

**CITY OF HAMILTON INTEGRITY COMMISSIONER,  
DAVID G. BOGHOSIAN**

**Citation:** Council Complaint re: Hamilton Police Services Board Selection Committee Confidentiality Breach (Re) – DGB-ICI-2023-01

**Date:** February 22, 2024

**REPORT ON COMPLAINT**

**Introduction**

[1] This report addresses a complaint (“the Complaint”) submitted by City Council to me pursuant to a resolution made at its December 13, 2023 meeting concerning a breach of the City of Hamilton Code of Conduct for Councillors (“COC”) related to the disclosure of confidential information from one or more closed session meetings of the Hamilton Police Services Board Selection Committee (“HPSBSC”; the Hamilton Police Services Board will be referred to herein as “HPSB”).

**The Complaint**

[2] The entirety of the Complaint was as follows:

The Hamilton Police Services Board Selection Committee believes there was a disclosure of confidential information from a meeting in September or October 2023, which informed an applicant, and former citizen-member of the Hamilton Police Services Board (HPSB) about the status of their application to sit on the HPSB for another term.

[3] No other information or supporting documentation was provided. The Complaint listed Councillor Nann (only) as a person who may have information relevant to the alleged Code contravention.

[4] The Complaint did not specifically reference any section of the COC alleged to be violated; however, it was clear it was alleging a breach of s. 5 of the COC, which generally prohibits the disclosure by one or more councillors of matters that have been discussed at, or learned as a result of deliberations at, an in camera meeting, or are otherwise confidential.

[5] The Complaint did not identify any particular councillor as the “target” of the investigation; rather, the Complaint asks the IC to investigate to determine who may have disclosed confidential information learned at an in camera meeting, and then investigate that individual. While somewhat

novel, I have determined that I have jurisdiction to investigate the Complaint on the basis of first determining whether a COC breach has occurred and then to determine whether any councilor was responsible for the breach.

[6] Section 13(1) of the COC provides as follows:

...“Complaint” includes a request made by the Council, a Member of Council, an officer or employee of the City, or any member of the public, as to whether or not a Member has contravened one or more of the provisions of this Code of Conduct, *or requesting that the Integrity Commissioner conduct an inquiry into conduct alleged to have contravened the Code.* [emphasis added]

[7] I interpret the second clause of this section to authorize me to investigate potential conduct contravening the COC regardless whether a particular councilor is implicated. I say this because if that were not the case, the second clause would be redundant, as the first clause specifically addresses the situation of a complaint against a particular councilor. I therefore find that I have jurisdiction to investigate the Complaint notwithstanding that no particular councilor was initially identified as having breached the Code.

## **Investigation**

### Interview with Councillor Nann on January 12, 2024

[8] I held a virtual meeting with Councillor Nann on January 12<sup>th</sup>.

[9] Councillor Nann is the Chair of the HPSBSC, which is charged with recommending to City Council the City’s citizen-member appointee to the HPSBSC for the next term of Council.

[10] She advised that Fred Bennink had been the longstanding citizen-member representative of the City on the HPSB. The current HPSBSC desired that there be more “representatives of vulnerable communities in the City” on the HPSB. Mr. Bennink (who I note is a conservative, white male) did not fit this profile.

[11] Prior to the announcement of the HPSBSC’s chosen citizen-member representative on the HPSB (which was obviously not Mr. Bennink), Mr. Bennink had publicly made comments to the effect of “I’m being thrown out like the trash” and other statements that made it clear he knew he was not being re-appointed as the City’s representative. The information of the chosen candidate was supposed to have remained confidential until it was officially announced. More significantly, prior to the announcement of HPSBSC’s selection, Mr. Bennink resigned from the HPSB as the City’s representative and within a day or two, it was announced that he was being appointed to the HPSB as the Province’s representative.

[12] When I asked her if she had any thoughts as to who may have disclosed this information, she stressed that she did not know but suspected that it had been Councillor Pauls given that she

was “against the inclusiveness process,” had been a strong proponent of re-appointing Mr. Bennink and had resigned from the HPSBSC shortly after it decided not to grant Mr. Bennink an interview.

#### Interview with Councillor Pauls on January 15, 2024

[13] I met with Councillor Pauls at her office at City Hall on Monday, January 15<sup>th</sup>. The meeting had been scheduled to discuss an unrelated matter but I took the opportunity at the end of the meeting to raise the issue of the possible leak of confidential information about the HPSBSC selection process.

