Office of the Integrity Commissioner

integrity.commissioner@edmonton.ca

INVESTIGATION REPORT 2001

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 2001
Complainant:	Complainant 2001
Date of Complaint:	April 19, 2020
Respondent:	Councillor Mike Nickel

TABLE OF CONTENTS

COMPLAINT

The Complainant alleges that on April 18, 2020 at around 10:00 a.m. and April 20 and 21, 2020:

> Mike Nickel posted unprofessional and unaccepting imagery of a fellow councillor. His post promotes misinformation. Although it is his right to do so, he is deleting the comments of those challenging him.
>
> On April 20, 2020 he changed his Facebook page name from 'Councillor Mike Nickel' to 'Mike Nickel'. I believe this is an attempt to say that he was speaking as an individual, and not as a councillor, in order to avoid taking responsibility for breaking the code of conduct. Although, simple screen shots show that he posted the original disrespectful communication on the page while it was called "Councillor Mike Nickel". I believe this to be a thinly veiled attempt to find a loop hole in the code of conduct, which is not in the spirit of the bylaw.
>
> Councillor Nickel on April 21, 2020 changed his pages description to state it is a personal page. I will reiterate it was advertised as a Councillor page when he made the post in question.

When I asked the Complainant what was meant by "promoted misinformation" the Complainant replied:

> It is my understanding that claiming the City of Edmonton spent lots of money on bike lanes during the pandemic is incorrect. This blog post also highlights other points where the information Councillor Nickel provided was misleading.
>
> I understand that the way it is written allows for some degree of subjectivity (i.e. what "spending money frivolously" means) in analyzing this.
>
> More importantly, I think that Councillor Nickel has publicly communicated in a disrespectful way which is in violation of the code of conduct.

The Complainant provided the Respondent's social posts on April 18 [attached as **Appendix A**] and the Complainant's posts that were deleted by Councillor Nickel, which said:

> "The fact that you have devolved to spreading misinformation and petty bullying to attack your colleagues makes me question if you are stable enough to help lead this city.
>
> There is a respectful way to disagree Councillor Nickel, and this isn't it. Please reflect on your actions and the message it sends. Trust me when I say this reflects poorly on you.
>
> If anyone else agrees that this behaviour is unbecoming of an elected official, I found this official complaint form online. [links to Code of Conduct complaint form for City of Edmonton Integrity Office].
>
> I will be making a complaint about this behaviour and I encourage others to as well.
>
> I've already screen shot this response because I know you are notorious for deleting negative comments and blocking people that disagree with you.

I almost never engage on social medial anymore, but I can't stand by and say nothing when I see blatant misinformation and bullying like this.

FYI, I posted my comment on Mike Nickel's original post. It was deleted within 10 seconds of posting. I reposted it. It was deleted again and now I have been blocked from commenting all together. I am familiar with Councillor Mike Nickel's tactics so I took screenshots of everything immediately. (Screen shots will be posted in the comm…[information cut off here]).

My original comment was deleted in under 30 seconds of posting so I am reposting here. As mentioned, I predicted he would delete my comment so I screen shot it as an initial precaution. I see that you can't post pictures in this comment section, likely because he doesn't want people to post screen shots. "The fact that you have devolved to spreading misinformation and petty bullying to attack your colleagues makes me question if you are stable enough to help lead this city.

There is a respectful way to disagree Councillor Nickel, and this isn't it. Please reflect on your actions and the message it sends. Trust me when I say this reflects poorly on you.

If anyone else agrees that this behaviour is unbecoming of an elected official, I found this official complaint form online. [links to Code of Conduct complaint form for City of Edmonton Integrity Office].

I will be making a complaint about this behaviour and I encourage others to as well.

I've already screen shot this response because I know you are notorious for deleting negative comments and blocking people that disagree with you.

CODE OF CONDUCT – APPLICABLE SECTIONS AND INTERPRETATION

The applicable sections of the *Code of Conduct* say:

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

> While carrying out their duties, Councillors must accurately represent and respect decisions made by Council while preserving the value of fair comment and differences of opinion.

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.

Part B: Communications, section 1 a):

> Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will ensure their communications accurately reflect the facts of Council's decisions.

Part B: Communications, section 1 c):

Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will ensure that all communications are accurate and not issue any communication that the Councillor knows, or ought to have known, to be false.

Part B: Communications, section 1 d):

Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will ensure that all communications issued by, or on behalf of, the Councillor, including social media, are respectful and do not discriminate, harass, or demonstrate disrespect toward any person.

Part B: Communications, section 1 e):

Without limiting the ability of a Councillor to hold a position on an issue and respectfully express their opinions, Councillors will not issue any communications that mislead the public about any matter.

Part E: Respectful Interactions, section 1:

Councillors will conduct themselves with decorum at all times, including while attending meetings, interacting with City employees and Councillor's employees, and engaging with the public.

