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Integrity Commissioner Office
for the City of Brantford

INVESTIGATION REPORT

Integrity Commissioner, Marvin J. Huberman, LL.B., LL.M. (ADR), FCIARB
Email: mhuberman@adr.ca

September 29, 2020

Sent by email to:

The Complainant, Mr. John-David Wrobel
jdwrobel.leadership@gmail.com

The Respondent, Councillor Dan McCreary
DanMcCreary@brantford.ca

Re: Code of Conduct Complaint - IC - 210 - 0620 (Wrobel/McCreary)

Dear Mr. Wrobel and Councillor McCreary:

Investigative Powers

I, Marvin J. Huberman, have exercised the powers and performed the duties of the Integrity Commissioner for the City of Brantford to inquire into, investigate, and prepare a report with respect to the Complaint described herein, pursuant to section 223.3 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended.

Introduction

On June 10, 2020, John-David Wrobel, a Brantford resident and a member of the public (the “Complainant”), filed a complaint about whether Ward 3 Councillor Dan McCreary (the “Respondent”), a member of Brantford City Council, has contravened the Code of Conduct applicable to the member, being Chapter 16 of the Code of Conduct for Members of the Council of the

Corporation of the City of Brantford and of its Local Boards (the “Code of Conduct”).

The Complainant states that he has reasonable grounds to believe that the Respondent contravened Section 16.2.2 (a) [“engage in a course of conduct consisting of patronizing or condescending comments or behaviour”] and (c) [“make or publish statements about other members of Council or of a Local Board, Municipal Staff, Local Board Staff or members of the public which would, whether or not they might have a defence of absolute or qualified privilege, constitute libel or slander”], and Section 16.2.5 (a) [“disclose or distribute confidential information where such disclosure or distribution would contravene the *Municipal Freedom of Information and Protection of Privacy Act*”] and (d) “misuse confidential information (information that they have knowledge of by virtue of their position as a member of Council or Local Board which is not in the public domain, including but not limited to e-mail messages and correspondence from other members of Council, members of the Local Board or third parties) such that it may cause detriment to the municipality, the Council or the Local Boards”] of the Code of Conduct arising from comments and questions posted by the Respondent on his Facebook page on May 27, 2020, associated with a link shared by another person about a May 26, 2020, brantfordexpositor.ca article titled “City cites fraud in suspending online golf booking system for non-members”.¹

Investigative Process

Having exercised the powers and performed the duties of the Integrity Commissioner for the City of Brantford pursuant to section 223.3 of the *Municipal Act, 2001*, as part of my investigation of this formal complaint, I reviewed:

- The Complainant’s Code of Conduct - Formal Complaint Form and Affidavit, received on June 10, 2020;
- The response of the Respondent to the Complaint, received on June 22, 2020;
- The Complainant’s reply to the response of the Respondent, received on July 7, 2020; and

¹<https://www.brantfordexpositor.ca/news/local-news/city-cites-fraud-in-suspending-online-golf-booking-system-for-non-members>

- Additional documentation and information from the Complainant, the Respondent, and Mr. Ron Heaslip, a witness, received on August 6, 10, 11, and 14, and September 15, 2020.

I interviewed the Complainant via teleconference on August 5, 2020.

I interviewed the Respondent via teleconference on August 10 and September 15, 2020.

I interviewed Mr. Ron Heaslip, a witness, via teleconference on August 11, 2020.

I received full cooperation with my investigation from the Complainant, the Respondent, and Mr. Heaslip, all of whom provided me with the documentation and information I requested.

The Complaint

Schedule A attached to the Affidavit of Complainant, sworn/affirmed by the Complainant on June 9, 2020, sets out the following particulars relied on by the Complainant in support of his complaint.

- “• My name is John-David Wrobel.
- I reside at [REDACTED].
 - I have been a resident of Brantford for more than 30 years.
 - I was a candidate for Brantford City Council, Ward 4, in 1997.
 - I was was a candidate for Brantford City Council, Ward 4, in 2000.
 - I was elected to Brantford City Council in 2000, 2003 and 2010.
 - I served 9 years as a Ward 4 Councillor for the City of Brantford.
 - I am familiar with the Code of Conduct for Members of the Council of the Corporation of the City of Brantford and of it's Local Boards.
 - I am actively involved in our community.
 - I am a volunteer for the Friends of Arrowdale group.
 - Friends of Arrowdale is now a Not-For-Profit organization.
 - I am an executive member of the Not-For-Profit organization of Friends Of Arrowdale.
 - I am acting as a concerned citizen of Brantford.
 - I am filing a formal complaint against Dan McCreary.
 - I believe the content and context of the complaint is associated with Dan McCreary's roll as a Municipal Councillor.

Personal
information
(address)
removed

- I believe, Councillor McCreary's identified posts and comments on social media are unprofessional and uncalled for as a Municipal Council.
- I believe, Councillor McCreary's Comments and remarks in session and in social media, demonstrate a bias towards a community organization, supporters of the organization, individuals and committee members of the organization.
- See attached Schedule A for additional details.
- I believe Dan McCreary has contravened Sections 16.2.2; 16.2.2 (a) and (c); Section 16.2.5 (a) and (d), in his roll as a City Councillor”.

