



Cunningham Swan

LAWYERS

• EST 1894 •

Tony E. Fleming
Direct Line: 613.546.8096
E-mail: tfleming@cswan.com

CONFIDENTIAL

January 5, 2021

Delivered by email: CAO@lanarkhighlands.ca

Mayor and Council Members – Township of Lanark Highlands
c/o Ryan Morton, CAO/Clerk
Township of Lanark Highlands
75 George Street
P.O. Box 340
Lanark, Ontario
K0G 1K0

Dear Mayor and Members of Council:

**RE: Complaint to Integrity Commissioner – Preliminary Review
Code of Conduct Complaint – September 29, 2020
Our File No.: 15027-23**

This public report of our investigation is being provided to Council in accordance with Section 223.6(1) of the *Municipal Act*. We note that Section 223.6(3) of the *Municipal Act* requires that Council make the report public. The Clerk should identify on the agenda for the next open session Council meeting that this report will be discussed. Staff should consider whether it is appropriate to place the full report on the agenda in advance of Council otherwise deciding how the report should be made public.

Should Council desire, the Integrity Commissioner is prepared to attend at the open session meeting to present the report and answer any questions from Council.

At the meeting, Council must first receive the report for information. The only decision Council is afforded under the *Municipal Act* is to decide how the report will be made public, and whether to adopt any recommendations made by the Integrity Commissioner. Council does not have the authority to alter the findings of the report, only consider the recommendations.

00271179.DOCX:

TEL: 613-544-0211
FAX: 613-542-9814
EMAIL: INFO@CSWAN.COM
WEB: WWW.CSWAN.COM

The Integrity Commissioner has included only the information in this report that is necessary to understand the findings. In making decisions about what information to include, the Integrity Commissioner is guided by the duties set out in the *Municipal Act*. Members of Council are also reminded that Council has assigned to the Integrity Commissioner the duty to conduct investigations in response to complaints under the Code of Conduct, and that the Integrity Commissioner is bound by the statutory framework to undertake a thorough process in an independent manner. The findings of this report represent the Integrity Commissioner's final decision in this matter.

PRELIMINARY REVIEW

On September 29, 2020, a complaint under the Code of Conduct (the "Complaint") was forwarded to our attention alleging that Councillor Ron Closs, (the "Member") had breached the Code of Conduct as a result of conduct on his Facebook account, including sharing offensive posts, making critical comments about certain members of the public, divulging confidential information in a Facebook post, and failing to direct constituent concerns to Township staff.

The Township's Code of Conduct and the *Municipal Act* provide the Integrity Commissioner with powers which include the ability to interview witnesses and review documents deemed relevant to the investigation process. In conducting the preliminary review, our process included:

- Reviewing the Township's complaint protocol;
- Reviewing the relevant provisions of the *Municipal Act*;
- Providing a copy of the request for inquiry and supporting materials to the Member, with a request for any written response to be provided within 10 days;
- Providing a copy of the Member's response to the complainant, with a request for any written response to be provided within 10 days;
- Providing a copy of the complainant's response to the Member with a request for any written response to be provided within 10 days; and
- Reviewing all submissions and analyzing the merit of the request for an investigation.

During the preliminary review we assume that the facts as set out in the complaint are true. We do this not for purposes of finding a breach, but to test the merit of the complaint. In other words, if the alleged behaviour in fact occurred, would that amount to a breach of the Code of Conduct? If the behaviour would constitute a breach, we undertake a full investigation to determine whether the allegations are true. If the behaviour, even if true, would not constitute a breach there is no reason to undertake a full investigation. It is important to understand that we make no finding of fact during the preliminary review - we simply assume the facts are true as a method to assess the merit of the complaint at this stage.

After conducting the preliminary review, the Integrity Commissioner found that the complaint warranted an investigation. During the investigation, the Integrity Commissioner interviewed witnesses, gathered and examined evidence relevant to the complaints and made findings of fact that are set out below.

