
CITY OF WELLAND INTEGRITY COMMISSIONER, H.G. ELSTON

Citation: Anonymous v. Councillor Speck
Date: November 3, 2020

REPORT ON THE MATTER OF A COMPLAINT AGAINST COUNCILLOR SPECK BY ANONYMOUS

Notice: Municipal Integrity Commissioners conduct inquiries and provide reports on their findings to their respective municipal councils. They may make recommendations for the imposition of a penalty or other remedial action to the municipal council. Reference should be made to the minutes of the municipal council meeting where the Commissioner's report was presented, to obtain information about council's consideration of each report. When possible, a link to the relevant municipal council minutes is provided.

[Link to Council Decision]

INTRODUCTION

1. During the closed session part of Council's General Committee meeting of June 23, 2020, the Committee was presented with the details of a confidential transaction, including the name of a company retained to advise the City. Councillor Graham Speck was curious about that company and googled it. His search yielded a phone number and he left his post in front of his home-office monitor and made a phone call to the company. The call was answered, Councillor Speck identified himself, asked for confirmation of the nature of the business and its retainer with the City and said goodbye.
2. Some three months after the meeting, the person whom Councillor Speck called brought the matter to the attention of his contact at the City, concerned that the call would somehow affect his work on the transaction. I received an anonymous complaint (not from the City's consultant or his contact at the City) about the call on September 28, 2020. The complaint alleges that Councillor Speck breached the rules on releasing confidential information under the City's *Code of Conduct* and its *Procedural By-law*.
3. Part V of the Code establishes the following rules for the management of confidential information.

V. CONFIDENTIAL INFORMATION

Members have access to confidential information by virtue of their position with the City of Welland.

Confidential information includes: information in the possession of, or received in confidence by the City, that the City is prohibited from disclosing, or has decided to refuse to disclose, under the *Municipal Freedom of Information and Protection of Privacy Act*, or other legislation; a matter that has been debated or discussed at a meeting of Council closed to the public, unless the matter is subsequently discussed in Open Council, or it is authorized to be released by Council; reports of consultants, draft documents and internal communications, which, if disclosed may prejudice the reputation of the City, its officers and employees, or its effective operation; and information concerning litigation, negotiation, or personnel matters.

No Member shall disclose or release by any means to any member of the public, any confidential information acquired by virtue of their office, in either oral or written form, except when required by law, or authorized by Council to do so.

No Member shall use confidential information for personal or private gain, or for the gain of relatives or any person or corporation.

No Member shall disclose the content of a matter that has been discussed at or the substance of deliberations of an in-camera meeting, except for content that has been authorized by Council to be released to the public.

The obligation to keep information confidential is a continuing obligation even if the Member ceases to be a Member.

4. Article 11.10 of the City's Procedural By-law states:

All deliberations and information and documentation received or taken while in a Committee-of-the-Whole In-camera meeting shall remain confidential. The final results of deliberations and such information and documentation may only be made public by the Clerk when such disclosure is authorized by Council, or authorized by legislation or legislative authority. All Members shall comply with Section 5 – Confidentiality of Policy HUM-001-0031 being the Code of Conduct for Members of Council.

5. The starting point on an inquiry into an improper release of confidential information is, of course, to ask whether the information was, in fact, confidential?

6. With reference to the Code of Conduct definition of confidential information in Part V, it seems to me that the information Councillor Speck was privy to was the name of a company that was doing business with the City. I have a hard time viewing that information as having been provided in confidence to the City, or that it is something that could be withheld under the *Municipal Freedom of Information and Protection of Privacy Act*. Neither have I any evidence that the name of the company *per se* was the subject of debate or discussion at the meeting, and it was not a report, a draft document or internal communication, which if disclosed could prejudice the reputation of the City, its officers and employees, or its effective operation. Although this company was involved in a negotiation, I do not see how the name of the company was "information concerning negotiation".

7. Accordingly, I find that the name of the company doing business with the City was not confidential information and Councillor Speck has done nothing wrong, at least with respect to the Code's regulation of confidential information. If I am wrong about that and it is confidential information, for the reasons that follow, I find that Councillor Speck did not "disclose or release ... to any member of the public, any confidential information".

