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CODE OF CONDUCT COMPLAINT 2020-11

INTEGRITY COMMISSIONER REPORT

THE CORPORATION OF THE CITY OF THOROLD

Daria Peregoudova
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AIRD BERLIS

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I. SUMMARY

A formal complaint was filed with the Integrity Commissioner on December 11, 2020 (the "**Complaint**"), alleging that Councillor John Kenny (the "**Councillor**") of The Corporation of the City of Thorold (the "**City**") contravened various sections of the City's Code of Conduct for Members of Council and Local Boards (the "**Code**").

A related formal application was also filed with the Integrity Commissioner on December 22, 2020 (the "**Application**") alleging that the Councillor had contravened subsection 5.2(1) of the *Municipal Conflict of Interest Act*.[1] This Application was filed pursuant to section 223.4.1 of the *Municipal Act, 2001*.[2] The Application was later withdrawn, and as such, will not be discussed further in this Report.

II. APPOINTMENT & AUTHORITY

Aird & Berlis LLP was appointed as Integrity Commissioner for the City pursuant to subsection 223.3(1) of the *Municipal Act, 2001* by Council by By-law No. 28-2019 on February 20, 2019.

Council adopted the Code and its Complaint Protocol (the "**Complaint Protocol**") on October 1, 2019 by By-law No. 126-2019.

As Integrity Commissioner, we are appointed to act in an independent manner on the application of the Code, and other rules and procedures governing the ethical behaviour of members of Council. We are required to preserve secrecy in all matters that come to our knowledge as Integrity Commissioner in the course of our duties. At the same time, the City is required to ensure that reports received from the Integrity Commissioner are made available to the public.

The Complaint was properly filed pursuant to Part B, Section 1(1) of the Complaint Protocol and subsection 223.4(1) of the *Municipal Act, 2001* and fall within the scope of the Code.[3]

This is a report on the investigation of the Complaint made in accordance with Part B, Section 11 of the Complaint Protocol and subsection 223.6(2) of the *Municipal Act, 2001* (the "**Report**").

The principles of procedural fairness require us to provide reasons for our conclusions and recommendations, which we have done in this Report. Our investigation was conducted in accordance with the Complaint Protocol and with a process that was fair to all parties. We have assessed the evidence in an independent and neutral manner. We have provided an opportunity to the Councillor to respond to all of the allegations set forth in the Complaint, and to review and provide comments on our preliminary findings and conclusions.

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[1] *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50.

[2] *Municipal Act, 2001*, S.O. 2001, c. 25.

[3] The Complaints alleged a contravention of Section 2.2 of the Code. From the outset of the investigation, we determined that Section 2.2 is a statement of principles in the Code and is not capable of independent enforcement – a position we and other Integrity Commissioner have consistently taken. However, the principles are important in providing guidance as to the interpretation and application of the Code.

III. CODE OF CONDUCT AND POLICY PROVISIONS AT ISSUE

The Complaint alleges that the Councillor contravened the following provisions of the Code:

- Sections 2.2; 4.1(f), (g) & (i); 10.1; 10.2; 10.3; 11.1; 11.2; 12.1; 12.2 and 13.1.

IV. REVIEW OF MATERIALS AND INTERVIEWS

In order to undertake our investigation and prepare this Report, we have reviewed and considered the following materials:

- The Complaint and all attachments thereto;
- The Councillor's response to the Complaint dated April 13, 2021 (the "**Response**"); and
- The City's Policy and Procedure Manual Policy Number 1000-02 (the "**Policy**") pertaining to the allocation of arena services.

We also reviewed such further materials that we considered appropriate to understand the context of the ethical framework and matters related to the Complaint.

Furthermore, we conducted an interview with a member of City staff on April 26, 2021.

