



Cunningham Swan

LAWYERS

• EST 1894 •

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

CONFIDENTIAL

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SENT BY EMAIL TO: victoria.charbonneau@pembroke.ca

Council
c/o Victoria Charbonneau, Clerk
City of Pembroke
1 Pembroke Street East
Pembroke, ON, K8A 3J5

Dear Council:

**RE: Code of Conduct Complaint – Final Report – Councillor Ian Kuehl
Our File No. 33136-25**

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 deciding how the report should otherwise be made public.

Should Council desire, the Integrity Commissioner is prepared to attend virtually 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. Council does not have the authority to alter the findings of the report, only consider the recommendations.

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

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TEL: 613-544-0211
FAX: 613-542-9814
EMAIL: [INFO@CSWAN.COM](mailto:info@cswan.com)
WEB: WWW.CSWAN.COM

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.

As a preliminary matter, Councillor Ian Kuehl (the "Member") questioned various aspects of the investigation process and most particularly withholding the name of the complainant. The Member made submissions in writing as to why he felt it was necessary to disclose the identity of the complainant. The Integrity Commissioner considered the arguments very carefully and disagrees with the submissions of the Member that the *Municipal Act* and/or Code of Conduct should be read in favour of disclosure. Were it necessary to disclose the identity of the complainant to afford the Member a full defence, the Integrity Commissioner would have done so.

The Member is incorrect that failing to disclose the identity of the complainant is necessary to allow the Member a defence that the complaint was vexatious or frivolous. The Member does not dispute the statement he made and the language he used in the statement that is at the heart of the complaint. Who made the complaint is entirely irrelevant given that the statement is uncontroverted. The Integrity Commissioner is therefore exercising his discretion given in the *Municipal Act* not to disclose the identity of the complainant. The balance of the procedural issues raised by the Member were also considered and to the extent necessary the Integrity Commissioner's responses have been incorporated into this report.

Timeline of Investigation

The key dates and events during the course of this investigation are as follows:

- Complaint Received – June 12, 2024
- Conducting Preliminary Review – July 2024
- Complaint sent to Member requesting Response – August 22, 2024
- Extension of time to respond granted to Member – August 28, 2024
- Member's Response received – September 17, 2024

Complaint Overview

The Complaint alleged that the Member attended a "Town Hall" style meeting on April 25, 2024. The meeting was attended by members of the public who were concerned with certain behaviour in the downtown. The Eganville Leader reported:

“Counc. Kuehl said that at the end of the day, it’s a social contract. These people deserve professional help, and they deserve professional treatment, he said. I don’t have a problem with addicts, but I have a problem with assholes. Just because you have a mental health issue or addiction problem doesn’t give you the right to go kick in somebody’s fence.”

The Member did not dispute that these were the words he used.

The complaint included other allegations that were considered in the preliminary review of this matter, and which were dismissed without an investigation. The words as quoted above are the only aspect of the complaint that was investigated. Given that there was no dispute about the statement, neither the complainant nor the Member were interviewed.

Limitation Period

We note that the incident occurred on April 25, 2024. The Complaint was received on June 12, 2024, within the 90 day limitation period for complaints established in the Code of Conduct.

Code of Conduct

The Complaint engages the following section of the Code of Conduct:

6.2 A Member shall not use indecent, abusive, or insulting words or expressions towards any other Member, and member of staff, or any member of the public ...”

Factual Findings

As the statement was not disputed, the assessment is a matter of considering the statement made in the context of the Code of Conduct.

The Member made a number of submissions as part of his response to the complaint.

First, the Member suggested that because section 6.2 of the Code of Conduct prohibits making indecent or abusive words or expression “toward ... any member of the public” his statement was not a breach as he stated he had a problem with “assholes”. In the Member’s submission, “this is clearly an introspective comment about the Member’s personal beliefs and, in line with the contemporaneous quote to MYFM/Pembroke Observer, the Member was clearly speaking about having a problem with criminals and others that cause actual nuisances to local residents.”

The Member further suggested that he was speaking in a private setting (having the media attend did not make it a public event in his view). Even if the persons in attendance were not considered the public (a finding the Integrity Commissioner rejects), the Code prohibits indecent or abusive words or expressions “towards” the public. This cannot be reasonably interpreted as meaning that the person must be standing in front of the Member in order to engage the Code of Conduct. The Member was referring to certain individuals (members of the public) as “assholes”. The fact that the persons may have committed criminal acts does not entitle the Member to ignore the Code of Conduct.

