

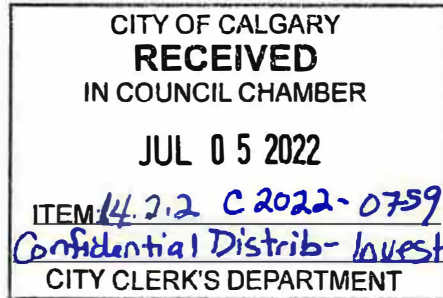


To: Calgary City Council

From: The Integrity Commissioner

Re: Councillor Dan Mclean

May 31, 2022



ITEM 14.2.2 C2022-0759
Confidential Distrib- Investigation Report

Report of Findings and Sanction Recommendation

The Allegations

On December 31, 2022, a complaint was submitted to the Integrity Commissioner regarding Councillor Dan Mclean.¹ It was alleged that during a Christmas Event he hosted on December 11, 2021, in a Calgary restaurant, Councillor Mclean participated without a mask, and was in breach of the provincial and municipal mask mandates.

Jurisdiction

Code of Conduct

I derive my authority in this matter from Section 63 of the *Code of Conduct for Elected Officials Bylaw 26M2018*, (the 'Code') which states:

The *Integrity Commissioner* has authority to investigate and adjudicate any allegation that a member has violated this Bylaw or *City* policy governing *Member* conduct.

I was given access to the complaint on March 10, 2022 and conducted my initial assessment pursuant to 'Part D' of the *Code*. On March 25, 2022, I issued a 'Formal Notice of Investigation' to Councillor Mclean as required by section 81 of the *Code of Conduct for Elected Officials Bylaw 26M2018*, (the 'Code'), as in my opinion, there were reasonable grounds to believe a violation of section 11 of the *Code* may have occurred. Section 11 states:

11. A *Member* must respect and comply with the law and avoid conduct that, in the eyes of a reasonable Calgarian, undermines, or has the potential to undermine public confidence in City Governance.

Further emphasis is placed on compliance with the law in Section 15 of the *Code* which states:

15. A *Member* must respect and comply with all obligations imposed on the *Member* by statute or other legal enactment, and by the City's policies and procedures.

In light of these two provisions, it is clear that complying with provincial Health Orders and City of Calgary Bylaws and are included in the Member's obligations.

Provincial and Municipal Mask Mandates

I will consider the enactments pertaining to masking and indoor gatherings as they relate to this complaint.

¹ The identity of the complainant is protected pursuant to section 17 of the *Freedom of Information and Protection of Privacy Act* and section 67 of *the Code of Conduct for Elected Officials Bylaw 26M2018* (the 'Code'). Other names and places have been removed on the same basis.

The City of Calgary's 'COVID Pandemic Face Covering Bylaw', (the 'City Bylaw'), came into force on September 4, 2021, and remained in force until March 1st, 2022. It was therefore in place on December 11, 2021, the date of Councilor McLean hosted the Christmas event.

The 'City Bylaw' required the wearing of face coverings in all public premises, including indoor spaces, which included restaurants. Under section 4 of the City Bylaw, exceptions to restaurant masking were limited, as per the following subsections:

4(d) persons who were seated at a table or bar at a public premises that offers food or beverage services.

4(g) persons who have temporarily removed their face covering where doing so is necessary to provide or receive a service.

The Alberta Government reintroduced a Mask Mandate for Albertans on September 4, 2021, requiring masks at all indoor gatherings. On March 1, 2022, the provincial mandate was lifted. There were revised Orders issued from time to time during the intervening period.

The provincial restrictions applicable to indoor gatherings on December 11, 2021, were set out in Alberta Health Order, CMOH Order 54-2021, dated December 10, 2021. The mandates for indoor gatherings, including restaurants, had not changed from preceding orders.

The relevant provisions of Order 54-2021 are as follows:

Part 4 Masking Requirements

A. Indoor Masking requirements

4.1 Except as set out in this Order, a person over the age of two must wear a face mask at all times while attending at an eligible participants' premises.