Part E: Respectful Interactions, section 3:

Councillors must not use any harassing or disrespectful language about Council, a Councillor or the public.

There is no definition in the *Code* for decorum. I suggest that Members of Councillor would generally have an understanding of what this means short of a definition within the *Code*. In any event:

Oxford English Dictionary (oed.com) defines decorum as:

> That which is proper, suitable, seemly, befitting, becoming; fitness, propriety, congruity.

Mirriam-Webster.com defines decorum as:

> Correct or proper behaviour that shows respect and good manners.

PROCESS and JURISDICTIONAL ISSUES

The Complaint was in writing, was within the time limits set out in the *Code*, and included the sections of the *Code* the Complainant felt were violated [Part A Sections 1 d) and 1 e)].

As part of the public interest function of my role, at times I may need to identify which sections of the *Code* I feel are applicable based on the information presented. This applies whether a complainant or respondent raises certain information or sections of the *Code*. I can also make a finding with respect to a section of the *Code* even if a complainant, or respondent in his or her defence, does not identify the correct sections of the *Code*. However, the allegations and information presented must relate to a section of the *Code*.

I have included in this report those sections of the *Code* that I found potentially apply to the issues raised in this Complaint.

During the investigation, when I had questions or needed more detail about this Complaint, I contacted the Complainant via email using the contact information provided by the Complainant. All information provided was considered for this investigation. I determined that it was not necessary to personally interview or have the Complainant swear a statutory declaration.

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 under the applicable headings. I also provided the Respondent with the sections of the *Code* I felt were relevant to this investigation and a list of the issues I felt were raised in this investigation. 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.

I considered whether the April 18 post was done as part of the Respondent's role as a City of Edmonton Councillor, or was purely personal. The Complainant says that on April 20, 2020 (after the April 18 post), the Respondent changed his Facebook page name from "Councillor Mike Nickel" to "Mike Nickel". The Complainant alleges that this is:

> …an attempt to say that he [the Respondent] was speaking as an individual, and not as a councillor, in order to avoid taking responsibility for breaking the code of conduct. Although,…he posted the original disrespectful communication on the page while it was called "Councillor Mike Nickel". I believe this is a thinly veiled attempt to find a loophole in the code of conduct, which is not in the spirit of the bylaw.

The Respondent says:

> My social media accounts are my own property. The costs associated with them I pay out of my own pocket….I changed the name on my Facebook page because I do not want there to be any confusion that this is my political opinion. I changed it to say Mike Nickel, not Councillor Mike Nickel. I wanted it to be crystal clear that the opinions expressed are my personal opinions. Even though I am Councillor Nickel, Mike Nickel has rights to express his opinion. I believe using my title as Councillor is no different than a doctor using a "Dr." prefix in their personal life. Members of Council express their personal opinion on their personal pages frequently. All Councillors post blogs, use social media etc. as an unofficial method to communicate with the public. Any official platforms to engage with constituents are owned by the City. The April 18 post was on a privately operated platform where I communicate with the public regarding activities both related and unrelated to Council.

In my view, whether the Respondent pays for his social media accounts himself is irrelevant. What matters is the content of those communications. Whether he communicates his views on social media

or uses some other medium, I find that the *Code* applies if those communications are about Council, his role as a Councillor, Members of Council, or the business of the City.

Fellow Integrity Commissioner Melinda Munro for the County of Brant in Ontario likened these situations to the employment law cases in which employees can be terminated for their outside of Council chambers social media activity. I agree with her analogy, as set out in *Bartscher v. Cardy*, 2018 ONMIC 28:

> While [the Code of Conduct] refers to 'official duties', it cannot be the case that the Council intended that its members would be free to behave in an outrageous manner outside the Council chambers such as to undermine public confidence in the office…the law of employment has long established that 'off-duty' conduct can be cause for discipline and dismissal where it is done in such as way as to damage the reputation or work environment of the employer….It can reasonably be suggested that once elected as a public official, all public activities are 'official duties' for the purpose of behaving in a manner consistent with the Code.

It is also worth noting that Part E section 1 of the *Code* says: "Councillors will act with decorum at all times…while engaging with the public." This requirement is not limited to conduct in Council or Committee meetings or at official Council functions. I also note that some of the sections of the Code (i.e. Part A, Sections 1d and 1e) when referring to Members of Council's duties include the phrase "while carrying out their official duties". Part B, Section 1d which deals with respectful communications while on social media does not include this phrase.

In this case, the April 18 post was clearly posted about Councillor Andrew Knack and about City of Edmonton business. Given the subject matter of the April 18 post and the fact that the Respondent says he was advocating on behalf of some of his constituents, I find that the *Code* applies.