[14] Councilor Pauls adamantly denied that she had told Mr. Bennink that he would not be re-appointed as the City appointed citizen-member representative on the HPSB. She did concede that at some point he asked her if interviews of candidates had been scheduled but she said she only told him to check with Clerks to find out if he was being granted an interview.

[15] She also pointed out that based on public comments Mr. Bennink had made when the application process was ongoing, he knew he was not going to be re-appointed. According to her, Councillor Kroetsch (also a member of the HPSB) and Mr. Bennink had clashed at HSPB meetings and Councillor Kroetsch had made it clear to him that he was not going to be re-appointed long before any official decision was made. In addition, months after the passing of the original application deadline, prior to which Mr. Bennink had applied, the HPSBSC decided to extend the application deadline to give the opportunity for more residents to apply. This clearly would have signaled to applicants who had applied before the deadline that they were deemed unsuitable and that the HPSBSC were looking for other applicants who better matched the profile they were looking for. She stated that it was only common sense based on these facts for Mr. Bennink to figure out he was not going to be re-appointed.

#### Interview with Fred Bennink on January 22, 2024

[16] I conducted a virtual interview with Mr. Bennink on Monday, January 22<sup>nd</sup>. I subsequently had two follow up calls with him after receiving information from other interviewees.

[17] Mr. Bennink had been the City’s citizen-member appointee to the HPSB since March 2019. He applied for re-appointment after his term formally ended in October 2022. He submitted his application in March or April 2023, shortly after it was publicly announced that applications were being accepted for the position.

[18] The original deadline for submitting an application was the end of May or early June 2023. Around the end of June 2023, he found out through public advertising that the HPSBSC had re-opened the application process and extended the deadline for applying for a couple of more months.

[19] At that point, he “saw the writing on the wall” as clearly the Committee would not be re-opening the application process if they were happy with the candidates they already had. That coupled with the fact that Councillors Nann and Kroetsch had made it clear to him that they did

not want him on the HPSB in the course of their service together on the HPSB and the fact that they were both on the HPSBSC lead him to conclude that he was not going to be re-appointed to the HPSB as the City of Hamilton's citizen-member.

[20] In early September 2023, he found out through his role as acting Chair of the HPSB that one of the Province's appointments to that Board, Mel Aphulathmudali [sp?], would not be re-appointed. As he wanted to continue serving on the HPSB and was fairly sure he would not be re-appointed by the City, in or about the September 10-15, 2023 period, he applied for the Provincial citizen-member position which was becoming vacant. I asked him to look for evidence of the timing of this application but he later advised he had been unable to find any record of that as the application had been made online.<sup>1</sup> He learned he was the successful candidate for the Provincial position on or about November 3, 2023, the day he resigned as the Hamilton appointee.

[21] I put it to him that Councillor Esther Pauls had been a big proponent of his on the HPSBSC, had strongly lobbied for him to be interviewed and resigned after he was not in apparent protest, and I suggested she was keeping him apprised of the HPSBSC deliberations. He denied knowing that Councillor Pauls had backed him at HPSBSC meetings and while he was aware she had resigned from the HPSBSC at some point, he was not aware of why she had resigned. He staunchly denied that Councillor Pauls advised him of anything to do with the deliberations of the HPSBSC or his status in those deliberations, and added that no other member of that Committee did so either. When I put to him Councillor Pauls' statement that he had at one point asked her about whether interviews had been scheduled and that she had referred him to the Clerks office, he denied doing so and maintained that he had no direct knowledge of who was being interviewed.

#### Interviews with Other HPSBSC Members

[22] I interviewed each of the other HPSBSC members, mostly over Zoom with a few by telephone, during the weeks of January 22<sup>nd</sup> and 29<sup>th</sup>.

[23] I asked each of them at least the following questions: do you know Fred Bennink and if so, in what capacity? Did you have any communications with Mr. Bennink during the period of March to November 2023 ("the Selection Period")? Do you have any knowledge, information or belief as to who may have told Mr. Bennink that he would not be re-appointed to the HPSB?

[24] The following are the responses I received in the order the respondents were interviewed:

*Andrea Purnell* – She was a lay member of the HPSBSC. Ms. Purnell does not know Mr. Bennink. She had no communications with him during the Selection Period. Her only relevant observation was that Councillor Pauls was a strong proponent of Mr. Bennink's candidacy and was very upset during the meeting (she believes it was in June 2023) at which it was decided Mr. Bennink would not be interviewed, to the point of abruptly slamming her computer shut and leaving the

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<sup>1</sup> He offered to sign a direction authorizing the Ministry of the Solicitor General to advise me of the date he applied but I declined to take him up on this in the interests of time.

meeting after the decision was made. At either that same meeting or another one, Councillor Pauls indicated she would be resigning from the Committee over its refusal to consider re-appointing Mr. Bennink.

