

Office of the Integrity Commissioner

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INVESTIGATION REPORT 2009
BY JAMIE PYTEL
INTEGRITY COMMISSIONER for
THE CITY OF EDMONTON

Report Date: July 19, 2020

To: City Council for The City of Edmonton

Re: *Council Code of Conduct Bylaw 18483*
(the “Code of Conduct” or “Code”)
Complaint 2009

Complainant: Complainant 2009

Date of Complaint: April 21, 2020

Respondent: Councillor Mike Nickel

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COMPLAINT

The Complainant alleges that on April 19, 2020:

I am his constituent. He blocked me on twitter for disagreeing with him. His twitter account and handle indicate he is a councillor. It appears to be a professional account and he uses it to communicate city business. Blocking a constituent from communicating or receiving city communication from their representative is disrespectful.

When asked what the Respondent blocked, the Complainant replied:

It was about his opposition to the temporary active transport lanes on Saskatchewan Drive.

CODE OF CONDUCT AND PROCESS

The Complaint was in writing, was within the time limits set out in the *Code*, and included the section of the *Council Code of Conduct* the Complainant felt was violated, which says:

Part A: Representing the Municipality, section 1 e):

While carrying out their duties, Councillors must communicate respectfully with members of the public, Councillors, City employees, and Councillor's employees.

During the investigation, I determined that it was not necessary to personally interview or have the Complainant swear a statutory declaration. I communicated via email with the Complainant on any questions I had about this investigation.

I provided the Respondent with all of the information and allegations provided to me by the Complainant. I interviewed the Respondent and he provided his written statement in response to this Complaint. The content of the Respondent's statement is contained within this report I invited the Respondent to raise any concerns around process or arguments at any time during this process. I reviewed and considered all of the information provided to me by the Respondent.

I did not find it to be in the public interest to identify the Complainant by name in this report. However, the Respondent was given the written Complaint, including name of the Complainant (except contact information), in case the identity of the Complainant raised any issues or defences for the Respondent.

RESPONDENT'S INFORMATION

The Respondent says:

- I allow contrary views on my social media pages as long as they are not abusive, profane or inappropriate activity such as spamming, taking over the site with too many posts that are copied and pasted, etc. I tell my staff to block or delete posts if the language in them is abusive, uses profanity or they are spamming to take over the conversation. There are limits. When it becomes abusive, then the limits kick in. As a principle, I don't involve myself and don't want to

be talking about personalities. [A commentator (not the Complainant)]...was deleted and blocked because she made a comment, then copied and pasted it as a reply to several other comments, and stopped when my staff blocked her. She is entitled to her opinion, but I am familiar with the tactic she used, that sends a notification to each person replied to, as an effort to get more people to see the comment. My staff made a judgement call on my behalf, based on the principles I have given them. I fully support my staff in this decision.

The Respondent says his unwritten social media policy is to use a common-sense approach based on the following principles:

- Mike Nickel's social media pages are the property of Mike Nickel.
- We reserve the right to remove anyone acting inappropriately, degrading, or offensive from our social media pages.
- We do not tolerate bots or anonymous accounts from interacting with our page.
- Individuals using "fake names" or "pseudonyms" while interacting with our pages will be removed and/or blocked.
- Anyone spamming or mass copying / pasting underneath comments in an attempt to intimidate or skew engagement in the conversation will be removed.

Discussion and Analysis

For the reasons explained below, I did not seek out and do an exhaustive review of the social media activity by the Respondent or the Complainant. There was no breach of the *Code* based on the analysis that follows.

The understanding of the intersection of municipal codes of conduct and the use of social media is somewhat in its infancy. Many municipal councils are looking at bringing in social media policies to govern these issues. While Council has not specifically enacted a social media policy, Edmonton's City Council chose to explicitly include in the *Code of Conduct* the requirement that their communications on social media must be respectful. Many codes are not this explicit.