ATTACHED
SCHEDULE A to the Affidavit of John-David Wrobel

Personal information (name) removed

Personal information (name) removed

A01

Screenshot from Dan McCreary's Facebook page
Wednesday, May 27, 2020
Councillor Dan McCreary posts a link on his facebook page
BRANTFORDEXPOSITOR.CA
City cites fraud in suspending on-line golf booking system for non-members



BRANTFORDEXPOSITOR.CA
City cites fraud in suspending online golf booking system for non-memb...

10 Comments 2 Shares

Like Comment Share
Interacting with yourself



A02

Screenshot from Dan McCreary's Facebook page
Wednesday, May 27, 2020
Councillor Dan McCreary adds the following comments and questions associated with the post identified above post.

Dan McCreary 19 mins
Usually 'Friends of Arrowdale' are quick to comment on every golf story. Is there some reason that they are strangely silent today regarding this Expositor story? The identity of this culprit is known to City of Brantford staff and has been provided to Police for investigation. Is the culprit closely tied to Friends of Arrowdale? Has the culprit taken encouragement or licence from other FOA members? Does that explain their silence? If I were an FOA supporter, I'd want to know. Stay tuned as the answers begin to unfold in the next few days.



- At the time of the post, the incident is under investigation by the Brantford Police Services.
- The Expositor article makes no reference to the group known as the "Friends Of Arrowdale"

"Usually 'Friends Of Arrowdale' are quick to comment on every golf story"

- unsupported comment; not factual

"Is the culprit closely tied to the Friends Of Arrowdale?"

- Under investigation; inference, suggesting of wrong doing by FOA members without supporting facts

"Has the culprit taken encouragement or licence from other FOA members?"

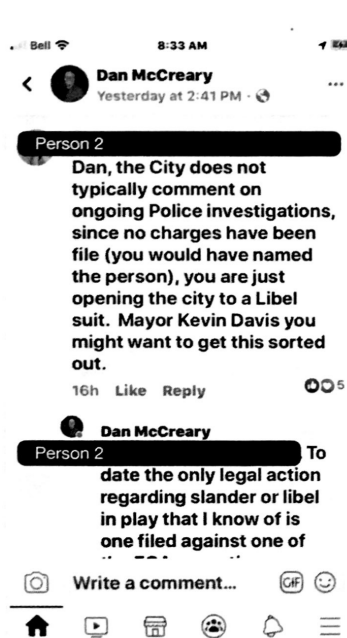
- Under investigation; inference, suggesting of wrong doing by FOA members without supporting facts.

"Does that explain their silence?"

- "their" - being Friends Of Arrowdale; infers or implies guilt by silence

Comments made by Dan McCreary appear to fall under section 16.2.2; 16.2.2.(a) and 16.2.2.(c)

ATTACHED
 SCHEDULE A to the Affidavit of John-David Wrobel



A05

Screenshot from Dan McCreary's Facebook page
 Wednesday, May 27, 2020

Councillor Dan McCreary and Post Commenter add the following comments associated with the post in question.

Person 2: "Dan, the City does not typically... you are just opening the city to a liable suit."

Dan McCreary: "To date the only legal action regarding slander or libel in play that I know of is one filed against one of the FOA executive."

- Thursday, May 28, 2020:
 - The 13 individuals of the FOA committee/executive were polled regarding "Action for slander of liable" against them.
 - The 13 individuals "ALL" indicated "NO" Action for slander or liable.
- Friday, May 29, 2020:
 - I went to the Superior Court of Ontario in Brantford.
 - I confirmed with the court clerk there were no actions for slander or liable on record for "a member of the FOA executive."

Comments made by Dan McCreary appear to fall under section 16.2.2 and 16.2.2.(c)



A06

Screenshot from Dan McCreary's Facebook page
 Wednesday, May 27, 2020

Councillor Dan McCreary and Post Commenter add the following comments associated with the post in question.

- Full text from A05

ATTACHED
SCHEDULE A to the Affidavit of John-David Wrobel

A07



Screenshot from Dan McCreary's Facebook page
Wednesday, May 27, 2020

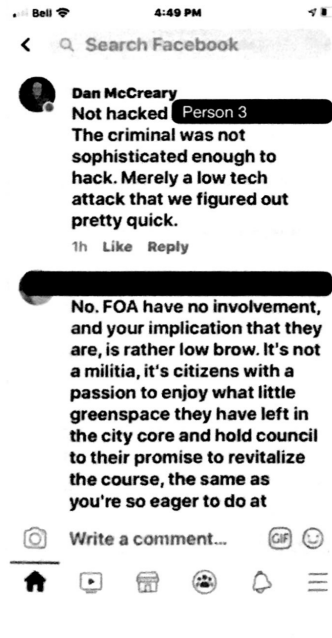
Councillor Dan McCreary and Post Commenter add the following comments associated with the post in question.

Person 3: "... is a very poor system that can easily be hacked..."
Dan McCreary: "Not hacked..." The criminal was not..."