*Councillor Mike Spadafora* – He knows Fred Bennink as an acquaintance as a result of them both being candidates for the same party in Hamilton ridings in the 2021 Federal election. He had no communications with Mr. Bennink during the Selection Period. He has no knowledge, information or belief as to whether anyone leaked confidential information about the HPSBSC selection process or who would have leaked such information.

*Oscar Mbaya* – He was a lay member of the HPSBSC. He has never met or spoken to Mr. Bennink. He had no communications with him over the Selection Period. He has no knowledge, information or belief as to whether anyone leaked confidential information about the HPSBSC selection process or who would have leaked such information. He noted that it was possible that when the Committee extended the deadline for applications, it sent a message to applicants who had applied prior to the original deadline, and to the incumbent City-appointee to the Board in particular, that they were not going to be appointed/re-appointed.

*Jane Mulkewich* – Ms. Mulkewich was a lay member of the HPSBSC. She is a practicing lawyer. She does not know Fred Bennink personally or in any professional or business capacity. She had no communications with him during the Selection Period. When asked about her knowledge, information or belief as to whether there was a leak of confidential information to Mr. Bennink, she noted that Mr. Bennink had to have known he was not going to be interviewed or selected by the Committee before the City's appointment to the Board was officially announced. That is because the announcement of Mr. Bennink's appointment to the HPSB by the Province took place the same day as the announcement of the City's appointment and the application process to become the Provincial appointee had to have been initiated weeks if not months earlier. In terms of who may have leaked the fact that he was not going to be interviewed or selected, she did not know but stated that at the meeting where it was determined Mr. Bennink was not going to be interviewed, Councillor Pauls was visibly upset and vocally displeased by that decision and at the next meeting of the Committee, she indicated that she would be resigning from the Committee.

*Councillor Cameron Kroetsch* – He had no personal or professional relationship with Fred Bennink. They had no interaction outside of HPSB meetings (they were both members). He had no communication with Mr. Bennink during the Selection Period outside of HPSB meetings. At a HPSB meeting held in September 2023 (he

believes)<sup>2</sup>, Mr. Bennink, who at the time sat two seats over from him with Mayor Horwath between them (she was not present on the occasion in question), appeared “ruffled” and asked him about the status of the selection process for the new City member appointee to the HPSB. Mr. Bennink then said to him “when is the City going to throw me down the cellar with the rest of the empties?” He said he did not respond to the inquiry or this comment.

*Councillor Maureen Wilson* – she does not know Fred Bennink personally or professionally. She had no communication with Mr. Bennink during the Selection Period. She recalled that during the HPSBSC selection process, Councillor Pauls demonstrated some strong emotions about who should be interviewed. She made it clear that she was not happy with the short list the majority on the Committee had arrived at (that did not include Mr. Bennink) and was yelling, tearful and angry in response to Councillor Nann’s comment that the existing City-appointee to the HPSB was not upholding “appropriate values.”

*Rita Greenspan* – She does not know Fred Bennink professionally or personally. She noted that she is the Executive Director of the John Howard Society and she met Mr. Bennink at a police-related function in that capacity in 2019 or 2020, at which time they spoke for maybe 30-60 seconds. She did not have any communication with him during the Selection Period. She has no knowledge, information or belief as to whether confidential information about the HPSBSC selection process was leaked and if so, by whom.

*Mayor Andrea Horwath* – Mayor Horwath only knew Mr. Bennink from their service together on the HPSB and through his candidacy for the Conservatives in a Hamilton riding in the last provincial election. She did not know him otherwise. She had no communications with Mr. Bennink outside of the HPSB. She has no knowledge, information or belief as to whether Mr. Bennink received any confidential information or if so, who might have provided it to him. When I asked about whether Mr. Bennink may have got the impression from Councillor Kroetsch that he was not going to be reappointed, she indicated that she never heard any exchange to that effect but noted that it was obvious the relationship between Councillor Kroetsch and Mr. Bennink was “fraught” and they did not get along. She also noted that the process for selecting the Hamilton representative on the HPSB dragged on over an extended period of time with extensions of application deadlines so this may have suggested to Mr. Bennink that the writing was on the wall.

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<sup>2</sup> The only meeting of the HPSB in September 2023 was on September 28<sup>th</sup>. The previous meeting had been held on July 27, 2023 (there was no meeting in August 2023).

