

ADVICE ON ADOPTION OF CODE OF CONDUCT RE: MEMBER ELECTION AND CAMPAIGN ACTIVITIES

EXECUTIVE SUMMARY

I do not recommend that Council develop a Code of Conduct for all Members of Council setting out guidelines and obligations in relation to the pre-election and campaigning period.

Currently, Members of Council are required under the Ethical Conduct Policy to exercise freedom of speech responsibly. The Ethics Advisor, City Solicitor and City Clerk have been directed by Council to prepare a revised Code of Conduct. Based on the codes applicable in other municipalities, and on the key ethical issues at stake, it is likely that I will recommend that the revised Code of Conduct direct Members of Council not to engage in speech which abuses, bullies or intimidates another Member. That narrow restriction recognizes that it is important for Members to talk freely about matters of policy, but that it is also important that a Member remain independent and able to act in the best interests of the municipality. Abusive, bullying or intimidating speech about or towards another Member risks undermining that Member's independence.

Adopting a separate Code of Conduct at this time is inconsistent with the direction to prepare a revised Code of Conduct that clarifies and synthesizes the ethical obligations of Members. Further, in my view the current direction to exercise freedom of speech responsibly can reasonably be interpreted as prohibiting speech that is bullying, abusive or intimidating.

ETHICS ADVISOR'S RECOMMENDATION

That Council:

1. Should not develop a Code of Conduct for all Members of Council, setting out guidelines and obligations in relation to the pre-election and campaigning period; and
2. Direct that Report C2017-0213 remain confidential pursuant to Section 24(1)(a) of the *Freedom of Information and Protection of Privacy Act*.

PREVIOUS COUNCIL DIRECTION / POLICY

The *Municipal Government Act* requires Members of Council to "consider the welfare and interests of the municipality as a whole" (s. 1539(a)). The *Act* further requires that Members be free from any disqualifying pecuniary interest (ss. 169-174).

The Ethical Conduct Policy for Members of Council (CC042, Effective 2013 July 01) notes that Members have a duty to "act fairly, free from any conflicts of interest". It also emphasizes the fiduciary duties of Members of Council, including the obligation to put the interests of the municipality ahead of their personal interests, that they act in the best interests of the municipality and that they act in good faith. It also directs Members of Council to exercise "freedom of speech responsibly".

The Members of Council and Elections Campaign Policy (CC041, Effective 2013 January 28) addresses acceptable practices during election campaigns, but deals primarily with preventing inappropriate use of City resources during elections, rather than with the speech or conduct of Members running for re-election.

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On 2016 December 19 Council directed the Ethics Advisor, the City Solicitor and City Clerk, in consultation with Members of Council, to prepare a revised Code of Conduct governing Members of Council.

BACKGROUND

At the Regular Meeting of Council on 2016 November 07, Council requested that the "Ethics Advisor....investigate developing a Code of Conduct for all Members of Council, setting out guidelines and obligations in relation to pre-election and campaigning period (position of Mayor) in the City of Calgary no later than February 27th, 2016."

Based on the discussion and motion presented, the specific issue Council appears to want me to consider is whether there ought to be restrictions on Members of Council endorsing or criticizing each other personally during election campaigns. During the course of the Meeting, Members expressed concern about Council moving to a party system by virtue of such endorsements or criticisms. Other Members expressed concerns that if such endorsements or criticisms were regulated or prohibited it would inhibit discussion of policy and issues, and Members' freedom of expression.

INVESTIGATION: ALTERNATIVES AND ANALYSIS **Stakeholder Engagement, Research and Communication**

To answer the question posed by Council, I have reviewed existing Council policy and the *Municipal Government Act*, summarized above. I have considered policies and guidelines from other municipalities. Finally, I have considered the general ethical issues applicable to this question.

Existing City of Calgary Policy

Current policy does not provide clear direction to Members of Council about the limitations, if any, on what they can say about each other, either during the course of discharging their office or in the conduct of an election. The current direction in the Ethical Conduct Policy to exercise freedom of speech "responsibly" is overbroad and has uncertain meaning on its own terms.