- Dan McCreary cited the individual is a "criminal"
- I believe at the time of the comment, the complaint/city investigation was turned over the the police for investigation.
- I believe, at the time of the post/comment, there was no public record of the alleged being charged or convicted.
- I believe citing the individual as "criminal" in the alleged matter, lacks reggraded to due process for the unnamed accused.

Comments made by Dan McCreary appear to fall under section 16.2.2 and 16.2.2.(c)

A08



Screenshot from Dan McCreary's Facebook page
Wednesday, May 27, 2020

Councillor Dan McCreary and Post Commenter add the following comments associated with the post in question.

- Full text from A07

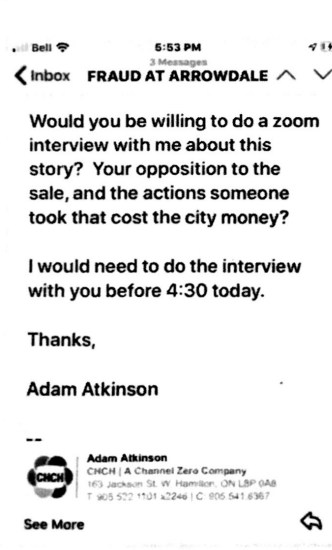
ATTACHED
 SCHEDULE A to the Affidavit of John-David Wrobel



A09

Screenshot from FOA committee Members email
 Wednesday, May 27, 2020
 Email sent to FOA member from CHCH contact for interview

I have been in contact with the Recipient
 The Recipient is a committee member of the FOA.
 The recipient indicated a set-to between himself and Dan McCreary over FOA posts and content.
 The Recipient provided me with the screen shots.
 The Recipient has granted me the authority to add this to the complaint.
 The Recipient has no relation to the Sender.
 The Recipient has not posted his personal email within the FOA group.
 The Recipient has emailed the Sender questioning how he obtained the recipients contact information and his knowledge of the recipients position within the FOA.
 The Sender has not replied to the FOA committee member.
 The interview between the sender and the recipient never took place.
 Dan McCreary was interviewed by CHCH at Arrowdale, Wednesday, May 27, 2020
 It is believed that Dan McCreary has access to the recipients email.
 it is believed, by way of convenience, the interview took place with Dan McCreary by CHCH.
 I believe, as Chair, Dan McCreary has my contact information for such interviews.



A10

Screenshot from FOA committee Members email
 Wednesday, May 27, 2020
 Email sent to FOA member from CHCH contact for interview

- Full text from A09
- It is believed that Dan McCreary provided CHC the personal contact information of the Recipient, that would not otherwise would be readily available, to the Sender of CHCH.



Items A09 and A10 appear to fall under section 16.2.5 and 16.2.5.(a) and 16.2.5.(d)

ATTACHED
SCHEDULE A to the Affidavit of John-David Wrobel

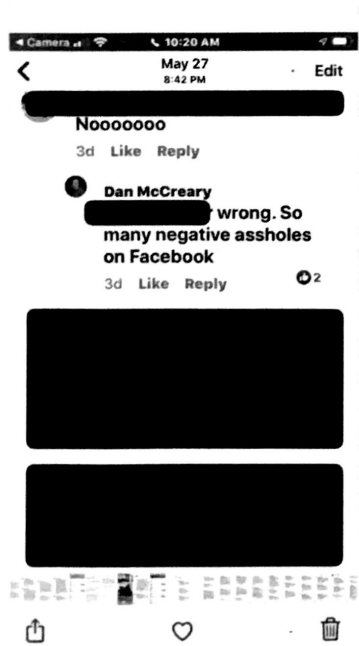


A11
Screenshot from Dan McCreary's Facebook page
Wednesday, May 24, 2016
Councillor Dan McCreary's post relating to heritage "Crystal House" with comments to members of the public.

A12 comments are associated with this post.

UPDATE: content of comments in the post have been removed, deleted or altered.

Personal information (name) removed



A12
Screenshot from Dan McCreary's Facebook page
Wednesday, May 27, 2020
Recent discussion relating to heritage and Arrowdale as a heritage item...
Dan McCreary to the commenter: "so many negative assholes on Facebook."

Comment made to a person responding to Dan McCreary's post.
Comments were made to reference Arrowdale as a possible heritage item/ designation.
Referring to an individual or group of individuals, including, but not limited to FOA supporters or members.

Items A12 appears to fall under section 16.2.2

The Response

The Respondent takes the position that he did not contravene the Code of Conduct because:

“In general, the allegations made by Mr. Wrobel are without merit, frivolous and vexatious. Mr. Wrobel is among the leaders of a special interest group (Friends of Arrowdale) which vociferously opposes a legitimate decision by the Corporation of the City of Brantford.

In total, statements made by me (and cited by Mr. Wrobel) are entirely factually correct or believed by me to be so.