However, the *Code of Conduct* does not require Members of Council to engage the public on social media or to participate in debate with members of the public. In my view, when Councillors use social media platforms as a method to communicate to the public on issues of public interest, they need to tread carefully when limiting participation by the public. These platforms are used by the public to raise their concerns. It is part of the Council member's role to initiate communications and respond to communications by the public.

The role of municipal councillors is somewhat different from other politicians who may find themselves subject to their own political party's policies on social media use. Many such parties have brought into effect policies that permit members to block or delete commentators if, for instance, they use threatening or discriminatory language, or troll the politician's site. Blocking happens at all political levels in Canada, although some commentators see it as an affront to democracy and possibly off-side

the elected official's obligations to their constituents. The preponderance of commentary on this issue is politicians' public accounts should remain public, unless blocking is necessary and justified.¹

To my knowledge, the Canadian Courts have not ruled on whether elected officials can block members of the public, in particular, their constituents. In the United States, some courts have ruled that politicians who block constituents are violating the First Amendment of the U.S. Constitution which protects freedom of speech. The Southern District Court of New York found that President Trump should not be permitted to block people on his Twitter account as Twitter is a "public forum" under the First Amendment.² However, the freedom of expression protections under the *Canadian Charter of Rights* are different from the U.S. First Amendment, and the Canadian courts have not ruled on how our *Charter* will respond to such actions by politicians.

This is an important issue, as social media platforms are used extensively not only by politicians, but also by constituents for a number of reasons, including knowing their politicians' views on particular topics, to express their own views and to get updates on what is happening within their municipality. By blocking someone, an elected official is singling out that person who is no longer being allowed, as others are, to weigh in on the issues. That person is also prevented from immediately and easily seeing posts by that elected official. The member of the public can search for this information, but it is not readily available when they are blocked.

Many elected officials argue that constituents can still contact them after they are blocked through other means such as email. This helps the elected official verify the author of the communication and engage in more private discussions. The Respondent also says that he is just blocking people from this form of communication, not all communication.

I am of the view that it is entirely reasonable for elected officials to place some parameters on acceptable conduct on their social media pages. This is particularly so if the page is being hijacked by people trolling, spamming, using bots, using discriminatory or harassing language, etc.

Whether the Respondent violated the *Code* when he deleted and blocked those commenting on the April 18 post is not an issue that is clearly covered by the *Code*. I suggest that blocking would be a breach of the *Code*, for instance, if it was proven, on a balance of probabilities, that a Member of Council was deleting or blocking someone based on grounds that are protected by Human Rights legislation. But that is not the case here.

The Respondent has some guidelines with respect to the behaviour he will tolerate on his social media pages. Such guidelines always require an element of judgment and it is not for me to question that judgement. However, in my view, to encourage democratic debate on a site that is meant to serve the public, I suggest that blocking should be done sparingly, with other methods such as muting being considered only when justified. Comments, if said respectfully, should not be deleted or blocked even if

¹ For instance, the former Integrity Commissioner for the City of Toronto, Val Jepsen, in her 2016 *Annual Report* commented that "...social media is a way to communicate with constituents and blocking them could be seen as a refusal of service". See also "Can a politician block you on Twitter?" by Cara Zwibel of the Canadian Civil Liberties Association, June 7, 2019, ccla.org, who says online spaces have become the public square and unless being subjected to repeated harassment, blocking by elected officials is "terrible for democracy".

² See: National Observer, July 4, 2019, by Emma McIntosh and Fatima Syed.

they express a contrary view. But, this is within the Councillor's discretion. There are no specific rules in the *Code of Conduct* or Council policies that apply to this issue.

Findings – Deleting and Blocking Social Media

I find on balance that the *Code of Conduct* was not violated when the Respondent blocked commentators on his social media page. While I think this sort of blocking should be done sparingly and based on justifiable and defensible guidelines, there is nothing currently in the *Code* that prevents this. There is no legal guidance on this issue. Council may choose to pass a social media policy to address this situation. Currently, this is left to Members of Council to use their judgment.

FINDINGS

While appreciative of the Complainant for raising this topical issue, for the reasons noted above, I have made no findings of a breach of the *Code of Conduct* by the Respondent.