8. Councillor Speck called the actual business that is doing the work for the City. He did not release the name of the business to a member of the public and cannot be culpable in the disclosure or release of information into the public domain.

9. Moreover, there being absolutely no evidence to suggest it, I find that Councillor Speck's call was not made for "personal or private gain, or for the gain of relatives or any person or occupation".

10. As I suspect that my findings may come as a surprise to some, I will take the liberty of setting out what I understand to be the basic principles governing confidentiality and closed meetings.

11. Section 239(1) of the *Municipal Act, 2001*, establishes that all meetings are to be open to the public, except for those matters listed as exceptions under section 239(2), which may be closed to the public (*emphasis added*). The City's *Procedural By-law* mimics these provisions.

12. Rather than imposing a "cone of silence" over any and all topics and discussions in closed session, a more reasonable approach has emerged; it is only the disclosure of information that reveals the "substance of the deliberations" that is the harm to be protected against.

13. This principle has been enshrined in the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended ("MFIPPA"), and explored in various Information and Privacy Commissioners' decisions.

14. To wit, section 6. (1) (b) of the MFIPPA permits a head to refuse to disclose a record “that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public”.¹

15. In *White Rock (City)*, Commissioner Loukidelis stated:

*The first question is what is meant by the words "substance" and "deliberations" in s. 12(3)(b). In my view, "substance" is not the same as the subject, or basis, of deliberations. As Black's Law Dictionary, 8th ed., puts it, 'substance' is the essential or material part of something, in this case, of the deliberations themselves.*²

16. In Order F11-04, Commissioner Denham said that the substance of deliberations is what was said at a meeting, not the material that stimulated the discussion.³ In another case, the adjudicator found that the records in dispute did not reveal the substance of deliberations because one cannot reasonably conclude from the material what council members thought, said or decided regarding the material being considered.⁴

17. On the other hand, previous Orders have found that disclosing a specific motion would reveal the substance of deliberations.⁵ Similarly, in Order M-184, the Commissioner found that the confidentiality provisions would apply to records that would permit the drawing of accurate inferences with respect to the substance of *in camera* deliberations.⁶ (Please see my November 3, 2020 report in the case of *Anonymous v. DiMarco*.)

¹ *Municipal Freedom of Information and Privacy Act*, R.S.O. 1990, c. M.56, as amended

² Order F19-18; *White Rock (City) (Re)*, [2019] BCIPCD No 20

³ Order F11-04; *Vancouver School District No 39 (Re)*, [2011] BCIPCD No 4

⁴ Order F12-11; *New Westminster (City) (Re)*, [2012] BCIPCD No 15

⁵ Order M-184, [1993] OIPC No 244

⁶ Order M-481 (Revised), [1995] OIPC No 118

18. Applying the reasoning of these cases, I do not believe that by calling the advisor who was named in a confidential report to the Members, Councillor Speck had revealed the substance of the deliberations.⁷

19. I am also satisfied that, although the prohibition is expressed in a more explicit way in the Procedural By-law - *All deliberations and information and documentation received or taken while in a Committee-of-the-Whole In-camera meeting shall remain confidential* – this difference in form should not be taken to broaden the class of information to remain confidential or to invite a different analysis.

20. Accordingly, I find that Councillor Speck did not breach the confidential information rules in the City’s Code of Conduct or the requirements respecting the confidentiality of information obtained in closed session, under the City’s Procedural By-law.

21. That said, I do not condone Councillor Speck’s actions. Apart from the obvious lapse in his attention to the matter at hand his diversion must have caused, and the concern his call raised with the City’s agent, it is not hard to image the somewhat cavalier nature of his mission leading to any number of unfortunate events. The start of a meeting of council, open or closed, should end any collateral investigations.

All of which is respectfully submitted this 3rd day of November 2020.

A handwritten signature in black ink, appearing to read 'H.G. Elston', followed by a long horizontal line extending to the right.

H.G. Elston
Integrity Commissioner City of Welland

⁷ Order F19-18; White Rock (City) (Re), [2019] BCIPCD No 20