Mr. Wrobel references 16.2.2;

(a) engage in a course of conduct consisting of patronizing or condescending comments or behavior;

None of my commentary was patronizing or condescending (ie) demonstrating superiority

(c) make or publish statements about other members of Council or of a Local Board, Municipal Staff, Local Board Staff or members of the public which would, whether or not they might have a defense of absolute or qualified privilege, constitute libel or slander; or

None of my statements were slanderous or libelous

Mr. Wrobel references 16.2.5

(a) disclose or distribute confidential information where such disclosure or distribution would contravene the *Municipal Freedom of Information and Protection of Privacy Act*;

None of my statements disclosed confidential information.

(d) misuse confidential information (information that they have knowledge of by virtue of their position as a member of Council or Local Board which is not in the public domain, including but not limited to e-mail messages and correspondence from other members of

Council, members of the Local Board or third parties) such that it may cause detriment to the municipality, the Council or the Local Boards.

None of my statements misused confidential information.

In responding to specific examples cited by Mr. Wrobel:

With respect to the individual who defrauded the Corporation of the City of Brantford. He has been charged by BPS and that is a matter of public record. He will be sued by the Corporation, and that shortly will be a matter of public record. Facebook screen captures will show him to be a Friend of Arrowdale. This material will all be available to the investigator.

With respect to the member of the FOA with a slander/libel action in play. Mr. Wrobel has received communication requesting he remove an offensive facebook post and issue an apology as an early resolution to a future legal action. Evidence by a fellow councillor with first-hand knowledge will be available to the investigator.

With respect to the 'recipient' Mr. Heaslip. It is difficult to discern Mr. Wrobel's intent. Both he and Mr. Heaslip are equally vocal in the media and neither should be surprised to be contacted by the media for comment.

With respect to the Crystal Cottage post. It is factually correct that there are 'many negative assholes on facebook.' The comment did not reference any particular person".

The Reply

In his reply to the response of the Respondent, the Complainant states:

"Response to Councillor Dan McCreary's comments noted in his initial response.

"None of my statements were slanderous or libellous."

Councillor McCreary implies FOA (Friends of Arrowdale) with includes, but not limited to:

- the Not-For-Profit executive;
- committee members;
- volunteers; and the the 8,000 plus supporters/community members.
- I/We believe his use of questions/comments were intended, with malice, to paint the Not-For-Profit organization as underhanded and instigating the alleged wrongdoing.
- I/We believe his questions/comments impugn the integrity of the organization and its committee members, volunteers and community supporters.
- I/We believe the questions/comments were intended to discredit the organization as a whole within the face of our community.

A: "None of my statements disclosed confidential information."

B: "None of my statements misused confidential information"

PART I (A)

- At the time of Councillor McCreary's questions/comments, I was the Chair of Friends Of Arrowdale, Not-For-Profit Organization.
- I believe Councillor McCreary, was aware of my roll.
- I believe my contact information is widely public and available for such media use.
- I believe, if there was a need for an interview, the media could have reached out to me for comment.
- I believe the media representative received Mr. Heaslip's contact information form Councillor McCreary, without consent by Mr. Heaslip.
(attached photo's in the original complaint)
- I believe Mr. Heaslip will be available to comment on the disclosure of his price and confidential information to the media, by Councillor McCreary.

PART II (A & B)

- I believe Councillor McCreary has disclosed and made use of information that is “Private and Confidential”, that would not otherwise be afforded to him outside his roll of an elected Municipal Councillor.
- Councillor McCreary references “Mr. Wrobel has received communication requesting he remove an offensive post and issue an apology...”
- Councillor McCreary references “Evidence by a fellow councillor with first hand knowledge...”
- I believe the “fellow councillor with first hand knowledge” is Councillor Jan Vanderstelt.
- I acknowledge receipt of a private and confidential letter dated February, 21, 2020
- I believe the letter identifies the complainant, a “fellow councillor with first hand knowledge”; myself and the alleged third party.
- I believe, the letter alleges one person with libel. It states “The above statement, by _____ , constitute libel of” the fellow councillor.
- I believe, at the time of the code of conduct complaint lodged against Councillor McCreary, no action was filed with the Superior Court of Ontario in the Brantford/Brant region.
- I believe, that because this matter is not before the courts, or in the court system, the matter is NOT public and remains private and confidential.
- I believe, it was Councillor McCreary that disclosed the alleged libel information to a fellow executive member of Friends Of Arrowdale. (Screen shots of the conversation with the executive member confirms his conversation with a councillor about the alleged libel and slander are available upon request)
- I believe, Councillor McCreary made use of the private and confidential information, provided to him by a “fellow councillor with firsthand knowledge”, for nefarious purposes.
- I believe Councillor McCreary used this private and confidential third party information in his posts, questions and comments, with the clear intent of discrediting the organization as a whole.
- I believe Councillor McCreary continues to use the information provided to him by Councillor Vanderstelt and disclose this information to the general public”.