V. BACKGROUND AND FACTUAL CIRCUMSTANCES

(a) The Complaint

The Complaint contains allegations with respect to two (2) primary subject areas and their surrounding events, which we set out below:

i. Ice Time Request

The Councillor is a member of the Thorold Mounts hockey team (the "**Mounts**"). The Complaint alleges that in or around November 2020, after initially giving up a Sunday morning ice time slot, the Mounts subsequently asked for their ice time back, resulting in the bumping of a minor hockey team to an earlier ice time during which it was difficult to find referees. The Complaint alleges that this request, and subsequent decision to return the ice time, were improper given protocols and prior discussion which held that once ice time was surrendered, it was permanently forfeited.

The Complaint alleges that the above-noted actions constituted a contravention of Sections 2.2, 4.0(f), 4.0(g), 11.1, 11.2, 12.1, 12.2, 13.1 of the Code.

ii. Emails

The Complaint alleges that the Councillor acted deliberately to intimidate a fellow member of Council (the "**Member**") via emails dated November 16, 2020 which were forwarded to a large group of "private individuals", some of whom are alleged to be police officers. In these emails, the Councillor stated "[The Member] firing up the community against our hockey team" and "This is what [the Member] thinks of our ice time. Let the boys know on Sunday. Thanks." The emails

show that the Member is carbon copied. In other words, he was aware that these emails were being sent.

The Complaint alleges that the above-noted actions constituted a contravention of Sections 2.2, 4(f), 4(g), 4(i), 10.1, 10.2, 10.3, 13.1 of the Code.

VI. PRELIMINARY MATTERS

Based on the evidence provided in support of the Complaint, we used our discretion to summarily dismiss the allegations pertaining to sections 4(f), 4(g), 10.2, 12.2, and 13.1 of the Code.

As indicated above, we also noted that while Section 2.2 of the Code, which forms part of the Code's key statements of principles and establishes a foundation for an understanding and application of the Code, the section is not capable of independent enforcement. As such, while our findings below take guidance from Section 2.2 in interpreting and applying the Code, we have not made specific determinations as to any contraventions pertaining to Section 2.2.

VII. ANALYSIS

This Part of our Report sets out our findings regarding the allegations in the Complaints.

i. Ice Time Request

This portion of the Complaint pertains to sections 11.1, 11.2, and 12.1 of the Code, which provide as follows:

Section	Provision
11.1	A Member shall not use the influence of their office or appointment for any purpose other than the exercise of his or her official duties in the public interest.
11.2	A Member shall not use the status of their position to influence the decision of another person to the private advantage or non-pecuniary interest of themselves, their parents, children or grandchildren, spouse, or friends or associates, or for the purpose of creating a disadvantage to another person or for providing an advantage to themselves.
12.1	A Member shall seek to avoid conflicts of interest, both pecuniary and nonpecuniary. A Member shall comply with the requirements of the Municipal Conflict of Interest Act with respect to obligations relating to pecuniary interests. A Member shall take proactive steps to mitigate any non-pecuniary conflicts of interest in order to maintain public confidence in the City and its elected officials.

It is clear that the COVID-19 pandemic significantly disrupted operations at the arena, including having one (1) operational ice surface (instead of the usual two (2)), and temporarily reduced change-room availability. As such, a decision was made and communicated to all stakeholders that the schedule would remain fluid based on the Province of Ontario's colour-coded re-opening system, and would be determined on a month-to-month basis based on the ability for teams to use the change-room and showers.

In or around September 2020, the Mounts made a decision to give up their Sunday morning ice slot of 10:00-11:30 a.m. that they had held for approximately forty-five (45) years on the understanding that, if and when change-rooms became available, the team would reclaim its standard time. A minor hockey team which typically occupied the 6 a.m. time slot took over the Mounts slot on a temporary basis.

In November 2020, it became apparent that as a result of a half-hour gap in the schedule, as well as the fact that on December 1, 2020, the Province was moving into a new stage of re-opening, user groups would need to convene to make some possible changes to the ice time schedule.

