

This information was released to the public on
April 23, 2024.

CLOSED COUNCIL MEETING
MONDAY, APRIL 22, 2024

Second Opinion of Ethics Commissioner Investigation Report – Complaint Mo323

That Council authorize public disclosure of the second opinion of the Ethics Commissioner Investigation Report for Complaint Mo323 to the Ethics Commissioner and to the public subject to Councillor Stutt's consent of the timing and method of disclosure for each disclosure.

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April 23, 2024.

APPENDIX "I"



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April 16, 2024

File No.: SURR 007

VIA EMAIL: Jennifer.Ficocelli@surrey.ca

City Clerk and Director Legislative Services
City of Surrey
13450 – 104 Avenue
Surrey, B.C. V3T 1V8

Attention: Jennifer Ficocelli

Dear Madame Clerk:

RE: Request for a Conflict Opinion on Councillor Rob Stutt

Further to the direction of Mayor and Council, the City has requested a second opinion on the report of the Ethics Commissioner with respect to his finding that Councillor Stutt was in a conflict of interest. I have reviewed such report and various legal authorities to draw an opinion. This opinion has considered the following documents in coming to a conclusion:

1. Letter re: Request for a Second Opinion – dated March 14, 2024;
2. Report of the City of Surrey Ethics Commissioner – dated June 7, 2023 including excerpts of the position taken by Councillor Stutt's legal counsel (the "**Report**"); and
3. *City of Surrey Council Code of Conduct Bylaw, 2020*, No. 20020 (the "**Bylaw**").

Executive Summary

This opinion agrees with the Report's conclusion that there was no pecuniary interest on Councillor Stutt voting on the motion of November 14th, 2022 determining whether to transition police services from the RCMP to the Surrey Police Service (the "**Motion**"). This opinion further concludes that there was no other personal interest that gave a rise to a conflict of interest. As such, I have concluded that Councillor Stutt was not in a conflict of interest when he voted on the Motion.

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Legal Analysis

Conclusions in Report

I concur with and affirm a number of the Report's conclusions as follows:

1. Councillor Stutt did not have a direct or indirect pecuniary interest;
2. Councillor Stutt did not have a conflict with Family Member #2 being a member of CUPE Local 402; and
3. Councillor Stutt acted in good faith with the intention of fulfilling a promise he made to voters during the election to maintain the services of the RCMP.

The Report recognized the difficulty in arriving at a conclusion that Councillor Stutt was in a conflict of interest. In particular, the Commissioner stated:

“There are relatively few cases in Canada concerning the circumstances in which a non-pecuniary personal interest in a matter will give rise to a conflict of interest...”

And further:

“I must admit that I have struggled with this question and do not come to the following decision easily, particularly given the significance of and controversy surrounding the policing issue in Surrey. Others may well disagree with me...”

Page 13 & 14 of the Report

Background

The Report provides a comprehensive factual background. The source of conflict in the Report relates to Councillor Stutt's Family Member #1 working for the Surrey detachment of the RCMP. The following facts are relevant:

1. Councillor Stutt was elected in 2022 on the Surrey Connect slate with a mandate to stop the transition from the RCMP to the Surrey Police Service (the “SPS”);
2. On November 14, 2022, City Council had an open meeting with options to either maintain the RCMP as the police of jurisdiction or continue the transition to the SPS;
3. Councillor Stutt voted in favour of the Motion to maintain the RCMP which was carried on a 5-4 majority vote of Council;
4. At the time of the November 14, 2022 meeting, Family Member #1 was a member of the Surrey detachment of the RCMP; and
5. Family Member #1 had sought a transfer to another RCMP unit in April 2022 but the Surrey detachment refused to release Family Member #1.

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Issue – Was there another, personal interest giving rise to the conflict of interest?

The above question was highlighted in the Report to determine whether Councillor Stutt was in conflict. I agree with the framing of this question. It should also be noted that the Report made no findings with respect to s. 32 of the Bylaw against Councillor Stutt. As such, the conflict relating to Family Member #1 is the only issue of review in this opinion.

The Report provides a comprehensive review of the case law authority on conflicts. As the Report notes, there is little case law specific to the facts in this case.

