

CITY OF HAMILTON INTEGRITY COMMISSIONER, DAVID G. BOGHOSIAN

Citation: Council Complaint re: Selection Committee Confidentiality Breach (Re) – DGB-ICI-2023-02

Date: March 1, 2024

REPORT ON COMPLAINT

Introduction

[1] This report addresses a 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 Selection Committee (“the Complaint”).

The Complaint

Background

[2] On November 9, 2023, the previous Hamilton Integrity Commissioner (“IC”) forwarded to me a complaint filed by Councillor Cassar on September 9, 2023 which it had not been able to investigate and report on prior to the expiration of its term. The Complaint appended a letter from a Hamilton lawyer, Douglas Burns, dated August 30, 2023 and indicated that it contained details of deliberations of the Selection Committee that could only have been learned in closed session Selection Committee Meetings. The letter asked the IC to investigate how the lawyer had acquired this information. The Complaint further suggested that the IC speak to Loren Kolar of the Clerks Department who was the Legislative Coordinator responsible for the Selection Committee for more information.

[3] I spoke with Councillor Cassar on November 17, 2023. He advised me that he was not submitting the Complaint personally but on behalf of the Selection Committee in his capacity as Chair of that Committee and that the Committee had resolved to have him forward the Complaint to me on its behalf. I advised him that pursuant to s. 13(1) of the COC, I could only investigate a Complaint made by the Council, a Member of Council, an officer or employee of the City, or any member of the public, not one brought by a Committee of Council.

[4] On December 20, 2023, Ms. Kolar sent me a Complaint submitted by Council pursuant to a resolution made at its December 13, 2023 meeting. The Complaint was as follows:

On September 12, 2023 and September 15, 2023, the Selection Committee received the attached correspondence from A. Douglas Burns, Burns Associates, regarding the deliberations of applications for the Committee of Adjustment. It is believed that there was a disclosure of confidential information from closed session meetings of the Selection Committee, regarding deliberations of applications for the Committee of Adjustment, which formed the basis of the complaint in the letter.

[5] 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.

[6] 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 councillor was responsible for the breach.

[7] 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]

[8] I interpret the second clause of this section to authorize me to investigate potential conduct contravening the COC regardless whether a particular councillor 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 councillor. I therefore find that I have jurisdiction to investigate the Complaint notwithstanding that no particular councillor was initially identified as having breached the Code.

Letters from Douglas Burns

[9] Two letters were received from Mr. Burns, one dated August 30, 2023 and the other dated September 11, 2023.

[10] The August 30th letter does not identify who Mr. Burns was representing. It complained about the process for selecting members of the Hamilton Committee of Adjustments (“COA”) by the Selection Committee. It made a number of assertions, including the following:

- The number of applicants who applied for appointment to the COA by the original deadline for applications;

- The number of additional applicants who applied for appointment to the COA after the original deadline was extended;
- The fact that no existing COA members were “considered” or “chosen” for another term;
- The particular voting pattern amongst Committee members for COA candidates;
- Only 5 of the 9 current COA members were mentioned by name. These happened to be the 5 who had applied for re-appointment but who had not been granted interviews.

[11] The September 11th letter, which also does not identify who Mr. Burns is representing, made the following assertions of note:

- The Committee failed to grant interviews for COA positions to well-qualified applicants;
- The Selection Committee was unfair and biased.

Investigation

Interview with Loren Kolar

[12] I spoke with Ms. Kolar on November 13, 2023. She is the Legislative Coordinator for the Selection Committee. She indicated that information regarding the number of applicants initially and then after the extended deadline, who were granted interviews for COA positions and who were ultimately selected was only shared in confidential emails to Selection Committee members or could only have been learned at closed session meetings of the Committee (all deliberations of the Selection Committee are held in camera so as not to disclose who the candidates were). She advised that she had not disclosed any such information to anyone who was not on the Selection Committee.

[13] She indicated that some of the information in the Burns letters was inaccurate, including the claim that no existing COA members were considered or chosen for re-appointment and the voting pattern of Committee members that was alleged. Regarding the latter, she indicated that there was no formal voting for candidates by Committee members and all decisions were reached by consensus.

[14] Finally, she suggested that I speak with Jamila Sheffield of the COA as she believed Jamila had some information that would interest me.