On November 18, 2020, the City's Parks and Recreation staff responsible for ice time distribution convened a meeting over Zoom with a group of stakeholders, including a Mounts representative, representatives of minor and junior hockey, as well as Mayor Terry Ugulini and the Councillor and Councillor Ken Sentence in their capacity as representatives of the Parks, Trails and Recreation Committee of Council. A discussion ensued whereas the stakeholders were notified that an adjustment to the schedule was necessary.

At the meeting, the Policy was considered to determine which user group would have appropriate priority. The Policy provides that the following order is to be considered of ice time priority scheduling:

1. City of Thorold Recreational Programming
2. Partner Groups
3. Seasonal Clients

As a "partner group" under the Policy, the Junior B team qualified as the highest priority group, and requested to take their preferred Sunday morning slot, which request was granted and which resulted in the bumping of minor hockey by 30 minutes.

However, the following day, the Junior B team opted out of their newly selected slot. As the next user group in priority under the Policy, the Mounts, as a seasonal and historical client, were provided the opportunity to reclaim their prior Sunday morning slot, which they elected to do. In addition to the order above, the Policy makes it clear that "The City of Thorold wishes to recognize long term clients. These clients that have had the same hour(s) for two or more consecutive years from the current year have first right of refusal on that facility booking time." There is no doubt under the terms of the Policy that the Mounts were the next group in priority.

Importantly, we learned that as a result of the changes to the ice time schedule, the minor hockey team's time was being bumped *regardless* of whether the Junior B or the Mounts team elected to take their preferred or prior slot.

Of note is that during our investigation, both the Councillor and City staff confirmed that notice of at least two (2) weeks was given of the above change. However, in reviewing the evidence, it appears that the changes became effective on or about November 14, 2020. While we have no reason to conclude that the meeting of November 2020 among stakeholder groups did not take place as described, there does appear to be a discrepancy with respect to notice given. Notwithstanding, as there is no notice requirement in the Policy, and the notice is not relevant to our determinations in this Report, we did not explore this issue further.

Our substantial finding is that there is no evidence that the Councillor inappropriately asserted his influence or status as a member of Council to influence the decision with respect to ice time in

contravention of Sections 11.2 and 11.2 of the Code. The Councillor participated in the meeting in his capacity as a long-standing member of the Mounts hockey team. A City staff member present at the meeting confirmed that the Councillor did not assert himself so as to create any undue pressure.

Furthermore, we do not see it as necessary that the Councillor would have declared, or sought "to avoid" a non-pecuniary conflict of interest with respect to this matter. Based on our findings, there was a clear expectation that the Mounts would eventually reclaim their ice time of forty-five (45) or more years. As such, the Mounts, and by extension, the Councillor's interests in this matter existed long before, and will likely exist long after his elected role.

More importantly, there was simply no evidence that the Councillor failed to manage any conflict of interest which could undermine public confidence in him or Council at large as contemplated by Section 12.1 of the Code. The bulk of the issue appears to stem from the fact that the minor hockey team felt inconvenienced by the schedule change, and the Complainant looked to point the finger and create a nexus between the Code and what, in reality, was a community-based, policy-driven decision.

For the reasons set out above, this portion of the Complaint is dismissed.

ii. Emails

This portion of the Complaint pertains to Sections 4(i), 10.1, and 10.3 of the Code, which provide as follows:

Section	Provision
4 (i)	In all respects, a Member shall… refrain from making disparaging comments about another Member or unfounded accusations about the motives of another Member.
10.1	A Member shall treat all members of the public, one another and staff with respect and without abuse, bullying or intimidation and ensure that their work environment is free from discrimination and harassment.
10.3	A Member shall comply with the City's workplace harassment and violence policy.

The Councillor, despite denying any intent to intimidate, bully or threaten the Member, did not provide us with a full response as to why he forwarded the Member's email with respect to hockey time to members of the Mounts, and what he hoped would happen as a result of his comment, "This is what [the Member] thinks of our ice time. Let the boys know on Sunday. Thanks." The Councillor indicated that he was simply "letting everyone know" as he was not going to be present at the following Sunday's hockey game, and that the casualness of his tone was also the product of him and the Member being long-time acquaintances in a small community where everyone is familiar with one another.