The Respondent says he would react differently to this investigation if Councillor Knack had made a complaint. However, the *Code* says:

> If any person believes that a Councillor has contravened this code of conduct, that person may make a written complaint to the Integrity Commissioner.

In my view, it is perfectly acceptable for members of the public to question the conduct of Members of Council. The *Code* provides a way for them to do this. Based on the language of the *Code*, it is not a requirement that the alleged "victim" be the complainant.

The impugned conduct also needs to be sufficiently egregious to warrant investigation, and not a minor or trivial issue. Here, I decided to investigate, in part, because the language and images depicted in the April 18 post came across, at first blush, as potential breaches of the *Code*. However, more investigation, thought and analysis were needed to determine if, in context, the April 18 post violated the *Code*.

The Complainant is also concerned that comments posted by the Complainant were deleted or were blocked from the Respondent's social media page. Without some investigation and analysis, it was not clear if this would be found to be a breach of the *Code*. I did not undergo a complete review of social media activity by the Respondent and the Complainant, but I did consider whether deleting or blocking on social media is a potential breach of the *Code.*

While typically I would not issue a report to Council unless there were findings of a Code breach, here there were mixed findings and the issues overlapped. Therefore, aspects of the Complaint that are both dismissed and accepted are found in this report.

THE LEGAL and CODE OF CONDUCT BACKDROP

This investigation is centred around the right to freedom of expression and how it interacts with the *Code of Conduct*. The Respondent asserts that in the April 18 post he was simply asserting his freedom of expression rights and he should not be censored or censured for doing this.

The role of a Municipal Councillors is complex and includes being both a politician and a legislator. This is sometimes referred to as a "hybrid function". As stated in *Geatrix v. Williams*[1]*:*

> The Courts have confirmed that municipal councillors have hybrid political and legislative functions[2]. That they are representatives of the communities that elect them,[3] and that members of the public have the right to address their municipal representatives on issues of concern[4]…
>
> It is part of the role of a Council Member to communicate with members of the public about municipal issues. This includes both initiating communication and responding to communication initiated by members of the public. In doing so, a Council Member is not limited to explaining and defending what the municipality is already doing. As part of the political process, a Council Member is entitled to form views, to hold views, to express views and, once in office, to give effect to those views.[5] Some of those views may involve a change in law or a change in direction. **Provided that a Council Member proceeds lawfully and in a manner consistent with the *Municipal Act*, the Code and other legislation and by-laws**, nothing prevents a Council Member from taking, defending and seeking to implement a position that advocates change. Indeed, the Courts have clearly stated that as an elected representative of the public a municipal councillor is entitled to take "an open leadership role" on an issue.[6] **[emphasis added]**

As well, as stated in *Jeffrey v. Sprovieri*[7]*:*

> Political commentary must comply with the Code, but otherwise an Integrity Commissioner has no jurisdiction over it. As Integrity Commissioner Cameron noted in the 2012 case:
>
> > I cannot and will not be a referee for free speech in a political arena provided it stays within the bounds of…the Code.

---

[1] By Integrity Commissioner Guy Giorno for the Town of Orangeville in Ontario, 2018 ONMIC 6 at para 132.
[2] *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1179 at 1196.
[3] *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20 at 43, cited with approval by *Old St. Boniface Residents Assn. Inc.* note 13, at 1193.
[4] *Re McGill and City of Brantford* (1980), 111 D.L.R. (3d) 405 (Ont. Dist. Ct.) at 411, cited with approval by *Old St. Boniface Residents Assn. Inc.,* note 13, at 1193-4.
[5] *Re Cadillac Development Corp. Ltd. and City of Toronto* (1973), 1 O.R. (2d) 20.
[6] *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, (1989), 58 Man. R. (2d) 255 (C.A.) at 264, affirmed [1990] 3 S.C.R. 1170.
[7] 2018 ONMIC 21, Guy Giorno, as Integrity Commissioner for the City of Brampton, at para 86.

Subsequently, Mr. Randy Pepper, the delegate of Integrity Commissioner Cameron, expanded on the same principle in Investigation Report No. BIC-33-1112:

> Freedom of expression is a fundamental right in Canada so the Code must be interpreted in a manner consistent with this fundamental right. Based on the law set out below, I cannot find that the Code should be interpreted to appoint the Integrity Commissioner as a speech referee in the political arena.
>
> As the Supreme Court of Canada noted in the *Committee for the Commonwealth of Canada v. Canada,* [1991] 1 S.C.R. 139:
>
> > Freedom of expression, like freedom of religion, serves to anchor the very essence of our democratic political and societal structure…Hence, the justification for the widest freedom of political speech stems not only from some abstract search for truth, but also from the tangible goal of preserving democracy…I find that the Integrity Commissioner has a very limited role in relation to the "freewheeling debate on matters of public interest…

The Complainant alleges that the Respondent has publicly communicated in a disrespectful way in the April 18 post. The Complainant also alleges that the Respondent has promoted misinformation in the April 18 post. The *Code of Conduct* provides that while preserving the value of fair comment and differences of opinion, Councillors must ensure their communications accurately reflect the facts of Council's decisions, that all communications are accurate and not issue any communications that mislead the public about any matter.