Interview with Jamila Sheffield

[15] I spoke with Ms. Sheffield on November 13, 2023. She is the Secretary Treasurer of the COA. She advised me that at a meeting of the COA on June 29, 2023, following the conclusion of the hearings for the day, the COA members who were present met and discussed the issue of the respective re-appointments to the COA and made derisive comments about the Selection Committee, and discussed the fact that a majority of the Selection Committee were against interviewing and re-appointing incumbent members. She indicated that because the members were still in the hearing room, although the audio recording had been turned off, staff continued to take Minutes of the meeting. I asked her to send me those Minutes and she did.

[16] She said the main speaker and discloser of the information that came out in that session was COA member David Serwatak. She thought Mr. Serwatak said Councillor Tom Jackson provided him with the information or she may have just inferred that because she has believed that Mr. Serwatak and Councillor Jackson had a close relationship.¹ I note that Mr. Serwatak and Councillor Jackson had each served the City together in their respective capacities for approximately 30 years as of the time of this development.

Minutes of June 29, 2023 COA Meeting

[17] I was provided with a 9 page, typed document called “Agenda” but which were clearly Minutes of the June 29, 2023 COA meeting.² The bottom of p. 8 and all of p. 9 of the Agenda documents the discussion after the formal hearings for the day had concluded. That portion of the Minutes reads in its entirety as follows:

DAVID [SERWATUK] – **We are being kicked off of the committee** and the selection committee should be free and non-biased **and we are not being allowed interviews.** They flat out lied and they are not re opening it to us. They did not have new applicants if we were not involved. Could we each write a letter stating our concerns. I think this should be abolished and this needs to be a fair interview. This is just procedural. **This end result would still be the same of 5 – 4.** If those of you who are interested please write a letter. There should be a new selection committee because this is not right. I will bring all of the letters forward to Andrea.

Nancie [Mieczko] – How do you know this? And second – what would the letter say?

David – I think that it should be more personal letters to try and make an impact.

Nancie – How do you know this?

¹ In a subsequent conversation, she told me that from time to time, she has heard Mr. Serwatak bring up in COA sessions the fact that he had been speaking with Councillor Jackson about some issue or another.

² These Minutes were not taken by Ms. Sheffield but by another City employee.

David – Gossip – **I know this because I have friends on the selection.**

Bob [Charters] – Wouldn't we be better to have a lawyer write a letter based on the committee.

Nancie – Integrity commissioner writes the letter? My understanding is that they could intervene.

Dale [Smith] – Unless this is public record how can we pose this to them with no proof?

David – They could be brought in and they could lie.

Margaret [Smith] – There are minutes are there not?

Dale – The chairman should make note of this.

Thomas [Lofchik] – They could play the devils advocate and let's try to get a wider group of people and then interview us?

David – **Witnesses in the room have verified this and they were on the bad side of the vote.**

Thomas – If this goes this far – Then we could bring in Andrea with the integrity commissioner.

David – We are just wanting a fair opportunity.

Bob – Andrea is not going to enact her mayor powers and we need to get this elevated and how do we get this there? If we are going to be open and honest. I think getting this to the integrity commissioner / lawyer and to the committee.

David – I will talk to Mark [Dudzic] and see if someone could write a letter on behalf of us and then we could try to get this sorted.

Thomas – Maybe the lawyer could be prepared to act on this because this isn't fair.

David – The people who did deny us are probably looking for their friends to apply. Randomly these new applicants will come forward. I will talk to Mark about this and we will get a lawyer.

Dale – the city will fail if we are all gone.

Nancie – They will have no recollection if we are all gone from the committee. They will not have any experience.

Dale – We have all re applied I assume.

Thomas – The committee could all be getting put away.

David – I'll put this forward and get this rolling.

Nancie – People say this is the best committee they have seen.

[emphasis added]

Examination of David Serwatak Under Oath on January 11, 2024

[18] I had Mr. Serwatak served with a summons to appear for examination pursuant to my powers under s. 223.4(2) of the *Municipal Act, 2001* and s. 33(3) of the *Public Inquiries Act, 2009*. He was personally served at a COA meeting held on December 7, 2023 with an original return date for the examination of December 15, 2024. After much back and forth with Mr. Serwatak's legal representative, Douglas Burns, the examination proceeded through Nimigan's Court Reporting on January 11, 2024.

[19] Mr. Serwatak appeared at his examination with his lawyer Douglas Burns, the same one who had authored the August 30 and September 11, 2023 letters that form the subject-matter of my investigation. Mr. Burns did not object to any questions I posed on Mr. Serwatak's examination nor did he engage in any re-examination of Mr. Serwatak after I had completed my examination.