4.2 For greater certainty a person over the age of two must wear a face mask
(a) in all indoor spaces on the premises of an eligible participant that all persons may attend

B. General exceptions to Masking

4.3 Despite this part of the Order, a person is not required to wear a face mask at all times while attending an eligible participant's premises if the person is:

(e) seated at a table while consuming food or drink or, if standing at a standing table while consuming food or drink, as long as the person remains standing at the standing table at all times while consuming the food or drink.

Document: Appendix A to Record of Decision – CMOH 54-2021

In Scope

Restaurants and food courts with controlled access to the public.²

² There is no dispute that the event in question was in compliance with the COVID screening requirements in Order 54-2021, Part 5.

The Complaint and Investigation

I have fully considered the complaint and complainant response, as well as Councillor Mclean's Replies provided during my investigation in making the decision below.

The text of the complaint is reproduced here:

I wanted to talk to someone about the councilor Dan McLean's behavior at his meet and greet this christmas during the pandemic.
He held his meet and greet at his "good friends" (location withheld) and during the meet and greet was maskless with all attendees walking around. As someone who has been affected negatively (immunocompromised with young children and a husband who works with the largest outbreak in canada), I was very disturbed by his behavior.
I pointed out the lack of mask use on his FB post and he blocked me from his FB page, so something that should be a tool to use I can no longer access. I had a few other friends comment and they were also blocked from accessing him for comments.
Since he was in breach of the bylaw on masking- what can be done for this. I also have concerns with the inability to stay in touch with FB blocking he is using (when there was no attack just a comment) I have reported (name withheld) as his actions through 311 as well, with no reply. Photos attached.
Please let me know what can be done"³

Councillor Mclean provided his formal 'Reply' to the complaint on April 4, 2022, in accordance with section 82 of the *Code*. It is reproduced in part, here:

"Thank you for your March 25, 2022 email in regards to a complaint and a Notice of Investigation. I am writing to provide you with my response to this matter as per your instructions.

On December 11, 2021, I held my first Christmas Meet & Greet (name withheld) which is located in my Ward. This was a public event meant to provide residents of Ward 13 an opportunity to meet me and ask questions in a casual environment. We also provided food and non-alcoholic beverages for residents.

At this event, we went to great effort to ensure COVID related policies were being followed. We had a staff member of Hudson's designated to scan QR-Codes in compliance with the Provincial Health Mandate at that time. All attendees including myself and my staff wore masks to and from this event. As some of the pictures provided have illustrated, most people were seated, or standing at tables while consuming food and beverages. Due to the overwhelming interest in this event, we had far more attendees than expected and as such all seats were quickly filled. At my request, we opened another part of Hudson's to provide more seating opportunities allowing for greater social distancing and to do our best to ensure everyone was seated or standing at a table.

Over the past two years, we have all done our very best to deal with COVID-19 and to comply with the related laws passed by all levels of government. While being politically opposed to these measures, I stated when I passed my Motion to repeal the mask mandate, that we all need to respect people's personal choices when it comes to masks. I find it very unfortunate that this matter comes forward at this time when we are all working hard to move past the trauma and difficulties of the past two years. However, if it is determined that this matter is proceed with further investigation and adjudication, I would submit that there are many similar matters that could be investigated in the same light. For example, On December (date and location withheld) many members of council, including (name withheld) where not wearing a mask. I have attached a photo of this event which went public at that time. If requested, I can provide extensive evidence of (names withheld) violating the very mask rules that they advocate for. I have also spoken publicly about this hypocrisy ..."

³ I have not attached the photographs as the identities of the other individuals present are protected by FOIPPA.

(reference and portion withheld -privacy /hearsay)

Overall, the wearing of masks has been a highly political matter. Over the past two years, I have done my best to comply with all public health measures, both privately and as a public official, even though I have been politically opposed to these measures. I again submit that at the event in question, all public health measure were followed to the very best of our abilities.

I thank you for the opportunity to respond.

