

Office of the Integrity Commissioner

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INVESTIGATION REPORT 2008
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 2008

Complainant: Complainant 2008

Date of Complaint: April 20, 2020

Respondent: Councillor Mike Nickel

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COMPLAINT

The Complainant alleges that from April 17 to 20, 2020:

Councillor Nickel is removing respectful but unfavourable comments from his Facebook page, as well as banning those making them, particularly on this post. The post also contains inaccurate information about Council and Administration's current activities.

Nickel's posts suggest that City Administration and Council have no plans and have taken no action - aside from demarcating the temporary activity spaces - with regards to health, safety, and financial security of Edmontonians during this crisis. This is provably false even after a cursory glance over Council meeting minutes over the last two months which include discussions and votes on property tax deferrals, utility bill deferrals, eliminating transit fares, budget amendments, etc. This is on top of other actions that included temporary layoffs and service reductions at the City of Edmonton to curb spending.

Attached as **Appendix A** is the Respondent's April 17 social media post that was provided by the Complainant and is the subject of this Complaint (the "April 17 post").

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 Council 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.

Miriam-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 b), 2 d), Part B 1 a) and 1 e), and Part E section 1].

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 17 post was done as part of the Respondent's role as a City of Edmonton Councillor, or was purely personal. 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 a 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 17 post was clearly posted about Council, decisions by Council and about Mayor Iveson and some of the Councillors. Given the subject matter of the April 7 post, I find that the *Code* applies. I note that the Complainant is not a Member of Council and no Members of Council have complained about the April 17 post. 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 in the April 17 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 17 post violated the *Code*.

The Complainant is also concerned that the Respondent was deleting unfavourable comments and blocking some commentators from his 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, 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 17 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 functions². That they are representatives of the communities that elect them,³ and that

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.

members of the public have the right to address their municipal representatives on issues of concern⁴...

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. Sprovier*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.

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...

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.

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 of 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 says⁸:

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 here in Windsor – might be viewed in California or Calgary or Copenhagen or Cairo.

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]**

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.

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 issues⁹:

- 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;
- 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.

With respect to the April 17 post, the Respondent says:

- I shared on social media the message on April 17, 2020. This post reflects how strongly I feel about the issues. Saying the Mayor and Councillors have checked out on reality is a fair

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.

comment by me and is shared by many members of the public at large. I have not apologized for posting this message and I will not apologize. This is me exercising my freedom of personal expression.

DISCUSSION AND ANALYSIS

The April 17 post appears to contain political statements about Council including these statements:

There is NO leadership on how we rebuild Edmonton after this crisis.

There is NO considering for the tens of thousands of Edmontonians who will slip into poverty.

There is NO approach on how to deal with hundreds of businesses who will be unable to rehire workers or be able to pay their property taxes.

In my view, the very language used, such as: “NO approach’ and “NO leadership”, are statements of opinion and political commentary. It is obvious from reading the April 17 post that the Respondent disagrees with the decisions of Council to the point of saying there is no approach. The question is whether this is fair comment on a political issue or whether the Respondent is misrepresenting the facts and not respecting decisions of Council.

It is doubtful that anyone reading these statements would take them literally, but would see them as statements of opinion. A cursory review will find support for an alternative view. I expect that most people reading this post would not read it literally and would likely be aware of steps taken by Council that support an alternate view than the one expressed by the Respondent. I find that these statements are less about disrespecting decisions of Council and more about challenging Council’s overall approach and strategy.

However, I do find that these statements push the limits on Part A, 1d and Part B 1a of the *Code* that require Members of Council to accurately respect and represent decisions made by Council and ensure their communications accurately reflect the facts of Council’s decisions. While troubled by how the Respondent pushes the limits on the *Code*, I err on the side of freedom of expression with respect to these statements. The comments were made by the Respondent using his political judgement and it is for the electorate, not me, to judge. I find that these comments are protected by the fair comment provisions in the *Code*.