On this issue, the Ontario Supreme Court stated in *Buck v. Morris et al.*, 2015 ONSC 5632, at paragraphs 189-193:

> There can be no doubt that politics, whether it be federal, provincial or municipal, is not for the faint of heart. Some might say a thick skin is a prerequisite for any politician.
>
> A thick skin, however, does not mean that a politician is fair game for those intent on damaging their reputation with false, malicious, and defamatory statements. Freedom of speech, whether in the political forum or not, does not extend to statements that are untrue and have as their sole purpose an intent to damage someone else's reputation.
>
> The right to freedom of speech in our society is not an absolute right. While freedom of speech is a cherished right in a free and democratic society, there are reasonable limitations. The Town of Aurora, like many other towns and cities in the Province of Ontario, has a Code of Conduct that purports to codify parameters of reasonable conduct for elected Town officials…
>
> The plaintiff clearly has a perception that she has an unfettered right to freedom of expression and freedom of speech. That freedom, however, is circumscribed by the Code.

The Supreme Court of Canada in *Prud'homme v. Prud'homme*, 2002 SCC 85, stated at paras 42-45:

> …while elected municipal officials must be quite free to discuss matters of public interest, they must act as would the reasonable person. The reasonableness of their conduct will often be demonstrated by their good faith and the prior checking they did to satisfy themselves as to the

> truth of their allegations. These are guidelines for exercising the right to comment, which has been repeatedly reaffirmed by the courts.

I am of the view that it is not the role if the Integrity Commissioner to censor or interfere with political debate and commentary. It is not my role to decide whether views expressed by Members of Council are meritorious or properly held.

It is also not my role to interpret whether the *Code* is contrary to the freedom of expression rights found in the *Canadian Charter of Rights*, which is an issue for the courts to decide. However, I am of the view that the right to freedom of expression found in the *Charter* has limits. In this case, the limits have been self-imposed by City Council with the issuance of the *Code of Conduct*. The *Code* allows fair comment and Members of Council to hold a position on an issue. This is balanced with *Code* requirements, such as, to accurately represent Council's activities, be respectful and act with decorum.

No code of conduct can list all of the possible ways individuals can disrespect one another. Some codes provide non-exhaustive lists of what is considered disrespectful conduct to give those who are governed by the code a sense of what is contrary to the code. However, it is left to those who are governed by those codes to use their judgement. When a complaint is made, those who administer the code and investigate alleged breaches (in this case, me as the Integrity Commissioner), must determine if the impugned conduct is disrespectful. As part of that review, consideration is given to the context and facts around the impugned conduct.

The *Code of Conduct* requires Members of Council to respect the decisions made by Council while preserving the value of fair comment and differences of opinion. Some Integrity Commissioners in Canada have commented on this requirement. For instance, Bruce Elman, Integrity Commissioner for the City of Windsor says[8]:

> City or Municipal Councils occupy a unique role in our society. They are, at one time, both deliberative legislative bodies for the geographical entity known as their city, town, county, or municipal district, and at the same time, they are, effectively, a corporate board of directors for the commercial entity known as the Municipal Corporation of (in this case) the City of Windsor….
>
> In other words, in the lead up to a specific decision, Council is a deliberative governmental body wherein almost unfettered freedom of speech reigns but once that decision is made, Council becomes a corporate board and, as with vast majority of corporate boards, public dissent is discouraged or even prohibited. The reason is rational and sensible: Decisions made by Council become the official policy of the City of Windsor. When Members of Council speak out or engage in conduct indicating opposition to official City policy outside the deliberative confines of the legislative process , their comments or conduct can diminish the integrity of Council decisions in the public eye, damage public confidence in Council itself, or even undermine the City's reputation, domestically or internationally. One can only imagine how [the Councillor's statement] – perhaps taken as hyperbole her in Windsor – might be viewed in California or Calgary or Copenhagen or Cairo.

[8] Re Complaint brought pursuant to the Code of Conduct of the City of Windsor against Councillor Rino Berolin, Integrity Commissioner Bruce Elman's report dated April 20, 2018.

It should be noted that Councillors have plenty of opportunities prior to a decision being made by Council to express their views on the merits of a proposal and they can provide as much context as they wish and use as much hyperbole as they believe is necessary. If a Councillor has particular concerns regarding an item on the Council Agenda, the Councillor can call a press conference to express those concerns. Councillors can post their concerns on their webpages or on social media to express those concerns. Councillors can go to community groups or BIAs to rally support for their position. The Councillor can even encourage citizens to become delegates to Council when the matter is debated. Finally, Councillors may express all of their concerns during the debate on the matter when it comes before Council.