Relevant Provisions of the Code of Conduct

Section 16.2.2 of the Code of Conduct provides:

“16.2.2 Respectful Conduct

In all of their interactions with one another, Municipal Staff, Local Board Staff, Officers, and members of the public, in connection with their duties as a member of Council or of a Local Board, as the case may be, members of Council and Local Boards shall interact with and treat every person with dignity, respect and equality. Without limiting the generality of the foregoing, members of Council and Local Boards shall not:

- (a) engage in a course of conduct consisting of patronizing or condescending comments or behaviour;
- (b) make written or verbal abuse or threats;
- (c) make or publish statements about other members of Council or of a Local Board, Municipal Staff, Local Board Staff or members of the public which would, whether or not they might have a defence of absolute or qualified privilege, constitute libel or slander; or
- (d) engage in Workplace Harassment or Workplace Violence.”

Section 16.2.5 of the Code of Conduct provides:

“16.2.5 Confidentiality

Members of Council and Local Boards will respect and refrain from disclosing or distributing confidential information that comes into their possession whether such confidential information is received at *in camera* Meetings, through confidential reports, or through other means. Without limiting the generality of the foregoing, members of Council or of a Local Board shall not:

- (a) disclose or distribute confidential information where such disclosure or distribution would contravene the *Municipal Freedom of Information and Protection of Privacy Act*;
- (b) disclose or distribute legal opinions or other confidential solicitor-client communications over which the municipality has or may claim solicitor-client privilege;

(c) disclose or distribute confidential reports or other confidential information belonging to the municipality or Local Board; or
(d) misuse confidential information (information that they have knowledge of by virtue of their position as a member of Council or Local Board which is not in the public domain, including but not limited to e-mail messages and correspondence from other members of Council, members of the Local Board or third parties) such that it may cause detriment to the municipality, the Council or the Local Boards”.

Analysis, Findings, Conclusions and Recommendations

Did the Respondent contravene Sections 16.2.2 (a) and (c) and 16.2.5 (a) and (d) of the Code of Conduct by posting the impugned comments and questions on his Facebook page on May 27, 2020, associated with a link shared by another person about a May 26, 2020, brantfordexpositor.ca article titled “City cites fraud in suspending online golf booking system for non-members”?

This issue raises a matter of statutory interpretation given that the Code of Conduct was enacted by by-law pursuant to the *Municipal Act, 2001* (the “Act”).

Principles of Statutory Interpretation

In *Rizzo & Rizzo Shoes Ltd.*², the Supreme Court of Canada adopted the modern principle of statutory interpretation, which requires courts today to interpret a provision by considering it in its entire context and by both:

1. Looking at its ordinary and grammatical meaning, in line with the plain meaning rule; and
2. Ensuring that the interpretation is in harmony with:
 - a. The scheme of the statute as a whole;
 - b. The object of the Act; and

² *Rizzo & Rizzo Shoes Ltd.*, Re, 1998 CarswellOnt 1 (S.C.C.) at para. 21.

c. The intention of the legislature.

This approach takes a more “holistic view” of statutory interpretation, encouraging courts to look at context.³

Application of Principles

As a matter of statutory interpretation, the Complainant contends that the Respondent by posting the impugned Facebook comments and questions: (a) “engaged in a course of conduct consisting of patronizing or condescending comments or behaviour”; (b) “made or published statements about other members of Council or of a Local Board, Municipal Staff, Local Board Staff or members of the public which would, whether or not they might have a defence of absolute or qualified privilege, constitute libel or slander”; (c) “disclosed or distributed confidential information where such disclosure or distribution would contravene the *Municipal Freedom of Information and Protection of Privacy Act*”; and (d) “misused confidential information (information that they have knowledge of by virtue of their position as a member of Council or Local Board which is not in the public domain, including but not limited to e-mail messages and correspondence from other members of Council, members of the Local Board or third parties) such that it may cause detriment to the municipality, the Council or the Local Boards”, in contravention of Sections 16.2.2 (a) and (c) and 16.2.5 (a) and (d) of the Code of Conduct.

I do not agree with the Complainant’s argument.

In my view, on their proper construction, the relevant words in Sections 16.2.2 and 16.2.5 of the Code of Conduct, are not to be defined as contended by the Complainant. His construction is not based on the ordinary and grammatical meaning of those words, nor does it take into account the context. Rather, his approach to the interpretive exercise is as Doherty J.A. described in *Glimmer Resources Inc. v. Exall Resources Ltd.*⁴ – it gives meaning to the relevant words in the Code of Conduct by impermissibly looking at them under an “interpretive microscope in isolation.”

³ *Rooney v. ArcelorMittal S.A.*, 2016 CarswellOnt 13026 (Ont. C.A.) at para. 13.

⁴ *Glimmer Resources Inc. v. Exall Resources Ltd.* (1999) 119 O.A.C. 78 (C.A.) at para. 17

The Context

Context is paramount.

Pursuant to section 224 (a) of the *Municipal Act, 2001*, “It is the role of Council...to represent the public and to consider the well-being and interests of the municipality.”

As explained in *The Ontario Municipal Councillors Guide 2018*,⁵ the representative role of Council involves representing the views of constituents when dealing with issues that come before Council. It also involves having a broader understanding of the issues impacting the municipality as a whole; and considering conflicting interests and making decisions that will not be popular with everyone, by taking into account all available information when making evidence-based decisions. While disagreements are common among council members, it is important to remember that councillors are working toward a common goal, and that there is no single, correct approach to the representative role.