In *L'Abbé v. Blind River (Village)* (1904), 7 O.L.R. 230 (Div. Ct.), the common law outlines there may be a “substantial interest” that is not pecuniary where there is a likelihood of bias. Within this context, the Report appears to categorize Family Member #1’s position in the RCMP as a substantial interest for Councillor Stutt.

In *Watson v. Burnaby (City)* 1994 Carswell BC 772 the court outlined that in order to be disqualified from voting due to a conflict, there must be a “substantial interest”. There are a number of areas where the court suggests a “substantial interest”. What is not a substantial interest however are interests which are “remote or of little consequence”. Those interests are not disqualifying.

Both the Report and legal counsel to Councillor Stutt referred to Mr. Justice Rogers’ decision in *Fairbrass v. Hansma* (2009 BCSC 878) where the court held:

“I agree that conflict of interest legislation needs to be interpreted in a way that will give effect to its purpose and intent. That purpose and intent is to preserve the integrity of the political system in this Province, and to ensure that elected officials operate in the public's interest rather than in their own.” [emphasis added]

Given that there are few cases in Canada where a non-pecuniary personal interest will give rise to a conflict of interest, there are some takeaways in applying the facts in these circumstances:

1. If Family Member #1 had been transferred out of the Surrey detachment prior to the Motion, there would be no conflict. While Family Member #1 has since been transferred, the City and Councillor Stutt have been placed in this position due to the transfer delays by the RCMP;
2. There was no benefit accruing to Councillor Stutt or Family Member #1 as a result of Councillor Stutt’s vote on the Motion. Councillor Stutt’s vote had an inconsequential impact to Family Member #1’s employment which was similar to Family Member #2’s employment within the City; and
3. There was no substantial interest that gave rise to a personal interest to warrant a conflict. Rather, interests were “remote or of little consequence” at best.

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Councillor Stutt made a promise to his constituents to stop the transition to SPS. Any interests that may give rise to a potential conflict were not of a substantial interest. This in my view was the intent of the reasoning in *Fairbrass* where elected officials should operate in the “public’s interest rather than in their own.”

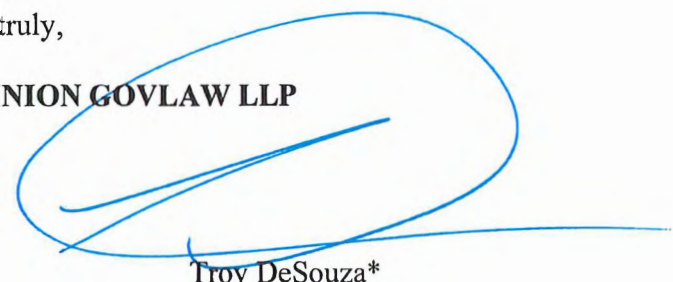
Conclusion

The Report provided considerable space for another conclusion to find that there was no conflict of interest. This opinion supports that other conclusion. As such, there was no conflict and Councillor Stutt acted within his public mandate and duty as an elected official of the City.

Yours truly,

DOMINION GOVLAW LLP

Per:



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TD/pl
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Summary re Surrey Ethics Commissioner Investigation Report – Complaint M0323

On June 7, 2023 the Ethics Commissioner delivered to the City an Investigation Report in accordance with section 73 of the *Council Code of Conduct Bylaw, 2020, No. 20020* (the “Code of Conduct”). This is a summary of the Commissioner’s Report to Mayor and Council.

The Complaint

On February 27, 2023, the Office of the Ethics Commissioner received a complaint that Councillor Rob Stutt had breached the Code of Conduct on November 14, 2022 by attending, participating, and voting at a meeting of Council at which the transition to the Surrey Police Service as the Police of Jurisdiction for the City of Surrey was under consideration. The complaint alleged that Councillor Stutt breached certain sections of the Code of Conduct including section 21 in that he had a pecuniary conflict of interest in relation to the matter under consideration, as well as another interest constituting a conflict of interest, given that one of his children (Family Member #1) was a member of the RCMP Surrey Detachment, and another of his children (Family Member #2) was an employee of the City’s RCMP Support Services (Civilian) Department. The complaint also alleged that by participating and voting at the meeting, Councillor Stutt had attempted to obtain a benefit for a family member from the City, contrary to section 32 of the Code of Conduct.

