



ADR
CHAMBERS

Integrity Commissioner Office
for the Toronto District School Board

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April 11, 2023

SENT VIA EMAIL TO:

Toronto District School Board
5050 Yonge Street, Fifth Floor
Toronto, ON
M2N 5N8

Re: Toronto District School Board Annual Report (File No. IC-23027-0323) for the Operating Period of February 14, 2022 to February 13, 2023

Thank you for the opportunity to act as the Integrity Commissioner (or “IC”) for the Toronto District School Board over the past year. We are providing our Annual Report for the first operating period of February 14, 2022 to February 13, 2023.

The IC’s role is to help Trustees ensure that they are performing their functions in accordance with the School Board Member (Trustee) Code of Conduct (the “Code”) and the *Municipal Conflict of Interest Act* (“MCIA”). The IC is available to educate and provide advice to Trustees on matters governing their ethical behaviour and compliance with the Code and MCIA, as well as consult with Board staff regarding policies which intersect with the ethical obligations of Trustees. The IC is also responsible for receiving, assessing, and investigating appropriate complaints respecting alleged breaches of the Code by Trustees.

Requests for Advice

Eight Requests for Advice from Trustees were received and responded to in writing during this operating period.

Due to the nature of such requests, the Integrity Commissioner always receives Requests for Advice in writing. In many cases, the IC may also have a telephone or videoconference discussion with the Trustee seeking advice to better understand the nature of the question being asked and to ascertain all relevant facts prior to responding with a letter of advice.

All Requests for Advice are considered confidential, with the Trustee retaining privilege over the matters raised and advice given. Accordingly, a Trustee may share the advice of the Integrity Commissioner, but the IC is bound to maintain confidentiality unless and until some or all of the advice is shared by the Trustee, or with their written consent – at which point the letter of advice is no longer confidential. While there is nothing in the *Education Act, R.A.O. 1990, c.E.2 (the “Education Act”)* or in any Board policies requiring this, it is in keeping with the rules under the *Municipal Act, 2001, S.O. 2001, c.25 (the “Municipal Act”)* concerning Requests for Advice to Integrity Commissioners from municipal council members and is considered by our office to be a best practice. For reference, the relevant portion of the *Municipal Act* states, in part, as follows:

Duty of confidentiality

223.5 (1) The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

Release of advice

(2.1) Advice provided by the Commissioner to a member under paragraph 4, 5 or 6 of subsection 223.3 (1) may be released with the member’s written consent.

Partial release by member

(2.2) If a member releases only part of the advice provided to the member by the Commissioner under paragraph 4, 5 or 6 of subsection 223.3 (1), the Commissioner may release part or all of the advice without obtaining the member’s consent.

Our office appreciates that sometimes Requests for Advice may be related to urgent matters with very little lead time before the advice is required. We do our best to triage such requests. However, we ask and strongly urge all Trustees to read agenda materials early and thoroughly in order to identify potential issues and make their Requests for Advice in a timely manner. This will ensure that we have enough time to gather all relevant facts, conduct any necessary research, and respond with the best, most comprehensive advice possible in advance of any meeting(s) or other circumstances for which the advice may be applicable.

Code of Conduct Complaints

Fourteen formal complaints were received and processed during this operating period pertaining to the Code of Conduct (the “Code”).

Six of these complaints dealt with the same subject matter and they were joined together in a single investigation. These six matters were investigated, and a final report was issued in respect of each one with a finding of a Code contravention. No penalty was recommended for this breach as remedial action, such as an apology, was deemed to be appropriate. The IC recommended the Board pass a resolution supporting this remedial action. One complaint was resolved through mediation.

Six other complaints were investigated with a report to the parties indicating that no contravention of the Code was found.

One complaint was suspended due to the election moratorium. That matter remained open beyond the end of this operation period and will accordingly be accounted for in our next Annual Report.

One informal complaint was received and the complainant identified that they wanted the IC to conduct a mediation between the two parties. The respondent declined to participate in the mediation. The complainant abandoned the complaint and the matter was subsequently closed.

One complaint was received during the election moratorium, but the IC declined to investigate as the IC is not permitted to hear complaints during this period.

We received one complaint that was not properly filed and the complainant abandoned the complaint when asked to follow the Complaint Protocol.

Informal and Formal Complaint Processes

Trustees ought to be aware that the Complaint Protocol provides for two complaint handling processes – an informal procedure and a formal procedure.

Under the Informal Complaint Process, complainants may attempt to address their Code concerns directly with the respondent Trustee. The Integrity Commissioner may be involved in the informal process, on consent of both parties, by acting as an impartial facilitator or mediator. In this instance, the IC (or delegate) will conduct a mediation either in person, or by telephone or videoconference, and assist the parties in an effort to arrive at an early resolution to the issue(s) in question on mutually agreeable terms. The Integrity Commissioner encourages the use of this process as often as possible.