Indeed, elected Members of Council are entitled to take different approaches and positions on issues and to disagree with others, even with the majority on an issue. As the Supreme Court of Canada stated: “In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens...A public officer may in good faith make a decision that he or she knows to be adverse to interests of certain members of the public...”⁶

Members of Council, under the democratic process, are entitled to form views, hold views, express views, change views, and give effect to views, as to matters of public policy affecting the municipality.⁷

It is not the role of an Integrity Commissioner to restrain or prevent Members of Council from exercising their fundamental freedom to express themselves and manifest their thoughts, beliefs, and opinions, including freedom of the press and other media of communications as to matters of public policy affecting the well-being and interests of the municipality.

⁵ www.ontario.ca/document/ontario-municipal-councillors-guide-2018, at p. 4 of 111

⁶ *Odhavji v. Woodhouse*, 2003 SCC 69 (CanLII) at para. 28

⁷ *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1973 CanLII 818 (ONSC), 1 O.R. (2d) 20 at para. 43, cited in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC).

As Integrity Commissioner Donald Cameron stated in his 2012 Report:⁸

“I cannot and will not be a referee of free speech in a political arena provided it stays within the bounds of s. 2.1 [now Rules Nos. 14 and 15] of the Code”.

Investigator, Randy Pepper, the delegate of Integrity Commissioner Cameron, subsequently expanded on this principle as follows:⁹

Freedom of expression is a fundamental right in Canada so the Code must be interpreted in a manner consistent with this fundamental right. Based on the law set out below, I cannot find that the Code should be interpreted to appoint the Integrity Commissioner as a speech referee in the political arena.

As the Supreme Court of Canada noted in *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 SCR 139:

Freedom of expression, like freedom of religion, serves to anchor the very essence of our democratic political and societal structure. As expressed by Jackson J., in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at p. 642, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”. Robert J. Sharpe explains the futility of basing this axiom merely upon some yearning for ultimate truth, in “Commercial Expression and the Charter” (1987), 37U.T.L.J. 229, at p. 236:

The essence of the market-place of ideas argument is that control and regulation of expression is intolerable because we can trust no government to know the truth. Those who purport to legislate the truth invariably turn out

⁸ City of Brampton, Report No. BIC 030-192, December 4, 2012.

⁹ City of Brampton, Report No. BIC-32-1112, December 18, 2012, Randy Pepper, Delegate of the Integrity Commissioner.

to be tyrants. The market-place of ideas argument prescribes an open process precisely because we cannot agree on what is the truth. Hence the justification for the widest freedom of political speech stems not only from some abstract search for truth, but also from the tangible goal of preserving democracy.

In a defamation context, the Supreme Court noted more recently in *WIC Radio Ltd. V. Simpson*, 2008 SCC 40 (CanLII), [2008] 2 SCR 420 at para. 2,

An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest.

In view of the above law, I find that the Integrity Commissioner has a very limited role in relation to the "freewheeling debate on matters of public interest" which is not engaged by Councillor Palleschi's reported comments. I have therefore concluded that the allegations of the BSO/Mr. Todd against Councillor Palleschi do not require further investigation and the complaint should be dismissed."

I agree with the above statements and analysis of Integrity Commissioner Cameron and Investigator Pepper concerning the role of the Integrity Commissioner as a speech referee in the political arena, and I adopt them for purposes of the present Complaint.

In my view, the relevant words in Sections 16.2.2 and 16.2.5 of the Code of Conduct must be interpreted in light of and in harmony with this context and consistent with the Respondent's representative roles and democratic rights: his fundamental freedom to express himself and manifest his thoughts, beliefs, and opinions, including freedom of the press and other media of communications as to matters of public policy affecting the well-being and interests of the municipality.

Findings

Having thoroughly reviewed and carefully considered the documentation and information obtained in the course of my investigation (collectively, the “evidence”), I find that the Respondent’s impugned Facebook comments and questions, associated with a link shared by another person about a May 26, 2020, brantfordexpositor.ca article titled “City cites fraud in suspending online golf booking system for non-members”, involved matters of public policy, including that Arrowdale is a municipal golf course; the city suspended all online golf bookings for non-members after becoming aware of what it states was an act of fraud; city police are investigating; the city said a member of the public sought to “intentionally interfere” with the online booking system and that it is also considering taking legal action against the person and any associates believed to be responsible for this interference, being matters affecting the well-being and interests of the municipality, and they manifested the Respondent’s thoughts, beliefs, opinions, and/or expressions, as to those matters.

Based on the evidence, I find that the Respondent by posting the impugned comments and questions on his Facebook page did not (a) “engage in a course of conduct consisting of patronizing or condescending comments or behaviour”; (b) “make or publish statements about other members of Council or of a Local Board, Municipal Staff, Local Board Staff or members of the public which would, whether or not they might have a defence of absolute or qualified privilege, constitute libel or slander”; (c) “disclose or distribute confidential information where such disclosure or distribution would contravene the *Municipal Freedom of Information and Protection of Privacy Act*”; and (d) “misuse confidential information (information that they have knowledge of by virtue of their position as a member of Council or Local Board which is not in the public domain, including but not limited to e-mail messages and correspondence from other members of Council, members of the Local Board or third parties) such that it may cause detriment to the municipality, the Council or the Local Boards”, in contravention of Sections 16.2.2 (a) and (c) and 16.2.5 (a) and (d) of the Code of Conduct.