## The Code of Conduct

### [25] SECTION 5: CONFIDENTIALITY

5. (1) No Member of Council shall disclose or release by any means to any member of the public, any confidential information acquired by virtue of his or her office, in either oral or written form, except when required by law or authorized by Council to do so.

...

(3) No Member of Council shall disclose the content of a matter that has been discussed at, or is or has been, the substance of deliberations of or at, an in camera meeting, except for content that has been authorized by Council Code of Conduct (Page 7 of 13) Council, or a Committee of Council, or otherwise by law, to be released to the public.

(4) Under this section, every Member shall, unless otherwise authorized or required by law, maintain confidentiality over, and not disclose, the following forms and types of information and documents:

- (a) items under litigation, negotiation, or personnel matters;
- (b) information that infringes on the rights of others (e.g., sources of complaints where the identity of a complainant is given in confidence);
- (c) price schedules in contract, tender or Request For Proposal documents submitted to, or received by, the City on a confidential basis, which have not been adopted, or authorized for disclosure, by the City;
- (d) information deemed to be personal information under the Municipal Freedom of Information and Protection of Privacy Act; (e) statistical data required by law not to be released (e.g. certain census or assessment data).

[26] Section 1 “Definitions” of the COC defines “confidential information” as follows:

(d) “confidential information” includes but is not limited to information: (i) in the possession of the City that the City: - is prohibited from disclosing; - is required to refuse to disclose; or - has exercised its discretion to refuse to disclose, under the Municipal Freedom of Information and Protection of Privacy Act or any other law.

[27] While some might consider disclosure of confidential information to be relatively low on the pecking order of misconduct on the part of councillors, in my view, intentionally putting information out to the public which might compromise the positions of certain citizens who are the subject of that information and giving a chosen few access to valuable information that the rest

do not have is a serious breach of one's duty as an elected official. It is a form of corruption plain and simple and should be dealt with harshly in terms of penalties when it is established, particularly given the difficulty of identifying and proving such misconduct

[28] Dealing firmly which such misconduct is all the more important because councilors are rarely "caught" engaging in this conduct. They are typically smart enough not to use their municipal email address and the cost of getting to the bottom of any given breach is extremely time consuming and expensive. Anecdotally, I would estimate based on discussions with other integrity commissioners and municipal solicitors that perhaps only 1 in every 20 instances of councillors' breach of confidentiality is uncovered. For that reason, on the rare occasions when such misconduct is established, it should be dealt with harshly so as to act as a strong deterrent to future wrongful disclosures.

### **Findings**

[29] There is ample evidence that Councillor Pauls was a strong supporter of Fred Bennink's re-appointment to the HPSB and was upset that he was not short-listed and therefore certainly not going to be re-appointed to the HPSB by the City. Based on what Councillor Kroetsch said Mr. Bennink asked him at the Board meeting in late September 2023, he was clearly fishing for information on the selection process. Mr. Bennink claims he had already applied to the Province as of that date (given the November 3<sup>rd</sup> announcement of his appointment, I would have to think that was true). Yet why would Mr. Bennink be asking Councillor Kroetsch about the state of the HPSBSC process if he had already been informed by Councillor Pauls that he was not being interviewed for the City appointment? The most likely conclusion in this regard is that he had a strong suspicion because of the re-opening of applications but did not actually know that he was not going to be reappointed, and had applied to the Province as a back-up plan in case that turned out to be the case.

[30] I have considered the following discrepancy between the statements of Councillor Pauls and that of Mr. Bennink. Ms. Pauls stated that at some point, Mr. Bennink asked her if interviews of candidates had been scheduled but she said she only told him to check with Clerks to find out if he was being granted an interview. Mr. Bennink denied making any such inquiry of Councillor Pauls. I find this discrepancy somewhat concerning but it is difficult to draw any firm conclusion from it. One or the other could simply have a mistaken recollection. Regarding Councillor Pauls' statement that Mr. Bennink did make that inquiry of her, she may have been truthful in her denial that she told Mr. Bennink anything that was confidential.