The Formal Complaint Process involves an investigation of the complaint by the IC (or a delegated investigator in our office). A request for a formal inquiry involves specific filing requirements which must be met for the complaint to be processed and accepted for inquiry. A formal inquiry follows the procedural rules set out in the Complaint Protocol which are designed to ensure fairness to both sides. The Integrity Commissioner retains the discretion to vary the procedural rules in order to maintain a fair process – an example of this might be the granting of a reasonable amount of additional time for a party to file submissions or to obtain necessary information.

It is important for Trustees to know that the power to determine a Code breach, as well as any resulting sanction, is one they retain as a self-governing Board. The Integrity Commissioner may present a report outlining his opinion that a Code breach has occurred, but the Board itself will have to consider and decide whether to adopt such findings. The Board also decides on any sanction or remedial action that may be taken in the case of a Code breach. Available sanctions are set out in the s. 218.3 (3) of the *Education Act*, which states:

(3) If the board determines under subsection (2) that the member has breached the board's code of conduct, the board may impose one or more of the following sanctions:

1. Censure of the member.
2. Barring the member from attending all or part of a meeting of the board or a meeting of a committee of the board.
3. Barring the member from sitting on one or more committees of the board, for the period of time specified by the board.

Remedial actions, as already noted above, may include something like an apology or some other restorative act.

Education, Training, and Policy Consultations

The Integrity Commissioner was engaged by the Board for several education sessions, as well as for policy consultation with Board staff. These include:

- Consulting on a draft policy
- Election Readiness Training – April 7 and May 24, 2022
- Attendance at Board Meeting – June 29, 2022
- New Board Education Session – December 6, 2022

The Integrity Commissioner remains available to assist with policy consultations and education sessions for Trustees.

General Inquiries Received

Twenty-five general inquiries were received during this operating period. Five of these inquiries were determined to be outside the scope of the IC's authority as the IC's jurisdiction is limited to Code complaints against Trustees and does not extend to staff or other members of the school administration. The remaining twenty-one inquiries varied in nature, but none resulted in the filing of a formal or informal complaint.

Policy Recommendations

While serving as your Integrity Commissioner over the past year, I have noted a Code of Conduct issue where there is room for significant policy amendment.

(i) Policy Recommendation re: Non-pecuniary Conflicts of Interest

Trustees will know that they are bound by the provisions of the MCIA, which deals with pecuniary (i.e., monetary or economic) conflicts of interest. The MCIA sets out certain requirements for Trustees when they retain a pecuniary interest in a matter under consideration by the Board.

However, I observe that there is no rule established under the Code respecting nonpecuniary (i.e., personal) conflicts of interest. While reference to "avoiding [...] conflicts of interest," can be found in section 6.1 (c) of the Code, this falls under a preamble section which is clearly established to act as an interpretive guide to the various Code rules that follow later in the document. It accordingly does not create a binding and enforceable rule respecting non-pecuniary conflicts of interest.

There is no legislation dealing with non-pecuniary interests / conflicts of interest in respect of school board Trustees (or municipal council members) in Ontario. However, section 6.1 (c) of the TDSB's Code speaks to avoiding conflicts of interest, which appears without specific reference to pecuniary or non-pecuniary interests. This broad statement suggests to me that the intention is for both pecuniary and non-pecuniary conflicts of interest to be covered by this underpinning principle. However, there is no rule within the body of the Code which reflects the apparent intent behind section 6.1 (c).

There is a continually evolving body of case law (as well as other authorities) which deals with the concepts of conflict of interest in the context of municipal councillors – and there is no real distinction between Councillors and Trustees respecting this particular issue. A well-known example was the October 2011 report of Justice Cunningham arising from the Mississauga Judicial Inquiry, titled "Updating the Ethical Infrastructure." On pages 146–147, Justice Cunningham wrote:

[...] [T]he Municipal Conflict of Interest Act (MCIA) does not constitute a complete codification of the law governing conflicts of interest for members of municipal councils. The common law also applies.

[...]

Conflicts of interest at common law are not restricted to the personal interests of members of council, and may even extend beyond to the interests of close family members. Professor Mullan provided the following useful overview of the common law of conflict of interest in his expert report prepared for this Inquiry:

In *Watson, Shaw J.* of the British Columbia Supreme Court had reached back to a 1904 Ontario judgment to support the proposition that, at common law, conflict of interest was not confined to pecuniary interests: *L'Abbe v. Blind River (Village)* (1904) 7 O.L.R. 230 (Div.Ct.) and *St. Bonaface, supra*:

'There may be a direct monetary interest, or an interest capable of being measured pecuniarily, and in such case that a bias exists is presumed. But there may be also substantial interest other than pecuniary, and then the question arises, on all the circumstances, as to whether there is a real likelihood of bias—a reasonable probability that the interested person is likely to be biased with regard to the matter at hand.'