[20] Mr. Serwatak freely admitted that he had retained Mr. Burns to write the two letters. He said he alone had retained Mr. Burns and he did not do so on behalf of any other members of the COA. He had Mr. Burns write the letters because he thought based on public comments by several Councillors including Councillor Kroetsch that the Selection Committee was going to "dismantle" the COA. When I put to him the comments he had made at the end of the June 29, 2023 meeting, he admitted to having made them but denied they were true. He alternately referred to them as speculation and as being "made up" in order to scare his fellow COA members into springing to action with him to try to stop the Selection Committee from not reappointing them. He specifically stated in response to my questioning "maybe I just made it up" to give his statements an air of authority when he said, not once but twice, during that discussion that he had gotten his information from "friends on the Selection [Committee]" and "Witnesses in the [Selection Committee] room". He said he was "maybe" lying to and misleading his fellow COA members to manipulate them into joining him in action to try to secure their re-appointments. With respect to the 5:4 alleged voting pattern on the Selection Committee that he referred to at the June 29th COA meeting, he said he did not know this and was just speculating on the voting pattern based on his knowledge of all of the members of the Selection Committee. When I pointed out to him that Mr. Burns' August 30th letter accurately set out the number of original applicants and how many additional applied after the application deadline was extended, he initially claimed he got this information from Ms. Kolar of the Clerk's office but after I told him I had spoken with her and she had denied providing him with that information, he claimed he could not to recall who had given him that information.

[21] He repeatedly denied that anyone on the Selection Committee leaked any information about the COA selection process to him. He did not deny having a “close relationship” with Councillor Jackson when first asked but later stated that he knew him only casually from seeing him around City Hall, as was the case with several other councillors. He specifically denied that Councillor Jackson had given him any confidential information about the COA selection process.

Follow Up Interview with Loren Kolar

[22] After my examination of Mr. Serwatak, I contacted Ms. Kolar to ask if Mr. Serwatak could have been given the information about the number of applicants before and after the extension of the deadline for applying to be a COA member by someone in the Clerk’s office. She stated that everyone in Clerks knows that such information is confidential and not to be disclosed and she doubted that anyone other than her and Selection Committee members would even have access to this information. She herself was not asked for this information by Mr. Serwatak or any non-Committee member and she did not give out such information to anyone other than members of the Selection Committee.

Interviews with Selection Committee Members

[23] I interviewed all members who served on the Selection Committee during the period from March through November 2023 (“the Selection Period”). The basic questions concerned their relationship with David Serwatak, whether they had any communications with him during the Selection Period and their knowledge, information and belief as to whether there had been a leak and if so, who the source of the leak was. Their responses, in the order I interviewed them, follows.

Councillor Craig Cassar – Councillor Cassar was the Chair of the Selection Committee. He does not know David Serwatak and has never communicated with him. He believes that the only possible source of the information contained in the Burns’ letters was someone on the Selection Committee because all of the deliberations of the Committee took place in closed session. He does not know who the source of the leak was. His only observation was that when the Committee was discussing the referral of this complaint to the IC, the only Committee member to express reservations about doing so was Councillor Jackson.

Councillor Mark Tedeson – He does not know David Serwatak. He had no communication with Mr. Serwatak during the Selection period. He has no knowledge, information or belief as to who may have leaked confidential information or if there even was a leak.

Councillor Cameron Kroetsch – He does not know who David Serwatak is. He had no contact with Mr. Serwatak. He has no knowledge, information or belief as to whether there was a leak or, if so, who was responsible for it.

Councillor Brad Clark – He does not know David Serwatak. He had no communication with Mr. Serwatak at any time. He has no knowledge, information or belief as to whether there was a leak or who was responsible for it if there was.

Councillor Tom Jackson – Councillor Jackson said he knew David Serwatak casually from seeing him around City Hall over the years. He denied having any personal, professional or business relationship with him. He denied communicating with Mr. Serwatak during the Selection Period. He has no knowledge, information or belief as to whether there was a leak of confidential information or if there was, who was responsible for it.

Councillor Maureen Wilson – She does not know David Serwatak. She has never had any communication with Mr. Serwatak. She has no knowledge, information or belief as to whether there was a leak or who was responsible for it if there was. She did not observe any of her fellow Committee members to be upset or opposed to the consensus of the Committee regarding who should be interviewed for appointment to the COA.