The Member cannot state that he supports addiction and mental health services on one hand and then disparage people in the next sentence because they are behaving criminally. Based solely on the context, it appears that the Member is directing his profanity towards the people who may be struggling with mental health and addiction issues. Regardless of the behaviour that spawned the statement, the statement is directed “toward” the public and is a breach of the Code of Conduct.

The Member also stated that the comment was based on, “the read of the room” and based on the stories that he had just heard for over an hour and a half. The Member suggested that if the Code had meant that the use of any profanity was prohibited it would have said so; his use in the circumstances was not a breach, therefore. His language was “colourful” but not prohibited in the same manner as the Procedural By-law which expressly prohibits the use of profane words.

The Integrity Commissioner disagrees. Using the term “asshole” to refer to someone is abusive, insulting and a breach of the Code of Conduct. That the person may have committed a criminal act does not make the comment less offensive. “Reading the room” does not allow a Member of Council to breach the Code of Conduct because they sense that the people in the room might accept or agree with his referring to other people in the community in that way.

This Code of Conduct is not, as suggested by the Member, about being “word police”. The Code of Conduct states in the Purpose and Policy Statement that the City of Pembroke, “is committed to achieving the highest quality of municipal administration and governance by encouraging high standards of conduct on the part of all elected officials ... The public should expect the highest standards of conduct from the members they elect to local government ... in turn, adherence to these standards will protect and maintain the Municipality’s reputation and the integrity of its decision-making process.”

The Member used appropriate language for the majority of his comments, balancing the need to respect all members of society and to expect adherence to the law and respect for private property. There was no need to use profanity and to denigrate vulnerable members of society.

To then suggest that this was simply “reading the room” shows no remorse and lessens the credibility of the Member’s earlier statements.

The Integrity Commissioner also considered the Member’s arguments that he had a Charter of Rights and Freedoms right to call members of the community “assholes”. The Integrity Commissioner rejects these arguments. The Code of Conduct does not impermissibly restrict freedom of expression by directing Members of Council to not make abusive, indecent or insulting comments to the public; this limitation is reasonable and proportionate.

The Integrity Commissioner accepts that there was general interest in this topic from the public. The Integrity Commissioner rejects the submission from the Member that he was entitled to use profanity simply because he was making a personal opinion known. The Member referenced section 10.3 of the Code to support this argument. This section does not immunize Council Members from the balance of the Code of Conduct simply because their personal opinion is also a breach of another section of the Code.

The Member encouraged the Integrity Commissioner to consider that the abusive and insulting language contained in the statement was made in isolation and therefore did not rise to a “significant level of inappropriateness so as to lose the right to speak freely.” That the impugned comments were made in isolation does not prevent them from being subject to the Code of Conduct. The mere fact that a breach of the Code of Conduct is potentially less egregious, does not mean that it should not constitute a breach.

Qualified Privilege

The Member also provided the Integrity Commissioner jurisprudence which considered free speech in the context of defamation. Specifically, the Member referred the Integrity Commissioner to the case of *Prud'homme v. Prud'homme*, which considered whether municipal councillors are protected by qualified privilege as a defence to allegations of defamation.

This case does not lend much assistance here. First, the Member has not been alleged to have defamed any identifiable individual. Accordingly, the Member cannot rely on the defence of qualified privilege.

Additionally, qualified privilege would not extend to a councillor acting outside of official council business. Qualified privilege pertains to comments made in an “occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person who it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.”¹ For example, municipal councillors enjoy qualified privilege over comments made at municipal council meetings.² Qualified privilege also will extend to

¹ *Hill v Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at para 143.

² See *Gutowski v. Clayton*, 2014 ONCA 921 (CanLII) at para 5.

the municipal planning process because a municipality has an interest and duty under the *Planning Act* and the *Municipal Act* to make the planning process transparent and accessible to its residents.³

However, the privilege does not attach to the statement itself, but rather, to the occasion on which the statement was made.⁴ Where there is no reciprocating interest or duty, qualified privilege will not apply. In this instance, the meeting in question was not sanctioned by the Municipality, and was not part of the Member's official duties as a councillor. There was no duty that required the Member to attend the meeting in question. The Member would not have enjoyed qualified privilege over the comments made therein.