This response falls short of a completely satisfactory explanation for the tone of the Councillor's email, which could have simply stated that there had been questions raised or a disagreement with respect to ice time, instead of stating that the disagreement constituted the individual Member's opinion on the issue. The statement, combined with the fact that the Member was copied on the email, could no doubt have resulted in some animosity between the Member and

others. This is especially true given that the Member was communicating on behalf of a member of the public who appeared to be upset by the decision regarding the minor hockey ice time change (irrespective of whether or not that perspective had merit, which is not important for our determinations in this Report).

What is important is that the Councillor's tone could have been perceived as seeking to intimidate the Member. Based on the evidence before us, we do not find that the email amounts to a breach of Sections 10.1 or 10.3 of the Code pertaining to workplace harassment and bullying, but we would advise the Councillor to be mindful of statements that could come across as threatening or seeking to intimidate others.

This is also true with respect to the Councillor's other email, which stated, "[The Member] firing up the community against our hockey team". The Councillor advised us that the intent of this email was to "let the guys know" that the Member was trying to stir up the community, and that he was not telling the truth as the Member had not even participated in the meetings and "didn't know what he was talking about".

The Councillor said that the intent was to advise his teammates of what the Member was doing, which he took exception to given that the Mounts are a respected, long standing organization, raising funds and actively working in the community every year. To this end, the Councillor was disappointed that the Member would raise such a trivial issue and took offence on behalf of his team. Lastly, the Councillor questioned the Member's motive in raising the issue, indicating that it might have been retaliatory and not in good faith.

We accept the Councillor's explanation with respect to his motivation in sending the email. However, Section 4(i) of the Code is clear that "*In all respects*, a Member shall… refrain from making disparaging comments about another Member or unfounded accusations about the motives of another Member" [emphasis added]. The Councillor was clearly aware that the Member's concerns were being raised as a result of a complaint he had received from a member of the public. In fact, the Member's email raising the issue included the original message from the member of the public making the complaint in the first place. As such, the Councillor knew, or ought to have known, that the Member was not raising the issue purely on his own volition, but in response to an issue being brought to him. This should have given the Councillor pause in pointing the finger at the Member directly and stating that he was "firing up the community" unilaterally, especially given the Member was once again, copied and likely to suffer the consequences. At the very least, the Councillor should have taken greater care in his commentary, which was disparaging, irrespective of the "rightness" or "wrongness" of his opinion. To put it bluntly, the Councillor could have been the bigger person.

In summary, we find the Councillor's emails to constitute a *minor* breach of Section 4(i) of the Code.

VIII. RECOMMENDATIONS

Subsection 223.4(5) of the *Municipal Act, 2001* and the Code both authorize the Integrity Commissioner to recommend and Council to impose the following penalties on a member who has been found to have contravened the Code:

a. a reprimand; and

b. a suspension of remuneration paid to the member for a period up to ninety (90) days.

Having regard to the totality of our findings, and taking into consideration that the Councillor has no prior history of Code contraventions or complaints against him, we do not find either penalty to be warranted or appropriate in the circumstances and we do not recommend their imposition. We find it to be sufficient that the Councillor is warned regarding the tone of his emails, which could be perceived as intimidating or critical, regardless of the context, and that he take under advisement that similar comments in the future could amount to more serious breaches of the Code and corresponding penalties.

IX. CONCLUSIONS

This Report has been prepared for and is forwarded to Council for its consideration of the Recommendations set out herein. Subsection 223.6(2) of the *Municipal Act, 2001* provides that this Report be made public.

AIRD & BERLIS LLP

Daria (Dasha) Peregoudova

Integrity Commissioner for the City of Thorold

Dated this 31st day of May, 2021.