No Course of Conduct Consisting of Patronizing or Condescending Comments

The phrase “engage in a course of conduct” connotes some degree of repetition or prolongation.

I do not find on the evidence that the Respondent by posting the impugned comments and questions on his Facebook page on a single day engaged in a “course of conduct” as that phrase is used in the Code of Conduct.

The Concise Oxford English Dictionary¹⁰ defines “patronize” as “treat with an apparent kindness which betrays a feeling of superiority” and “condescend” as “show that one feels superior...do something despite regarding it as below one’s dignity”.

I do not find on the evidence that the Respondent by posting the impugned comments and questions on his Facebook page made “patronizing or condescending comments” as those terms, properly construed, are used in the Code of Conduct.

The Comments and Questions Would Not Constitute Libel or Slander

A plaintiff in a defamation (libel and slander) action must prove that:

1. The defendant published a defamatory statement;
2. The defamatory statement referred to the plaintiff; and
3. The statement is defamatory - “has the tendency to injure, disgrace, prejudice, or adversely affect the reputation or character of the plaintiff”.¹¹

Assuming, without finding, that the Complainant has demonstrated on the evidence that the Respondent by posting the impugned comments and questions on his Facebook page, published defamatory statements and the statements are defamatory (elements 1 and 3 above), in my view, the impugned statements do not refer to a sufficiently identifiable plaintiff, the Complainant or another legal entity (element 2 above).

To establish a *prima facie* defamation case, a plaintiff must establish that the impugned statements would be reasonably understood to refer to **him** by the people to whom the statements were published. The plaintiff must

¹⁰ Tenth Edition, Revised, Oxford University Press, 2002

¹¹ Brown, *The Law of Defamation*, 2nd ed. (looseleaf) (Toronto: Carswell, 1999) at 4-3

prove that “ordinary and sensible persons familiar with the plaintiff would understand that the words referred to him”.¹²

Where defamatory statements are made about a group or organization, an individual member of the group or organization - to succeed in a defamation action - must establish that the statements would be reasonably understood to refer to each and every individual member of the group.¹³

I find on the evidence that the Complainant has not established that the impugned comments and questions posted by the Respondent on his Facebook page would be reasonably understood to refer to the Complainant by the people to whom the statements were published or that these comments and questions would be reasonably understood to refer to each and every member of the group or organization, Friends of Arrowdale.

In consequence, I find that the Complainant has failed to establish element 2 above, that the impugned comments and questions posted on the Respondent’s Facebook page refer to a sufficiently identifiable plaintiff, the Complainant, the Friends of Arrowdale, or other legal entity.

Thus, in my view, the Complainant has failed to establish a *prima facie* case of defamation in the circumstances of the present complaint.

I therefore find on the evidence that the Respondent did not “make or publish statements about other members of Council or of a Local Board, Municipal Staff, Local Board Staff or members of the public which would, whether or not they might have a defence of absolute or qualified privilege, constitute libel or slander”, in contravention of the Code of Conduct.

The Disclosure or Distribution Would Not Contravene the *Municipal Freedom of Information and Protection of Privacy Act*

¹² *Rocco v. Spoletini*, 2002 CarswellOnt 5258, [2002] O.J. No. 5236 para. 3 (S.C.J.); affirmed 2003 CarswellOnt 2217 (C.A.).

¹³ *Bou Malhab c. Diffusion Métromédia CMR Inc.*, 2001 SCC 9, 2011 CarswellQue 383; *S.I.U. v. Lawrence*, 1979 CarswellOnt 478, 97 D.L.R. (3d) 324 (C.A.); leave to appeal refused (1979), 24 O.R. (2d) 257n (S.C.C.)

I accept the evidence of the Respondent and Ron Heaslip, and find, that the Respondent did provide CHCH with Mr. Heaslip's personal email address in connection with the interview with the Respondent and CHCH about the May 26, 2020, brantfordexpositor.ca article titled "City cites fraud in suspending online golf booking system for non-members", referred to in screenshots A09 and A10 above.

I further find on the evidence, however, that the Respondent's disclosure or distribution of Mr. Heaslip's personal email address to CHCH in the circumstances of this complaint, would not contravene the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (the "Act"). I have reached this conclusion for the following reasons.

I adopt the reasoning in *Uxbridge (Town) (Re)*¹⁴, a decision of the Ontario Information and Privacy Commissioner, who has specialized expertise in interpreting and applying the Act, and I apply it here.

I find that Mr. Heaslip's personal email address is about Mr. Heaslip in a personal capacity and is "personal information" as defined in Section 2(1) of the Act.