The complaint complied with my request to respond to Councilor Mclean's Formal Reply on April 15, 2022. Subsequently, at my request, on May 5, 2022, the Councilor provided further clarification as follows:

- 1) The Christmas Meet & Greet was on December 11th, from 2PM-5PM.
- 2) In the eyes of a reasonable Calgarian, it is my view that no one violated public health regulations at this "Meet & Greet", as food and drinks were being consumed in this restaurant setting. If this person was actually at this "Meet & Greet" and felt uncomfortable, we certainly apologies for that. At no time at the event did anyone raise any Covid related issues with us, including restaurant staff. Furthermore, as previously mentioned, we went to great effort to ensure Covid related policies were being followed. QR codes were required at the entrance to our private room. Additionally, at my request, we opened another part of Hudson's to provide more seating opportunities, allowing for greater social distancing and to do our best to ensure everyone was seated or standing at a table when the event attendance was far greater than expected. Again, we did the very best we could to ensure all public health regulations were being followed.
- 3) I always invite and appreciate different opinions and viewpoints on my social media. However, I do block people for bullying, intimidating, and harassment. Almost always, people who are disrespectful are hiding behind fake profiles using burner accounts, bots and troll accounts.

This was the Complainant's further response to the above:

I read through the above and I don't find it satisfactory. He says they went to great lengths, but then listed what was under the REP program and the venue being a restaurant would have already been following if they were operating properly. The photos he posted on his page were all people walking around and having photo ops with signage / handshakes, and not eating / drinking.

I attached a screenshot as well of my comment he is calling "harassment, bullying and / or intimidation" which had me blocked from his page. As well images from the event.

Per section E in the code of conduct- I view being blocked on a public platform as bullying / intimidating based on voicing a different position and continuing to suppress any dissenting opinions. My comment was not aggressive or abusive but just pointing out him breaking the standing health orders.

19. A Member must communicate with Members of the public, one another, and with City employees and Members' staff respectfully, without abuse, bullying or intimidation.

Section 11 - a vocally anti-mask/restrictions individual chooses to hold a party that doesn't follow the gathering rules based on health orders - and posts photos to flaunt his "workaround"

11. A Member must respect and comply with the law and avoid conduct that, in the eyes of a reasonable Calgarian, undermines, or has the potential to undermine, public confidence in City governance.

Section 40- a vocally anti-mask/restrictions councillor chooses to hold / post photos publicly of him breaching/bending health orders and making the meet / greet in a format that the only ones who would attend shared the same mindset on public safety. Making the "average" constituent unwilling to attend due to safety concerns. Also held at his friend's restaurant so compliance can be non existent.

40. A Member must only use the influence of their office for the exercise of their official duties.

At this stage in the process, I will not consider sections 19 and 40 of the *Code* but only the original complaint as outlined in the Notice of Investigation. Section 19 and 40 were not part of the 'Formal Notice of Investigation' and section 11 captures the essence of the complaint. Further, adding additional infractions for the same incident at this time would be unfair, in my view.

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Findings of Fact

Masking requirements

Although the gathering on December 11, 2022, the restaurant was said to have followed the screening requirements pertaining to indoor gatherings (the restaurant required QR codes for entry for example), I find that Councillor Mclean did not comply with the masking requirements, for the following reasons:

The complainant stated that Councilor Mclean was not wearing a mask at the event. Councillor Mclean did not dispute the allegation that he failed to wear a mask at the event when he was obligated to wear one.

Councilor Mclean did not challenge the authenticity of the photographs showing him unmasked at the event. The photographs show Councillor Mclean in very close proximity to multiple individuals, without a mask on.

Councillor Maclean did not meet any of the exceptions to the masking requirements. He was not seated at a table, he was not providing or receiving a service, and he was not consuming drinks or food.

Therefore, I find as fact that Councilor Mclean was not wearing a mask at an indoor gathering when he was required to do so. In my opinion he failed to comply with both the provincial and municipal masking requirements. Failure to comply with these enactments was a clear violation of section 11 of the *Code*, which required compliance with the law.

Social Media Blocking

The complainant alleged that Councilor Mclean blocked herself and others from posting on his social media page, namely Facebook. She presented no evidence regarding the blocking of anyone besides herself, and I received no other complaints to this effect. I dismiss the allegation in so far as it pertains to alleged third parties.

The complainant commented on a photograph showing Councilor Mclean at the event, in close proximity to others, without a mask on. She commented on Facebook under the photograph:

“Phenomenal Mask Usage”. This was accompanied by a “thumbs up” emoji.