Findings

The Ethics Commissioner concluded that Councillor Stutt did not have a direct or indirect pecuniary interest in the matter under consideration at the November 14, 2022 Council meeting. In contrast to the legislation in Ontario, in British Columbia the *Community Charter* does not deem the pecuniary interests of a member of a Council member’s immediate family to be also a pecuniary interest of the Council member. In British Columbia, the courts have held that a pecuniary interest in a matter cannot be inferred from the existence of a family relationship alone. There was no indication that Councillor Stutt’s own financial interests were affected by the matter under consideration so as to give rise to a pecuniary conflict of interest. The complainant also referred to a case of the B.C. Court of Appeal which held that a pecuniary interest arises where an elected official is a director of a society that receives a financial benefit from the municipality, based on the existence of a fiduciary duty owed to the society. However, there was no indication that Councillor Stutt owed a fiduciary duty to anyone who might have benefited financially from the police transition.

Other forms of a personal interest in a matter can give rise to a conflict of interest, where a reasonably well-informed person would conclude that the interest might influence the exercise of the Council member’s duties. For that reason, members of Council must not participate in Council decisions that affect the members of their immediate families in ways that go beyond the interests those family members have in common with other members of the community, in circumstances where a reasonably well-informed person would conclude that there is a potential for bias. The Ethics Commissioner went on to consider the particular facts in this case. Well before the November 14, 2022 Council meeting, the transition of City employees to employment with the Surrey Police Board had been addressed in a Letter of Understanding between the City and CUPE Local 402, and in a Successorship Agreement between the Surrey Police Board and CUPE Local 402. Had Council decided to continue with the transition, at some point in the transition Family Member #2 would have been offered an equivalent union position with the Surrey Police Service, on the same terms and conditions as under the person’s employment with the City, including pay,

benefits and seniority. Given those circumstances, the Ethics Commissioner concluded that the matter before Council on November 14, 2022 did not have the potential to affect the employment of Family Member #2 in a substantial enough way that would give rise to a concern about improper influence or bias. However, the Ethics Commissioner found that since Family Member #1 was a serving member of the Surrey RCMP Detachment at the time of the November 14, 2022 meeting, and given the fact that a decision to continue with the police transition would have resulted in the elimination of a substantial number of policing positions within the Surrey RCMP Detachment, there was a personal interest in the matter under consideration that a reasonably well-informed person would have concluded might influence a member of Council in Councillor Stutt's position. While Family Member #1 had been pursuing a transfer from the Surrey Detachment, the Ethics Commissioner concluded that was not sufficient to overcome the perception of a potential for bias, since a transfer had not been approved at the time of the November 14, 2022 meeting. On that basis, the Ethics Commissioner concluded that Councillor Stutt had contravened section 21 of the Code of Conduct by participating in the discussion and voting on the police transition question at the November 14, 2022 Council meeting. While Councillor Stutt had acted in good faith, and had participated in the meeting with the intention of fulfilling a promise he made to voters during the 2022 City Council election, the potential for bias arising from a personal interest in a matter is determined objectively, from the point of view of a reasonably well-informed person.

Given the conclusions concerning the conflict of interest issue, the Ethics Commissioner could not find that Councillor Stutt was attempting to obtain a benefit for Family Member #2. The allegation of a benefit to Family Member #1 was largely subsumed within the complaint of a conflict of interest, and the Ethics Commissioner did not consider it necessary to make any specific findings concerning section 32 of the Code of Conduct in relation to Family Member #1.

Recommendations

The Ethics Commissioner noted in conclusion that whether a conflict of interest arises in any particular case depends on all of the relevant circumstances. Since according to Councillor Stutt Family Member #1 is no longer a member of the Surrey RCMP Detachment, that potential source of a conflict of interest in relation to future decisions of Council concerning the police transition would appear to have been eliminated. The Ethics Commissioner advised that moving forward Councillor Stutt will need to be mindful of the potential for a conflict of interest in respect of Council decisions that could affect the employment of Family Member #2. Given the findings in the report, the Ethics Commissioner made no specific recommendations as to a potential outcome or further measures Council should take in relation to the complaint.