Even then, after the decision is made, Councillors are free to explain why they voted as they did during the Council deliberations. They should, however, acknowledge the legitimacy of Council's decision as resulting from the deliberative and democratic processes of Council. **They should not be disrespectful and their comments should not be disparaging or inaccurate." [emphasis added]**

At the centre of this investigation are decisions made by Council during the COVID-19 pandemic and historically with respect to the construction of bike lanes in the City of Edmonton. A review of the history reveals:

- The construction of bike lanes was a decision made by Council going back to 2009 when the Council of the day carried a motion to approve the policy that: "The City of Edmonton strives to be pedestrian and bicycle friendly".

- On June 11, 2014 Council passed a motion that "enhanced public engagement strategies" outlined in a report by Transportation Services that included a bicycle infrastructure plan be approved. The Respondent voted in favour of this motion.

- During Council Meetings in November and December 2014, Council passed the 2015-2018 Capital Budget, including a motion for a $8.8 Million bikeway for the 102 Avenue area. The Respondent voted in favour of this motion.

- In 2016, the Respondent voted in favour of a motion for capital funding of $7.5 Million and an annual operating cost of $625,000 for physically separated bike lane infrastructure.

- With respect to the 2019-2022 Capital Budget discussed at the November and December 2018 Council meetings, the Respondent voted against a motion seeking increased funding of $2.17 Million for bike infrastructure expenditures, but the motion was passed. The Respondent also voted against a motion on the $5.7 Billion Capital and Operating Budget that included design and construction of a minimum grade bike grid in various areas in Edmonton, but the motion was passed.

- In response to this investigation, the Respondent referred me to the March 26, 2020 Emergency Advisory Committee of Council. A review of that meeting revealed that Councillor Knack brought forward concerns from some of his constituents that they were struggling with physical

distancing outdoors during the pandemic. City Administration said that they would review options in this regard. It was clear at this meeting that this was delegated to City Administration. No Council motions were passed in this regard.

- City Administration made expanded spaces available on some City of Edmonton roads and paths during the COVID-19 pandemic in April 2020. This was done to facilitate physical distancing during the pandemic. These were multimodal spaces for active transportation for:

    - Biking
    - Running
    - Walking
    - Rollerblading
    - Wheelchair use
    - Etc.

    The decision to do this was made by Administration under the State of Local Emergency, but Administration normally has the authority to make these sorts of decisions. Regular updates were given to Council about these measures and Councillors could raise any concerns they had with them.

SUMMARY OF RESPONDENT'S SUBMISSIONS

The Respondent provided some submissions regarding this investigation all of which were reviewed and considered by me. The following is a summary of the Respondent's submissions that were relevant to the issues[9]:

- By passing the *Code of Conduct*, Council did not agree to contract out of the *Canadian Charter of Rights and Freedoms*;
- Terms used in the *Code of Conduct*, like "disrespectful" have no objective criteria against which words can be measured;
- As "respectfully" is not defined in the *Code of Conduct*, the Integrity Commissioner is discouraged from inserting her own "personal subjective standards into that void";
- Members of Council should not be punished for acts that were never intended to cause harm;
- If victimless speech is to be censored there will be a chilling effect on free expression;
- Non-defamatory speech that may be offensive but falls short of inciting hatred to an identifiable group is constitutionally protected;
- There is no objective standard that exists regarding social media posts that could result in the posts being deemed offensive or disrespectful, especially by norms established in the political arena;
- The Respondent does not attack another Councillor, he simply questions Council and certain Members of Council spending priorities. He merely questions and sometimes attacks another Councillor's spending priorities for the City of Edmonton;

[9] The Respondent can also make further written submissions to Council before the Council meeting to consider this report and will have time at the meeting to make oral submissions.

- There is no personal attack. There is no disrespect. There is only a fundamental difference on an important fiscal matter. Far from disrespecting an adversary, the Respondent respects a fellow Councillor by essentially challenging him to a social media debate and giving him an opportunity to defend his position;
- The cartoon image of Councillor Knack is not offensive. It does not portray the Councillor in an unflattering light or distort his appearance in any negative way. It is simply a visual depiction to graphically demonstrate the thesis that Council's spending priorities are askew;
- There is no need to censure social media. The internet is self-policing. When someone posts something offensive, they are immediately 'outed' and/or castigated for their viewpoints;
- Members of Council should be allowed to participate unfettered in political debate regarding difficult fiscal choices. The Respondent should not be censured for doing his job – attempting to convince Members of Council and those who "follow" and support those Members, that the City of Edmonton needs to reprioritize its spending.