Charter Considerations

The Member demanded that the Integrity Commissioner engage in a Charter assessment in response to his submissions.

The Integrity Commissioner recognizes that section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), which provides everyone the right to freedom of expression, is engaged in this analysis and in the findings in this instance.

As detailed by the Supreme Court of Canada in *Doré v. Barreau du Québec* and subsequent decisions, the Integrity Commissioner must consider relevant *Charter* values and balance them against the objectives of the Code of Conduct. The Integrity Commissioner has considered the Member's right to freedom of expression in this instance and finds that the Member's *Charter* rights do not prevent the Member's statement from amounting to a breach of the Code of Conduct.

The purpose of the Code of Conduct, as stated in the Code of Conduct, is to ensure public trust and confidence in the Municipality's decision-making and operations by encourage high standards of conduct on the part of the Municipality's elected officials. The Code of Conduct also aims to protect and maintain the Municipality's reputation and the integrity of its decision-making process. To this end, the Code of Conduct places a certain standard on elected officials to act in a manner that furthers the objectives of the Code of Conduct. Specifically, members are restricted from using indecent, abusive or insulting words or expressions. The Integrity Commissioner recognizes that using "abusive or insulting language" is a form of expression that is covered by the *Charter*.⁵ Accordingly, the Code of Conduct does restrict *Charter* rights.

However, pursuant to section 1 of the *Charter*, the rights provided for by the *Charter* are not absolute and may be limited reasonably to promote certain objectives which are pressing and

³ See *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96.

⁴ See, for example, *Botiuk v. Toronto Free Press Publications Ltd.*, 1995 CanLII 60 (SCC), [1995] 3 SCR 3 at para 78.

⁵ See *Bracken v. Niagara Parks Police*, 2018 ONCA 261 (CanLII) at para 35.

substantial. The objectives of the Code of Conduct, to maintain public trust and confidence in municipal governance and its elected officials, are pressing and substantial.

The restriction on abusive, indecent or insulting language found in the Code of Conduct advances the Code of Conduct's objective of enhancing public trust in Council and protecting the Municipality's reputation and the reputation of its elected officials by restricting expressions that are indecent or abusive or insulting. Indeed, allowing Councillors to engage in indecent or abusive or insulting commentary or behaviour would undermine public confidence and could negatively impact the reputation of the Municipality and Council as a whole. There is a rational connection between the restriction on offensive language and the objective of promoting and ensuring public trust and confidence in the Municipality.

The Member referred the Integrity Commissioner to jurisprudence relating to free speech and freedom of expression. The Members submissions were that free speech is a fundamental democratic right which deserves strong protection, that local government electors should be permitted to speak freely, boldly, frankly, and even bluntly, and that the Integrity Commissioner should not interfere with or "chill" the "freewheeling debate" on matters of public interest.

The Integrity Commissioner agrees that freedom of speech and freedom of expression should attract generous protection in a democratic society. The Integrity Commissioner does not agree that enforcing the relevant sections of the Code of Conduct would infringe upon *Charter* rights in a manner that is not justified.

The Code of Conduct does not significantly impair the *Charter* right to freedom of expression. The provisions do not make broad or sweeping restrictions on the types of expressions that members can use. It simply requires that members refrain from using expressions that are abusive or indecent or insulting when referring to members of the public, other members, or staff. There is no chilling effect on political discourse or debate; members may advocate and debate forcefully and passionately for their constituents. The restrictions simply require members to advocate in a way that maintains public trust and confidence by refraining from being abusive, indecent, or insulting. The benefits of promoting political discourse that is free from abuse, indecency and insult outweigh the minimal impairment of the Member's *Charter* rights.

Investigation Findings

The use of the word "asshole" is abusive and insulting. The fact that the word was used to refer to someone alleged to have committed a criminal act does not make using the word acceptable. The standards of behaviour contained in the Code of Conduct apply to all situations and prohibit describing any person in the community as an "asshole".

The Member's comments, with the exception of the profanity, were measured and respected the difficult circumstances that some members of the Pembroke community find themselves in. The Member was able to communicate his views without resorting to profanity and should have done so in this instance.

Conclusion

The Integrity Commissioner finds that the statement made by the Member constituted a breach of the Code of Conduct.

The Integrity Commissioner recommends that Council issue a public reprimand to ensure that the public know that it does not condone this conduct.

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