Justice Cunningham also referenced Sopinka, J.'s Supreme Court of Canada decision in *Old St. Bonface Residents' Assn. v. Winnipeg (City)* [1990] 3 SCR 1170:

'It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest they have in common with other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as conflict of interest.'

"Optics are important," Justice Cunningham concluded. "It is essential to consider how a reasonable person would view the actions of the municipal councillor."

Once again, I note that these references are made respecting the role of municipal council members. However, considering the fact that the *MCIA* is equally applicable to both council members and Trustees, and because the Code refers to the avoidance of conflicts of interest in broad, general terms, I interpret the underlying principles concerning non-pecuniary interests to also be equally applicable to Trustees.

Accordingly, because there is an underlying principle without any express rule attached to it, I recommend that the Board consider this matter as part of its Code of Conduct review and determine whether non-pecuniary interests are to be addressed by a clear rule in the Code which takes into account the application of common law principles to non-pecuniary interests. I am happy to assist the Board with drafting any amendment(s) it may wish to undertake.

(ii) Observations re: Databases

In addition to the above amendment, I would also make the following observation about existing policy. I hope this observation will provide guidance at this early stage and help Trustees to avoid significant difficulty later on.

During our election readiness sessions, there were in-depth discussions related to the use of personal databases by Trustees to store data collected through campaigning and through constituency work in your wards.

Section 6.1.1 (k) of PR533 states as follows:

Trustees will not use the Board's email/voice mail system to record, distribute or disseminate election activity messages or correspondence. Trustees will not use any distribution lists or email addresses obtained when carrying out Official Business of the Trustee Office for election activity purposes. [emphasis mine]

It is my understanding that some Trustees may use external, private databases containing voter information for the purposes of election activity. Assuming the data is correctly and securely stored, was collected properly, and is not used for any purposes other than for the reason it was collected, maintaining a database for election purposes is a perfectly normal practice. However, I observe and draw the Trustee's attention to the underlined portion of the above-quoted policy excerpt. My view, based on the plain meaning of this rule, is that data collected as a Trustee (i.e., while fulfilling your role as a member of the Board) must either (i) not be entered into a private database, or (ii) if it is, must be separated from data collected and stored for election purposes.

Trustees are accordingly advised to keep separate data sets and not allow constituent data collected in their role as a Trustee to be mixed in with campaign data.

Billing

A summary of billing for the year is included in this report as Appendix 1.

Final Comments

It has been a pleasure assisting the School Board and its Trustees during this operating period.

We look forward to continuing to provide the services of Integrity Commissioner to the School Board in the forthcoming year.

Yours very truly,

A handwritten signature in black ink, appearing to read "M. L. Maynard". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael L. Maynard
Office of the Integrity Commissioner
ADR Chambers

APPENDIX 1
Summary of Billing

Billing for the year-to-date has totaled **\$57,412.48**, as detailed below.

Invoice Number	Date	Fees	HST	Total
8185	2022-02-10	\$1,000.00	\$130.00	\$1,130.00
8186	2022-03-18	\$1,000.00	\$130.00	\$1,130.00
8211	2022-04-08	\$1,000.00	\$130.00	\$1,130.00
8243	2022-05-09	\$1,000.00	\$130.00	\$1,130.00
8244	2022-05-09	\$1,080.00	140.40	\$1,220.40
8276	2022-06-09	\$6,630.00	\$861.90	\$7,491.90
8269	2022-06-10	\$1,000.00	\$130.00	\$1,130.00
8309	2022-07-07	\$11,997.50	\$1,559.68	\$13,557.18
8300	2022-07-07	\$1,000.00	\$130.00	\$1,130.00
8347	2022-08-08	\$275.00	\$35.75	\$310.75
8346	2022-08-08	\$1,000.00	\$130.00	\$1,130.00
8381	2022-09-09	\$5,145.00	\$668.85	\$5,813.85
8380	2022-09-09	\$1,000.00	\$130.00	\$1,130.00
8408	2022-10-06	\$1,000.00	\$130.00	\$1,130.00
8409	2022-10-06	\$900.00	\$117.00	\$1,017.00
8436	2022-11-08	\$1,000.00	\$130.00	\$1,130.00
8446	2022-12-01	\$1,000.00	\$130.00	\$1,130.00
8463	2022-12-08	\$8,970.00	\$1,166.10	\$10,136.10
8499	2023-01-01	\$1,000.00	\$130.00	\$1,130.00
8500	2023-01-09	\$180.00	23.40	\$203.40
8526	2023-02-08	\$2,630.00	\$341.90	\$2,971.90
8525	2023-02-08	\$1,000.00	\$130.00	\$1,130.00
TOTAL		\$50,807.50	\$6,604.98	\$57,412.48