In his Reply to this allegation, Councillor Mclean stated he blocked individuals whose comments are “bullying, intimidating, and harassment”. He did not deny blocking the complainant. I find that Councillor Maclean blocked the complainant on social media.

In this instance, it is my opinion that the allegation that the social media blocking of the complainant was not a clear violation of section 11 of the *Code*, or any other enactment, bylaw or policy, for the following reasons:

Social media issues are constantly evolving, and many jurisdictions have determined that it would be premature to impose rules or policies on elected officials.⁴

There are presently no enactments or social media policies restricting Calgary City Councillors in general, and in particular, no policy about when a Councillor Member should or should not block an individual on social media. It is currently left to the discretion of the individual Council Member.

Whether the complainant’s comment on the photo was bullying, harassing, or intimidating is a highly subjective question, in other words, a judgment call. While I may not agree that the statement “phenomenal mask usage” fit any of these categories, Councillor Mcleans’ perception at the time may have been that it was bullying or harassing, because of the tone of the comment. He was not in breach of any law or policy.

⁴ For example, Calgary, Edmonton, Toronto and Winnipeg have also refrained from imposing a policy on council members to date.

I dismiss the allegation that Councillor Maclean breached section 11 of the Code of Conduct due to social media blocking.⁵

It is my opinion that in some instances, social media blocking may be a violation of the *Code of Conduct*. The applicability of the *Code* will depend on the circumstances of each individual case.

Summary

It is my opinion that Councillor Mclean did violate section 11 of the *Code of Conduct for Elected Officials* when he failed to comply with the City's mask mandate, but he did not breach the *Code* when he blocked the complainant on social media.

Sanction Considerations

Where I determine that a violation of the *Code* has occurred, the next steps are set out in the *Code* at Part H - Adjudication and Reporting. Section 90 provides that I must write a report to City Council and recommend a sanction. However, if I determine that the Member took all reasonable steps to prevent the violation, or if it was trivial or committed through inadvertence or a genuine error in judgment, I may state so, and recommend that no sanction be imposed.

In this instance I cannot reasonably conclude that the violation was trivial, committed through a genuine error in judgment, or inadvertence. The Councilor knew the masking requirements; the Councillor chose not to wear a mask when required, and it was not a genuine error in judgment, so much as an individual, informed choice based on strong personal views. He stated:

While being politically opposed to these measures, I stated when I passed my Motion to repeal the mask mandate, that we all need to respect people's personal choices when it comes to masks.

I have considered the mitigating and aggravating factors below to decide what, if any, sanctions should be recommended for City Council to consider in the circumstances.

Mitigating factors

I do consider that Councillor Mclean stated he took some measures to ensure that the event venue complied with some of the requirements for indoor gatherings, namely QR Code screening.

I do consider that Councillor Maclean offered a limited apology in his email dated May 5th, 2022.

I do consider that Councillor Mclean cooperated fully with my request for a formal Reply to the complaint and answered all additional questions I put to him during the investigation.

Aggravating Factors

I must consider that Councilor Mclean held the Christmas event as the Ward 13 Councillor, and thus was representing the City of Calgary on the date in question. Councillor Mclean, as a member of Council, and as the host of the event had, in my opinion, an obligation to show leadership by complying with the law. He was obligated to hold himself to higher standards as an elected official and to demonstrate his leadership by complying with the province's indoor restrictions and the City's Face Covering Bylaw, even if he disagreed with them. Section 15 of the *Code* emphasizes these obligations:

Section 15: A *Member* must respect the decision-making process of *Council* and all its boards commissions and committees.

In my opinion Councillor Mclean was fully aware of the contents of the City's Face Covering Bylaw. He voted on it in Chambers. He publicly objected to the Bylaw. He then failed to show respect for the decision Council made to enact the Bylaw, as he was required to do.

I asked Councillor Mclean directly if he would acknowledge that he breached the masking requirements and the *Code*. He did not.

In my opinion, the Councilor's choice not to wear a mask, as host and especially as a Council Member, and his failure to require others to do so, were not trivial infractions, or a mere error in judgment. His decision was deliberate and showed disregard for the laws in place for all Calgarians, the majority of whom were complying with the unpleasant restrictions and experiencing the resultant hardships, because the law required it. Some members of the public were subjected to monetary fines for non-compliance with the Bylaw.