Current policy also does not provide any direction to Members of Council about when, if ever, things that they say would be considered improper because interfering with the work of City staff or the functioning of Council.

It should be noted, however, that the general deficiencies in City policies governing Member conduct were considered by Council at the meeting on 2016 December 19 and Council has directed the Ethics Advisor, City Solicitor and City Clerk to prepare a revised Code of Conduct.

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Policies From Other Municipalities

The policies of other municipalities give more specific direction on these issues, providing that Members of Council should not abuse, bully or intimidate each other or say things that might prejudice the decision-making process.

The Code of Conduct for Members of Council, City of Toronto, April 2011, provides that “All members of Council have a duty to treat members of the public, **one another**, and staff appropriately and without abuse, bullying or intimidation [emphasis added]” (Section XIV). Other Ontario codes of conduct contain similar provisions (see, e.g., City of Windsor Code of Conduct for Members of Council and Local Boards, Section XVI).

Toronto’s Integrity Commissioner recently issued an Interpretation Bulletin with respect to Social Media. The Bulletin states that

“Members must never use social media as a platform to treat members of the public, **one another**, or staff without respect. Members should not engage in or encourage bullying, flaming, or shaming of any other social media users. These types of interactions on social media misplace the focus of the interaction on attacking individuals rather than engaging in constructive discussion or debate. This manner of communication is inconsistent with the Code of Conduct and unbecoming of the office that members hold. [emphasis added]” (Office of the Integrity Commissioner, Interpretation Bulletin, Code of Conduct Members of Council (April 26 2016)).

The City of Waterloo’s Employee Social Media Policy notes that “Senior staff and elected officials must be particularly aware of their commentary surrounding issues currently before them in council so as to not prejudice the public process.” (Policy No. A-002, July 13, 2015).

Underlying issues

In my view the question asked by Council raises two competing ethical considerations:

1. Members of Council enjoy freedom of expression. That does not mean that Members of Council can say anything they like, but it does mean that restrictions on their speech must be justified and limited;
2. Members of Council must be able to exercise their governing responsibilities independently and in the best interests of the municipality. It is possible that comments made by one Member about another could in intention or effect undermine that other Member’s independence. This concern is, in my view, why advice and direction given to Members in other municipalities tells them not to bully, abuse or intimidate each other.

The existence or absence of parties is not a relevant ethical or legal consideration. Whether a party system is preferable is a matter of policy; there is no right or wrong answer to that question, ethically speaking.

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Advice

My advice to Council is that it not create an independent Code of Conduct addressing speech by Members of Council during election campaigns.

The revised Code of Conduct will address issues of appropriate speech by Members of Council, likely following the model of other codes that preclude abusive, intimidating or bullying speech. A limit of that type respects the importance of freedom of expression while acknowledging the risk that certain types of speech may undermine the ability of Members to discharge their obligation to act independently and in the best interests of the municipality.

An independent Code of Conduct would be inconsistent with Council's direction to rewrite and synthesize the ethical obligations of Members. In addition, election campaigns do not obviously raise ethical issues in relation to appropriate speech that are different from those that arise normally for Members of Council. In all circumstances the key point is that Members must be free to both discuss and engage with questions of policy, while also being free from bullying or intimidation that could undermine their ability to independently discharge their duties to the municipality.

Finally, pending the rewriting of the Code, in my view the current direction to Members to exercise freedom of speech responsibly could reasonably be interpreted as precluding speech that bullies, abuses or harasses another Member of Council.

Strategic Alignment

Not applicable

Social, Environmental, Economic (External)

Not applicable

Financial Capacity

Not applicable

Risk Assessment

Not applicable

REASON(S) FOR RECOMMENDATION(S):

The recommendations reflect current Council initiatives and policy in relation to Council member accountability and integrity.

ATTACHMENT(S)

None