Section 14(1) of the Act prohibits an institution from releasing the personal information unless one of the exceptions in paragraphs (a) to (f) of section 14 (1) applies.

Under Section 14(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

Sections 14(2) and (3) assist in determining whether disclosure would or would not constitute an unjustified invasion of privacy under Section 14(1).

If any of paragraphs (a) to (h) of Section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of privacy under Section 14(1), which can be overcome if Section 14(4) or the "public interest override" at Section 16 applies.

I find on the evidence that none of the presumptions in paragraphs (a) to (h) of Section 14(3) apply in the circumstances of this complaint.

¹⁴ *Uxbridge (Town) (Re)*, 2017 CanLII 31476 (ON IPC), Order MO-3436-I.

I further find on the evidence that the Respondent's disclosure of Mr. Heaslip's personal email address to CHCH does not constitute an unjustified invasion of personal privacy under Section 14(1) because one or more factors and/or circumstances favouring disclosure in Section 14(2) are present in the circumstances of this complaint. Specifically, I find that "the disclosure is desirable for the purpose of subjecting the institution to public scrutiny"; that "access to the personal information may promote public health and safety"; and that "access to the personal information will promote informed choice in the purchase of goods and services".

As a result, I find on the evidence that the Respondent by disclosing Mr. Heaslip's personal email address to CHCH in the circumstances of this complaint did not "disclose or distribute confidential information where such disclosure or distribution would contravene the *Municipal Freedom of Information and Protection of Privacy Act*".

The Respondent Did Not Misuse Confidential Information

I find on the evidence that the Respondent by disclosing Mr. Heaslip's personal email address to CHCH in the circumstances of this complaint did not misuse confidential information under the Code of Conduct because that email address was in the public domain.

I note, and find, that Mr. Heaslip's personal email address is listed in Ron Heaslip's LinkedIn profile, under Contact Info, placing it in the public domain.

In consequence, I find on the evidence that the Respondent by disclosing Mr. Heaslip's personal email address to CHCH in the circumstances of this complaint did not "misuse confidential information (information that they have knowledge of by virtue of their position as a member of Council or Local Board which is not in the public domain, including but not limited to e-mail messages and correspondence from other members of Council, members of the Local Board or third parties) such that it may cause detriment to the municipality, the Council or the Local Boards".

Is the Complaint frivolous and vexatious?

The Respondent contends that the Complaint is frivolous and vexatious.

I reject this argument because it is not supported by the applicable law or sufficiently clear, convincing and cogent evidence to which I accord weight.

The Code of Conduct does not define the words “frivolous or vexatious”.

In respect of civil actions and rules of civil procedure, the test for establishing that an action is “frivolous and vexatious” entails a high standard. It has been defined to include an action which, on its face, is so unreal that no reasonable or sensible person could bring it; and one which is “hopeless factually”, and which it is “plain and obvious...cannot succeed”; or more simply that the action is “devoid of merit”; or that includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation.¹⁵

In my view, the Complaint is worthy of serious consideration. It is not, on its face, without merit or substance, or trivial, or so unreal that no reasonable or sensible person could bring it; nor is it plain and obvious that it could not succeed. I therefore find that the Complaint is not frivolous.

I am not persuaded, and therefore I am unable to find, as contended by the Respondent, that the Complaint is vexatious, because the evidence does not support the conclusion that the Complainant pursued the Complaint in a manner that is malicious or intended to embarrass or harass the Respondent or others. This argument is based on the Respondent’s own belief, speculation and conjecture, which is based on unfounded and unconvincing evidence to which I give no weight.

Although the Complainant’s motives may be inclined to advocacy rather than to the provision of objective evidence, I accept the evidence of the Complainant, give it weight, and find that he filed the Complaint in good faith, sincerely believing that his allegations were reasonably based and could support a finding that the Respondent contravened the Code of Conduct in the circumstances of this case.

Conclusions

¹⁵ *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario)*10, 1997 CanLII 12196 (ON SC); *Seabrook et al v. Morison et al*, 2019 ONSC 4232 (CanLII).

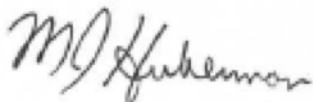
For the reasons stated above, I conclude that the Respondent did not contravene Sections 16.2.2 (a) and (c) and 16.2.5 (a) and (d) of the Code of Conduct by posting the impugned comments and questions on his Facebook page on May 27, 2020, associated with a link shared by another person about a May 26, 2020, brantfordexpositor.ca article titled “City cites fraud in suspending online golf booking system for non-members”.

Recommendation

Although I have determined that the Respondent has not contravened the Code of Conduct, the circumstances and analysis of this complaint may be of interest and importance to Council and the public.

I recommend that Council receive this report which finds no contravention of Sections 16.2.2 and 16.2.5 of the Code of Conduct.

Respectfully submitted this 28th day of September, 2020,

A handwritten signature in cursive script, appearing to read "MJ Huberman".

Marvin J. Huberman, LL.B., LL.M.(ADR), FCI Arb
Integrity Commissioner, City of Brantford
c/o ADR Chambers Inc., Office of the Integrity Commissioner