[31] There is a spectrum in terms of standards of proof in law ranging from balance of probabilities (meaning at least slightly greater than 50% more probable that a given conclusion is true or correct than not) to beyond a reasonable doubt (meaning approaching 100% certainty regarding a given conclusion). Courts have not opined on the standard of proof of questions of fact and mixed fact and law required to establish a breach of a Code of Conduct under the *Municipal Act, 2001*, whether that is proof beyond a reasonable doubt as in criminal proceedings, balance of probabilities as in a civil proceeding, or some standard in between those. Another Integrity



Commissioner has found that the applicable standard is balance of probabilities, as has the Office of the Ombudsman in the context of a closed meeting investigation.<sup>3</sup>

[32] In the absence of judicial guidance, I would have chosen to apply a standard somewhat higher than balance of probabilities but lower than the criminal standard of beyond a reasonable doubt given the significance of findings of misconduct against elected officials and the extent of sanctions capable of being levied against them.<sup>4</sup> However, in *F.H. v. McDougall, 2008 SCC 53 (CanLII)*, a civil case where damages for sexual assault were sought, it was held that there is only one standard of proof in a civil case and that is proof on a balance of probabilities. Although there has been some suggestion in the case law that the criminal burden applies or that there is an enhanced standard of proof, where, as here, criminal or morally blameworthy conduct is alleged, in Canada, there are no degrees of probability within that civil standard. I take this case to stand for the proposition that other than in criminal cases, the standard of proof is balance of probabilities.<sup>5</sup>

[33] I believe the closest analogy to the powers of an Integrity Commissioner investigation Code of Conduct complaints is that of professional disciplinary bodies undertaking disciplinary hearings. The Law Society of Ontario, the Investment Industry Regulatory Organization of Canada, the Ontario College of Chiropractors, the Ontario College of Pharmacists, the Ontario College of Teachers, the College of Physicians and Surgeons of Ontario and the College of Nurses of Ontario all apply the civil standard of proof, balance of probabilities, in determining the outcome of disciplinary proceedings.

[34] I therefore conclude that the standard of proof to be applied by me is balance of probabilities.

[35] Even applying this lower standard, I am unable to conclude that any confidential information was leaked to Mr. Bennink concerning the HPSBSC selection process or decision-making of if there was such a leak, who was responsible for that leak.

[36] It may be questioned why I did not use my powers to compel production of any councillor's email or cellphone records as I have the right to do. Regarding emails, it seems doubtful that any councillor would run the risk of disclosing confidential information via this medium. Further, given that all councillors have denied being responsible for the subject disclosure in this case, I

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<sup>3</sup> *Bartscher v Cardy* 2018 ONMIC 28 (CanLII); *Leeds and the Thousand Islands (Township of) (Re)*, 2015 ONOMBUD 23 (CanLII).

<sup>4</sup> A board which does apply a hybrid standard during disciplinary proceedings is the Ontario Civilian Police Commission ("OCPC"). The standard applied by the OCPC for a finding of misconduct under the *Police Services Act* ("PSA") is 'clear and convincing evidence'. This standard is mandated by s. 84(1) of the PSA. The Ontario Court of Appeal has held that this standard lies somewhere between a balance of probabilities and beyond a reasonable doubt: see *Jacobs v. Ottawa (Police Service)* 2016 ONCA 345 (CanLII).

<sup>5</sup> It has been explained by the Ontario Court of Appeal that the only reason why the OCPC applies a different standard, contrary to the holding of the Supreme Court of Canada in the *MacDougall* case, is because it is statutorily mandated by the PSA: see *Jacobs v. Ottawa (Police Service)* 2016 ONCA 345 (CanLII).

would expect that if there was anything incriminating in terms of texts or emails, they would have been double-deleted long ago. The most logical means would be a personal face to face meeting (of which there would be no record) or a call on their personal cellphones. Even if there were cellphone records (I have Mr. Bennink's cellphone number so as to be able to see if there were any calls to or from him), that still would not prove that confidential information was exchanged.<sup>6</sup> In terms of obtaining personal email and cellphone records, including text messages, I would need to apply to court to obtain an order compelling the disclosure of that information and I would need to put forward in an affidavit evidence amounting to reasonable grounds to believe I would find incriminating information, the same standard that would apply to obtaining a police search warrant. I do not have reasonable grounds to make such an application in my opinion. In summary, I do not believe I have the legal grounds to obtain an order compelling production of such records and I do not believe, given the low prospects of success on the application and of finding anything incriminating even if I were successful, that the substantial expense and time of proceeding with these steps would be justified.

### **Conclusions Regarding the Complaint**

[37] I have been unable to come to a conclusion on either question of whether there was a leak of confidential information and if so, who the source of the leak was.

[38] This concludes my investigation.

Respectfully Submitted,



David G. Boghosian,  
Integrity Commissioner,  
City of Hamilton

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<sup>6</sup> For example, some of the HPSBSC members also sit on the HPSB so calls between them to discuss Board issues would not be unexpected.