RESPONDENT'S INFORMATION - APRIL 18 POST

With respect to the April 18 post, the Respondent says:

- This post was in response to Councillor Knack making a comment on Twitter regarding my April 17, 2020 social media post(s). This post did not name any Councillors and contained a description of an idea suggested by Councillor Knack at the March 26, 2020 Emergency Advisory Committee meeting, then enacted by the Administration without consultation of Council, with a picture of one site. The post also brought forward my opinion of actions that we should be taking to minimize the negative impacts of COVID. In Councillor Knack's April 17, 2020 post, he made implications that I sit in Council meetings, vote no to everything, and do not offer solutions. I believed this to be an inaccurate interpretation of my work and responded with a comparable interpretation of his work.

- The cartoon image of Councillor Knack in my April 18, 2020 post had some stop animation showing Councillor Knack throwing money into a fire. Councillor Knack has since released a blog breaking down his disagreement with my April 18, 2020 post, then stated in a radio interview on April 21, 2020 that he did not find the post offensive.

- Mayor Iveson sent me a text message April 19, 2020, asking me to take down the April 18, 2020 post. As a professional courtesy to Councillor Knack, I asked my social media staff to remove it. The April 18, 2020 post has been taken down on all sources, while the April 17, 2020 post remains active. In hindsight, I wish I would not have taken it down.

- I do not think the April 18, 2020 post is disrespectful. I am expressing my opinion, as other Councillors do. It was in response to Councillor Knack's expression of his opinion. To me, this is just another form of expression about this type of behavior on Council. It was about Councillor Knack because Councillor Knack initiated the situation. In the public square, sitting Councillors retain freedom of expression.

- It strikes me as political bigotry. They don't have to like my opinion. Before [the] complaint came in, [the Complainant and another member of the public] put out a call to action to file a

complaint against me….On the April 18, 2020 post, someone made a comment that shared a link to a cycling special interest group calling for more people to file complaints against me. I deleted my post and I cannot find the cycling group post. Since this complaint has been filed, someone made a parody account of me that is similar to the cartoon I made of Councillor Knack. This account has followers that include the Mayor, sitting Councillors, Council staff, and City staff. Due to the anonymous nature of Twitter, I do not know how many of these followers filed complaints against me. While I do not intend to silence the right to freedom of expression of others, I do find it ironic that they are not only not offended by this, but effectively endorsing it. Their application of offensive standards is inconsistent.

- The issues around bike lanes go back for years. I have always questioned whether this is a wise financial decision. However, they have always been part of larger infrastructure budgets which I have supported. If they were presented as individual items, my support would be based on the merits of the individual project. It is my political opinion that bike lanes are inappropriate, based on the fact that the Downtown Bike Network failed to meet 3 out of 4 of the targets they set for themselves, as shown in a report to Council/Committee. I have always been an advocate of value for taxes, and I do not see an equitable value proposition for bike lanes.

- The cartoon is about spending money wisely. I have many constituents who are vehemently opposed to spending money on bike lanes. And for those who were on the fence before the pandemic, they are definitely against now when we've spent money on bike lanes, but can't cut the lawns.

- The City opened more "emergency bike lanes" recently. I have not seen evidence they are being used as intended, therefore I believe the City is wasting resources. Most of Council has endorsed this project on numerous occasions. The April 18, 2020 post was intended to outline the spending priorities of some of my colleagues on Council.

- If the Complainant says I have accused Councillor Knack of approving bike lanes during a pandemic that is their interpretation. They have to practice their own due diligence, too. There has to be a reasonable limit on what I need to respond. I cannot manage everyone's possible interpretations.

- I deny that the April 17, 2020 [sic April 18, 2020] post contained misinformation about the implementation of bike lanes during a pandemic.

- I'm a politician. Councillor Knack is a politician. I exercised my freedom of expression and opinion. I understand there are limits to freedom of expression. The April 18, 2020 post is not derogatory, hateful or disrespectful. It's not a personal attack, it was a response to a post from Councillor Knack. I challenge other politicians on what they have done. This is just a different way of challenging them.

- The decision to install bike lanes during the pandemic was made by the Covid-19 Task Team who decided to expand the network. It was not the decision of Council. But, at every turn, Councillor Knack has been an advocate of bike lanes through the budget process, including Councillor Knack making the suggestion for this action at the March 26, 2020 Emergency

Advisory Committee. The April 18, 2020 post is my interpretation. It's a metaphor for the spending habits by Council and in particular Councillor Knack. It's not just about pylons. It's a grander theme of what's being spent.

- I consider the April 18, 2020 post to be relatively tame. Complainants get to speak on their agenda. Anyone who speaks against their agenda is accused of unfair comment. It's like they want to shout you down. There is a political bigotry that exists where you cannot seem to have a legitimate discussion or comment without someone being offended. They have the right to be offended, but not the right to censor me.