Councillor Matt Francis – Councillor Francis resigned from the Selection Committee at the end of June 2023. He said he did so because of family responsibilities and the fact that there were a lot of Selection Committee meetings and he was not able to meet the time commitment. He said he knew David Serwatak was a member of the COA and knew him to say hello but he had no personal, professional or business relationship with him. He did not have any communication with Mr. Serwatak during the Selection Period. He has no knowledge, information or belief as to whether any confidential information was disclosed from in camera session of the Committee or who may have leaked the information if there was a leak.

The Code of Conduct

[24] 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).

[25] 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.

[26] 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, 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.

[27] Dealing firmly which such misconduct is all the more important because councillors 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

[28] In my Report on Complaint DGB-ICI-2023-01, also concerning an alleged leak of confidential information, I concluded after an extended analysis that the standard of proof I should apply to findings of fact and mixed fact and law is balance of probabilities.

[29] In this case, there are two questions to be answered:

- 1) Was there a disclosure of confidential information about the COA selection process?
- 2) If the answer to 1) is yes, who disclosed the confidential information?

1) Was there a disclosure of confidential information about the COA selection process?

[30] I find on balance of probabilities that there was a disclosure of confidential information by a member of the Selection Committee regarding the COA selection process during the Selection Period in 2023.

[31] At the June 29, 2023 COA meeting, Mr. Serwatak twice stated in response to where he got the information that “We are being kicked off of the committee ... and we are not being allowed interviews” and “This end result would still be the same of 5 – 4” that he had “friends on the Selection [Committee]” who were “on the bad side of the vote.” The clear inference is that Mr. Serwatak was informed of the Selection Committee’s deliberations by someone on the inside who was on the side of the incumbent COA members and who disagreed with the majority who were not. I reject Mr. Serwatak’s claim that he perhaps simply lied to his fellow COA colleagues to enlist their support in complaining about the Selection Committee process. I find Mr. Serwatak to be lacking in credibility in this regard and do not accept that he would be so completely untruthful with his COA colleagues; rather, I find that he was untruthful with me to protect the source of the information he had communicated.

[32] If it had just been information about the number of applicants for the COA positions that he had communicated, I might not be convinced that this information came from a Selection Committee member and could have been come from someone in Clerks, perhaps inadvertently; however, the information Mr. Serwatak conveyed went beyond this and concerned whether certain individuals were getting interviews and the way the voting broke down, undoubtedly confidential information related to the Committee’s deliberations, which I find came from someone on the Selection Committee.

[33] It is somewhat concerning to me that some of the information Mr. Serwatak conveyed to his fellow COA members was inaccurate, such as the fact that there was no formal voting and, according to Councillor Maureen Wilson, no apparent dissent expressed to the consensus position, as well as that none of the incumbent COA members would be getting interviews when some COA members were in fact granted interviews. I find that Mr. Serwatak was likely told that he and some other longstanding COA members would not be getting interviews and that a majority on the Selection Committee favoured revamping the COA’s make-up and he exaggerated the information he received, in respect of the former fact, to foster an “all for one and one for all” mentality amongst the COA members. Interestingly, the five COA members specifically named in Mr. Burns’ August 30, 2023 letter as having extensive experience on the COA who deserved to be reappointed were the 5 who were not granted interviews during the 2023 selection process. The other 4 incumbent

COA members not named in Mr. Burns' letter all received interviews. I find that insider information informed the content of Mr. Burns' letter.

2) Who disclosed the confidential information?

[34] I am unable to come to a conclusion as to who leaked the confidential information Mr. Serwatak received. I am concerned about the minimalization by both Councillor Jackson and Mr. Serwatak of the nature of their relationship, especially given the evidence of Ms. Sheffield and the negative impression I formed regarding Mr. Serwatak's credibility during his examination, not to mention the fact of their three decades' long service to the City together, which would make a personal bond between them seem entirely understandable. Ultimately, however, I remain without evidence to find on a balance of probabilities that Councillor Jackson disclosed the information set out in the Burns letters.

[35] It may be questioned why I did not use my powers to compel production of email and cellphone records of all of the Selection Committee members as I have the right to do. I would find it surprising that a councillor would use his or her City email or cellphone to communicate information that would breach the COC. I 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, that still would not prove that confidential information was exchanged. 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

[36] Although I have found that disclosure of confidential information by a member of the Selection Committee occurred, I have been unable to determine the source of the leaked information to the applicable legal standard.

[37] This concludes my investigation.

Respectfully Submitted,



David G. Boghosian, Integrity Commissioner,
City of Hamilton