find that there was no breach of the Code of Conduct by the Mayor in issuing the press release, as described above.
- [36] However, in reviewing the history of the matter, it is understandable that there could be public confusion over what took place. At no time in any of the public statements was the public advised that there would not be a Code of Conduct investigation into the complaint. In responding to this complaint, the Mayor has now clarified that there is no ongoing investigation into any alleged violation of the Code of Conduct.
- [37] This complaint is an example of circumstances which might fall under multiple policies and legislation. The Code of Conduct anticipates this: the Statement of Principle reads that “The Town of the Blue Mountain’s Code of Conduct is a general standard that augments Provincial laws and municipal policies and by-laws that govern conduct.”
- [38] In some municipalities, a complaint protocol sets out how complaints are to be classified and where appropriate, referred to other processes for resolution. The Complaint Protocol for the City of Toronto includes provisions for referrals, for example to counsel if the matter falls under the Municipal Conflict of Interest Act. In relation to policies with other procedures for resolving complaints, the City of Toronto Complaint Protocol notes:
- If the complaint on its face is with respect to non-compliance with a more specific Council policy with a separate complaint procedure, the complainant shall be advised that the matter will be processed under that procedure;*
- [39] A complaint protocol would assist members of Council and the public in understanding when complaints made under the Code of Conduct will be investigated and the subject of public report. It should be the subject of debate by Council and once in place, posted along with the Code of Conduct as part of the ethical infrastructure for use by all. It can reflect the value of early complaint

resolution, provide for fair and orderly classification of complaints and contribute to Council's public commitment to upholding the principles in its Code of Conduct.

V. Conclusion

[40] As a result of the finding that Mayor McKean did not breach the Code of Conduct, for the reasons provided above, I recommend that Council adopt this finding.

DATED this 26th day of November, 2016



Janet Leiper, C.S.