In the April 17 post the Respondent includes a photograph of pilons on the road with the words “Closing down roads. Adding temporary bike & walk lanes. During a pandemic! Have the mayor & some councillors completely checked out on reality?” This is a misleading statement. In fact, the decision was to allow for multimodal use (not just for cycling) to accommodate physical distancing during the COVID-19 pandemic. This was a decision of City Administration, not Council. The Respondent attributes this decision to Council when it was not a Council decision. This comes across as stretching the facts around the issue of bike lanes to suit the Respondent’s political agenda. It is well understood that the installation of bike lanes on Edmonton streets is a matter of public interest and some disagreement.

To rely on the fair comment protection, the Respondent must ensure the truth of his statements before expressing his opinion. Some may say that this post just reflects Mayor Iveson’s and some Councillors’ historical and current support of bike lanes and is not a stretch. But the context matters. These are

decisions made by City Administration (not Council) to temporarily expand spaces for a multitude of outdoor uses to accommodate physical distancing during the pandemic. While I accept that Administration is accountable to Council and some on Council expressed support for the measure to expand space for physical distancing outdoors, this was done by the Administration during a pandemic. The Respondent goes too far in either attributing this to Council and creating the impression that the construction of more bike lanes has been approved by Council. This is not mere hyperbole. It is misleading and does not accurately reflect the decisions of Council.

The choice of language and manner of communicating used in the April 17 post I find to be disrespectful. For instance, when the Respondent says:

“More bike lanes during a pandemic!?! I wish this was a joke but it isn’t...

Our mayor and some on Edmonton city council have completely lost grip on what is important right now...

You think we would be taking things seriously right now and use vital city resources and the power of our office properly...

And over an image of the temporary road expansions:

“have the mayor & some councillors completely checked out on reality?”

I find that this derogatory and derisive manner of communication is disrespectful of Council and lacks decorum. The Respondent is free to express his opinions, but how he does this must be in compliance with the *Code*.

Complainant and is the subject of this Complaint (the “April 17 post”).

FINDINGS – APRIL 17 POST

On balance, I find that while some of the views expressed in the April 17 post are fair comment, the Respondent violated the *Code of Conduct* as follows:

- (a) The manner of communicating was disrespectful of Council in violation of Part B Section 1d);
- (b) The Respondent’s conduct lacked decorum, in violation of Part E Section 1 of the *Code*;
- (c) The Respondent did not accurately reflect the facts of Council’s decisions when he attributed the installation of “bike lanes” or “temporary bike lanes” during a pandemic to Council in violation of Part B, Section 1a) of the *Code*; and
- (d) The Respondent was misleading, when he attributed the installation of “bike lanes” or “temporary bike lanes” during a pandemic to Council in violation of Part B, Section 1 e) of the *Code*.

DELETING AND BLOCKING ON SOCIAL MEDIA

In the April 17 to 20, 2020 period, the Complainant says the Respondent was removing respectful but unfavourable comments from his social media pages and banning those making them, particularly with respect to the April 17 post.

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. [A commentator]...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.

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 commentators on his social media pages 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

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.

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 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 ON 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. In the interim, this is left to Members of Council to use their judgment.

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 17 POST



Mike Nickel

April 17 at 2:58 PM · 🌐

😞 I'm fed up. Enough is enough.

More bike lanes during a pandemic!?! I wish this was a joke but it isn't..

❌ There is NO leadership on how we rebuild Edmonton after this crisis.

❌ There is NO consideration for the tens of thousands of Edmontonians who will slip into poverty.

❌ There is NO approach on how to deal with hundreds of businesses who will be unable to rehire workers or be able to pay their property taxes.

Our mayor and some on Edmonton city council have completely lost grip on what is important right now.

Our neighbours at the City of Vancouver are on the brink of bankruptcy.

People are fighting for their careers, their life's work, and their families.

They are fighting for everything that makes them whole.

Some are even fighting this infection in hospitals. My thoughts are on them as well.

People are relying on us right now to make decisions that will minimize the damage of this virus.

You think we would be taking things seriously right now and use vital city resources and the power of our office properly.

Instead I go to a recent council meeting where we discuss closing down roads and opening up temporary bike lanes and walking lanes on the roads.

With pylons! That will do the trick, right? 👍

I taught my kids their entire life not to walk on the streets.

Right now people are fatigued and stressed. We don't need to be experimenting with our roadways.

Also if there are emergencies, don't we want our roads open for emergency vehicles?

Democracy WILL continue during this pandemic.

Please don't remain silent. Speak up.