- The Code of Conduct cannot be used to inhibit my individual freedoms. The cartoon of Councillor Knack was just another form of expression.

- I have never apologized for the April 18, 2020 post and I'm not going to apologize. There is a principle here with what is a fair and open expression of personal opinion. I do not think I have violated the Code of Conduct.

Discussion and Analysis

The Respondent says his April 18 post was in response to prior negative comments by Councillor Knack. However, the Respondent did not provide any evidence of this and did not identify what post he was referring to, despite being told that if he wants me to consider this argument he must provide the information necessary to support the argument. Simply saying the April 18 post was a response to a post by Councillor Knack is not an answer.

The Respondent also refers to other alleged activity on social media involving Mayor Iveson and other Councillors, but provides nothing to support these suggestions. I have not been given anything to conclude that the Respondent's allegations of other Members of Council's conduct should be taken as mitigating factors when determining the outcome of this investigation.

I find the following comments in the April 18 post (which I have underlined) concerning:

> *Right now, every resident in Edmonton is watching their spending carefully.*
>
> *Andrew Knack, why can't you?*
>
> *Every dollar we spend wisely might mean another worker getting their job back at the City of Edmonton very soon. Does that mean anything to you?*
>
> *I get it, you have no idea what to do in this situation so you are reverting to what you know.*
>
> *I'm sure when you suggest more tax increases shortly it will be no big deal…*
>
> *Your most recent flavour of the week is more bike lanes.*
>
> *At some point, we will need every dollar at our disposal to bring this city back to life. To re-hire those people I mentioned above.*
>
> *I hope you haven't forgotten about them already.*

My solution to the current problem is to be very careful with spending right now. We should only spend what we absolutely must.

Somehow this isn't a solution for you. I get it. It's not flashy. It's not exciting.

Well I'm sorry saving money and spending wisely isn't your current priority.

I find the choice of language and manner of communicating in these comments is disrespectful. The comments come across as sometimes demeaning, derisive, and personal. Despite the Respondent saying this is not a personal attack, I find there is no doubt it is a personal attack publicly directed at Councillor Knack. Here, the Respondent says, in part, that he is fulfilling his duty to his constituents when he speaks on issues such as bike lanes. I completely agree that part of his role as Councillor is to raise issues on behalf of his constituents. However, this does not extend to making personal attacks on another Councillor with whom he has a difference of opinion.

The Respondent says that it is a stretch for anyone to say that the comments and image in the April 18 post are suggesting that Councillor Knack approved the construction of bike lanes during a pandemic. He says this post is a metaphor for wasteful spending. In my view, if the Respondent is going to make a metaphor on social media, it ought to be obvious that it is a metaphor. Clearly, it was seen as misleading by the Complainant. It was not clearly about Councillor Knack's decisions regarding spending, but was about the current installation of what the Respondent referred to as Councillor Knack's "most recent flavour of the week more bike lanes".

The issue of bike lanes and the specific temperature of the electorate for spending money during a pandemic makes this all the more of a hot button issue. This therefore requires the Respondent to not be reckless in how he presents the information. In fact, as discussed above, the recent introduction of temporary spaces for physical distancing was for a multiple of purposes (not just cycling) during the COVID-19 pandemic. This was a decision made by the City Administration and not by Council. In the April 18 post the Respondent suggests that Councillor Knack is responsible for this decision which, by the Respondent's own admission, is not true as he reports that Administration made this decision without Council approval.

I agree with the Respondent that he cannot be responsible for every interpretation that might be made by others of his communications. I also fully support and will not interfere with Members of Council expressing their views on matters of public interest and engaging in vigorous political debate. This gives the electorate an opportunity to hear the elected official's views and decide for themselves if they support those views. However, those communications must, objectively, not be misleading. I find, on balance, that the comments and image in the April 18 post are misleading as they leave the impression that Councillor Knack was responsible for approving more bikes lanes during a pandemic, which he was not.

With respect the cartoon image of Councillor Knack in the April 18 post, the Respondent argues that this image is not disrespectful and not offensive. He argues that this is simply another form of expression. However, I see the Councillor's oversized head superimposed on a smaller body, as he broadly smiles while burning (presumably) taxpayers' money as a belittling, personal attack, and not fair comment as between politicians on a political issue.

The cartoon image of the Councillor throwing money for "bike lanes" on a fire was capable of being viewed by many people. It reasonably left the impression that during a time of pandemic, when many were suffering financially, the Councillor was willing to burn money on the construction of bike lanes. The cartoon image does not say temporary bike lanes. I suggest that social media users often engage on social media by scrolling and seeing images without necessarily reading the accompanying commentary. Therefore, the cartoon image was likely to also have been viewed in isolation by some viewers while they scrolled the feed. I find that the cartoon image of the Councillor burning money on "bike lanes" was misleading.