ANALYSIS

Allegation 1 – Offensive Facebook Posts

Facts:

After undertaking an investigation, the Integrity Commissioner finds:

1. The Member operates a Facebook account under his name. While using this account, the Member has shared a mixture of personal posts, posts promoting his personal business, and posts from the Township's official page.
2. Between April and September 2020, the Member shared a number of posts on his wall that are the subject of this complaint (the "Posts").
3. The Posts were shared publicly, meaning they were accessible on the Member's Facebook wall by any users, regardless of whether they were within his personal network of friends. Some of the posts were original content made by the Member, while others were taken from other Facebook users or elsewhere online. There was some reason to believe the Member took steps to make these Posts private, and that their public availability was the result of inadvertence or a glitch. Since the complaint was filed, the Posts have been made inaccessible to the public.
4. The content of the Posts includes sexual or vulgar themes and/or language; jokes based on indigenous stereotypes; comparisons between COVID-19 public health measures and Holocaust concentration camps; and commentary critical of identity/racial politics.
5. The Member made a post on April 5th, 2020 disclaiming any association between the account and his position as Councillor. This one-time disclaimer did not accompany any of the Posts.

Determination:

The subject matter of this aspect of the complaint was also the subject of a separate complaint. Rather than duplicate the results of the investigation, the Integrity Commissioner has addressed this aspect of the complaint in our file 15027-22 and the recommendations in that report encompass the complaints in this report as well.

Allegation 2 – Derogatory comment about members of the public

Facts:

After undertaking an investigation, the Integrity Commissioner finds:

1. On September 7, 2020, the Member made a post on Facebook that shared a video initially posted on the White Lake Property Owners' Association Facebook page.
2. In his post, the Member stated:

“Everyone in Lanark Highlands should watch this!! I can assure you that I HAVE NEVER conspired with fellow Councillors King or Kelso or Reeve McLaren on any vote of Council and especially concerning White Lake. This is what SPECIAL INTEREST looks like and quite honestly it is deeply troubling. There are so many mistruths in this that I honestly don’t know where to start. PLEASE have a look and judge it for yourself... please share with other residents... it is important!”

Code of Conduct:

6.0 GENERAL CONDUCT

6.1 Every Member has the duty and responsibility to treat members of the public, staff and each other in a respectful manner, without abuse, bullying, harassment or intimidation.

6.2 A Member shall not use indecent, abusive, or insulting words or expressions toward any other Member, any member of Staff, or any member of the public.

10.4 Any use of social media in any form by a Member constitutes communication with the public that is governed by this section. Members shall identify in any social media communication that the views expressed by the Member are the views of that Member personally, and do not represent the views of the Municipality.

Determination:

The Integrity Commissioner concludes that using the phrase “special interest” is not a breach of the Code of Conduct. The association in question does represent a special interest independent of the general population. Council Members are not precluded by the Code of Conduct from having opinions and sharing those opinions. What the Code of Conduct prohibits is disrespect, abuse, bullying, harassment and intimidation – none of which is contained in the quote excerpted above.

What is considered insulting or abusive is not subjective; if all that were required was for an individual to believe a comment was abusive in order for it to breach the Code, no Member could live up to that standard. The Code of Conduct is measured against an objective standard; would a reasonable person apprised of the facts consider the statement abusive (or intimidating or harassing etc.)?

Residents and Members will have disagreements; that is expected in a democracy. Provided that Members of Council conduct themselves with decorum and avoid abuse and other prohibited conduct they are free to debate and disagree with the public.

In the circumstances, the Integrity Commissioner finds that the use of the phrase “special interest” is not objectively insulting, abusive or otherwise a breach of the Code of Conduct.

Allegation 3 – Divulging confidential information

Facts:

After undertaking an investigation, the Integrity Commissioner finds:

1. On September 1st, 2020, the Member responded via Facebook comment to a discussion about the Township’s Master Fire Plan.
2. In his comment, the Member stated:

“I cannot comment on why other members of Council came to the conclusions they did regarding the Master Fire Plan and its recommendations, but I considered all available information including the info I am sharing below plus knowledge gained while serving 30 years on the Lanark Highlands Fire Service to ensure that the residents covered by Station 5 are properly protected...