Reasonable Calgarians could interpret Councillor McLean's actions as sending a message that elected officials have a separate set of rules for themselves, or that they are above the laws that apply to ordinary Calgarians. This conduct had the potential to reflect badly on City Council. In my view, Councilor Mclean was suggesting that it is okay to choose to disregard a mandate imposed by City Council to protect the public, because he disagreed with it.

Councilor Mclean also chose to point the finger at other Council Members alleging they too had breached the mask bylaw and he referred to their conduct in his reply and in public as "hypocrisy". In his reply, he provided a photograph of a council member not wearing a mask at a meeting. The individual appeared to be speaking at the time. He stated:

I would submit that there are many similar matters that could be investigated in the same light. For example, On (date and location deleted) many members of council, including (name withheld) where not wearing a mask. I have attached a photo of this event which went public at that time. If requested, I can provide extensive evidence of (names withheld) violating the very mask rules that they advocate for. I have also spoken publicly about this hypocrisy.

I have received no complaints about other Council Members on this issue. Councillor Mclean was prepared to minimize his own breach and imply that if others break the law, he can do so with impunity.⁶ He referred publicly to specific Council Members and their 'hypocrisy'. This shows a failure to take responsibility for his actions and possibly disrespect towards his fellow Council Members.

Sanction Recommendation

In my view, in the balancing of the mitigating and the aggravating factors, I conclude that this violation is of moderate severity. I find that the aggravating factors that arose during this investigation outweighed the mitigating factors such that a moderate sanction is warranted.

Section 92 of the *Code* lists the sanctions that may be imposed for *Code* violations including:

- (a) a letter of reprimand addressed to the *Member*;
- (b) a request that the *Member* issue an apology;
- (c) the publication of a letter of reprimand or request of apology by the *Integrity Commissioner*, and the *Member's* response;
- (d) A requirement that the *Member* attend training;
- (e) Suspension or removal of the appointment of a *Member* as the *Deputy Mayor*;

⁶ I have not included the photograph Councillor Mclean shared to protect the privacy of the individuals in it. The probative value of the photograph was weak, in my view, as it did not provide context to the unmasking. It was not clear if this was a private or public meeting. Many public figures have worn masks at meetings and events, removing them to speak. (Ex. Dr. Deana Hinshaw has done so while giving COVID updates).

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- (f) Suspension or removal of the *Mayor's* presiding duties under section 154 of the *Municipal Government Act R.S.A. 2000, c. M-26*;
- (g) Suspension or removal of the *Member* from some or all *Council* committees and bodies to which the *Member* was appointed by *Council*; or
- (h) Reduction or suspension of the *Member's* remuneration as defined in section 275.1 of the *Municipal Government Act, R.S.A. 2000, c. M-26*, corresponding to a reduction in duties, excluding allowances for attendance at council meetings.

In my view, sanctions (a) and (b) alone constitute minor sanctions. So does sanction (c), since this report will be made public at the conclusion of this matter, pursuant to section 90(h) of the *Code*. In my view, sanctions (e) to (h) are more serious in nature and not appropriate in the circumstances.

It is my opinion that a combined sanction of (a) letter of reprimand from Council and (d) a requirement that Councillor Mclean attend training on the *Code of Conduct for Elected Officials Bylaw* with the Ethics Advisor within 30 days of Council's decision on sanction, would be a moderate and reasonable outcome in all the circumstances.

This sanction would reassure the complainant and the public at large that Council Members, including Councillor Mclean, are not above the law and are held accountable for their actions. It would provide an opportunity for Councillor Mclean to fully understand the requirements of the *Code of Conduct for Elected Officials Bylaw*.

Conclusion

I conclude that a violation of Section 11 of the *Code of Conduct for Elected officials Bylaw 26M2018* has been proven.

I recommend to City Council that a letter of reprimand be delivered to Councillor Mclean and that he attends ethics training with the Ethics Advisor within 30 days.

I request that the Integrity and Ethics Office be informed when the sanctions are completed.

This report was completed and signed by me at Calgary, Alberta on May 31, 2022.

"Ellen-Anne O'Donnell"
Integrity Commissioner
City of Calgary