Findings – April 18 Post

On balance, I find that the comments and cartoon image posted by the Respondent in the April 18 post violated the *Code of Conduct* as follows:

(1) The personal attack on Councillor Knack and the manner of communicating was disrespectful, in violation of Part B, section 1 d) of the *Code of Conduct* that says Councillors must ensure that all communications issued by Councillors, including on social media, are respectful.

(2) The personal attack on another Councillor and the manner of communicating lacked decorum, in violation of Part E, section 1 of the *Code of Conduct* that requires Councillors to act with decorum at all times.

(3) Communicating misleading information that left the impression that Councillor Knack approved the installation of bike lanes during a pandemic, when the decision was to temporarily use public space to expand spaces for multimodal use for physical distancing during the COVID-19 pandemic. This was a decision made by City Administration, not by Council. This violates Part B, sections 1 a) and e) of the *Code of Conduct* that say Councillors must ensure that their communications accurately reflect the facts of Council's decisions and do not mislead the public about any matter.

DELETING AND BLOCKING ON SOCIAL MEDIA

The Complainant raises concerns about having comments on the Respondent's social media pages deleted or blocked from commenting (or both). Complainant 2001 produced the commentary that was deleted and then blocked. Complainant 2001 suggested that the Respondent is in the habit of deleting or blocking those who disagree with him.

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. Of the scant information I had, there was no obvious breach of the *Code* based on the analysis that follows.

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.

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. 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.

Discussion and Analysis

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.[10]

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.[11] 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.

Some 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 the Complainant is not an issue that is clearly covered by the *Code*. The Complainant comments in her complaint that it is the Respondent's right to delete comments. 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

[10] 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".

[11] See: National Observer, July 4, 2019, by Emma McIntosh and Fatima Syed.

considered only when justified. Comments, if said respectfully, should not be deleted or blocked even if they express a contrary view. But, this is currently within the Member of Council'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 the Complainant from 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. In the interim, this is left to Members of Council to use their judgment.

FINDINGS

1. The comments and cartoon image posted by the Respondent in the **April 18 post** violated the *Code of Conduct* as follows:

   (a) The personal attack on another Councillor and the manner of communicating was disrespectful, in violation of Part B, section 1 d) of the *Code of Conduct* that says Councillors must ensure that all communications issued by Councillors, including on social media, are respectful.

   (b) The personal attack on another Councillor and the manner of communicating lacked decorum, in violation of Part E, section 1 of the *Code of Conduct* that requires Councillors to act with decorum.

   (c) Communicating misleading information that left the impression that Councillor Knack approved the installation of bike lanes during a pandemic, when the decision was to temporarily use public space to expand spaces for multimodal use for physical distancing during the COVID-19 pandemic and was a decision made by City Administration, not by Council. This violates Part B, sections 1 a) and e) of the *Code of Conduct* that say Councillors must ensure that their communications accurately reflect the facts of Council's decisions and do not mislead the public about any matter.

RECOMMENDATIONS

Section 153 (e.1) of the *Municipal Government Act* requires Councillors to adhere to the *Code of Conduct*. I have found that the Respondent did not adhere to the *Code*.

I recommend that Council:

1. Accept this report.
2. Direct that Mayor Iveson on behalf of Council issue a letter of reprimand addressed to the Respondent with respect to *Code of Conduct* violations found in this report.

APPENDIX A – April 18 Post

Councillor Mike Nickel
19 hrs ·

Right now, every resident in Edmonton is watching their spending carefully.

Andrew Knack, why can't you? 🤦

Every dollar we spend wisely might mean another worker getting their job back at the City of Edmonton very soon. Does that mean anything to you?

I get it, you have no idea what to do in this situation so you are reverting to what you know.

I'm sure when you suggest more tax increases shortly it will be no big deal...

Your most recent flavour of the week is more bike lanes.

At some point, we will need every dollar at our disposal to bring this city back to life. To re-hire those people I mentioned above.

I hope you haven't forgotten about them already.

My solution to the current problem is to be very careful with spending right now. We should only spend what we absolutely must.

Somehow this isn't a solution for you. I get it, it's not flashy. It's not exciting.

Well I'm sorry saving money and spending wisely isn't your current priority.

With the reduced traffic on the roads there is now a great opportunity for cyclists to enjoy the roadways.

I truly mean it. To everyone in this city enjoy the outdoors and get some fresh air.

Edmonton is one of the least dense of all the major cities on the planet. There are so many places to walk and be outside and have a 2 metre buffer.

Spending money frivolously on temporary bike lanes and orange pylons won't cut it.

I'm really sorry, but this is the fundamental difference between us I guess...

C'mon Andrew, now is your time to show some fiscal restraint.

119 55 comments 51 shares

Like Comment Share