With regards to Station 5 In White Lake here is some of the info I obtained from our Chief:

- 1) Currently, there are only 5 Firefighters on the roster
 - 2) One of those Firefighters does not have a permanent residence in Township and in fact, their residence is a considerable distance away
 - 3) One Firefighter is not responding to any medical calls at this time because of Covid concerns
 - 4) One Firefighter is available to perform limited duties and is normally not available during the winter months
 - 5) One Firefighter has only attended 1 training session this year and as of today the Chief has yet to meet him in person...
3. The information in Points 1, 2, and 4 were made publicly available in written comments provided by Fire Chief Richard at Schedule “E” of the Master Fire Plan, contained in the Agenda to the August 11th Meeting. The Fire Chief’s comments actually went into greater detail, including the specific jurisdictions where the firefighters resided and worked.
 4. The information in Points 3 and 5 was provided in oral comments by the Fire Chief at the August 11th Meeting.

Code of Conduct:

4.0 DEFINITIONS

d) “**Confidential Information**” includes information in the possession of, or received in confidence by the Municipality, that the Municipality is prohibited from disclosing, that the Municipality is required to refuse to disclose, or that the Municipality chooses not to disclose, under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA), or other legislation or policy of the Municipality. Without limiting the generality of the foregoing, Confidential Information also includes all information concerning matters dealt with at closed meetings, information that is marked as “confidential”, information obtained by the Member by virtue of their position as a Member that is not in

the public domain, or information that is otherwise determined to be confidential by the Chief Administrative Officer, Clerk or as specifically declared by Council.

5.0 CONFIDENTIALITY

5.1 Every Member must hold in strict confidence all Confidential Information acquired as a direct or indirect result of the Member's role with the Municipality. Confidential information shall not be disclosed except when required by law, or when authorized by Council or the Chief Administrative Officer.

5.2 Every Member shall keep confidential any information:

- a) Disclosed or discussed at a meeting of Council, Committee of the Whole or Committee, Board meeting or part thereof, that was closed to the public;
- b) That is circulated to members of Council that is marked confidential. Any documentation marked confidential shall be kept securely until no longer required in the course of business and shall at that time be destroyed by the member of Council or returned to the office of the Chief Administrative Officer for destruction; and
- c) That is received in confidence verbally in preparation for an in-camera meeting

Determination:

The Integrity Commissioner concludes that none of the information complained about was confidential and therefore there is no breach of the Code of Conduct.

Allegation 4 – Usurping the role of staff

Facts:

After undertaking an investigation, the Integrity Commissioner finds:

1. On September 2nd, 2020, a Lanark Highlands resident asked the Member via Facebook comment: “can you provide info as to why Middleville station is closing as Mr Rodgers has not responded to 2 of my emails yet.”
2. In his response the same day, the Member invited the user to call him at his personal phone number, writing: “[User name], please call me at [phone number].”

Code of Conduct:

11.0 INTERACTION WITH STAFF

11.3 Operational inquiries and complaints received from the public will be addressed by Members as follows:

- a) Members who are approached by the public with inquiries/complaints regarding operational matters should encourage the party to contact the appropriate department for review/resolution.

b) where the Member of the public is reluctant to contact the department directly, the Member should take the person's name, phone number and details of the inquiry/complaint and advise them that the matter will be referred to the Chief Administrative Officer for review/resolution.

c) members of the public should be encouraged to provide their issue/matters of concern in writing to the appropriate department.

d) where the inquiry/complaint is not resolved to the satisfaction of the member of the public, then the Member shall refer the member of the public to the Municipality's complaint policy for any further action.

Determination:

The Integrity Commissioner concludes that offering to speak with a resident is not a breach of the Code of Conduct. The Code prohibits a Member from directing staff and taking an active role in staff duties. The Code of Conduct should never be interpreted as prohibiting a Member of Council from talking with residents to forward complaints to the proper staff person. There is no indication in this case that the Member directed staff or acted outside the scope of his authority.

CONCLUSIONS/RECOMMENDATIONS

The Integrity Commissioner finds that Member Closs did not breach the Code of Conduct with respect to complaints 2, 3 and 4. Complaint 1 is addressed in our file no 15027-22.

This concludes the investigation and report in this matter.

Sincerely,

Cunningham, Swan, Carty, Little & Bonham LLP



Tony E. Fleming, C.S.
LSO Certified Specialist in Municipal Law
(Local Government / Land Use Planning)
Anthony Fleming Professional Corporation
TEF:am