

From: **"Mochrie, Paul"** <Paul.Mochrie@vancouver.ca>

To: **"Direct to Mayor and Council - DL"**

Date: 5/7/2022 8:29:24 PM

Subject: Integrity Commission advice - elections

Attachments: Elections Q&A (Current to May 6, 2022).pdf

Good evening Mayor and Council,

On behalf of the Integrity Commissioner, I am sharing the attached Q&A document which provides the Commissioner's guidance with respect to the 2022 municipal election and the applicable by-laws, policies, legislation, and jurisprudence.

If you have any additional questions regarding this topic, please contact the Commissioner's office directly at Integritycommissioner@vancouver.ca.

Best,
Paul

Paul Mochrie (he/him)
City Manager
City of Vancouver
paul.mochrie@vancouver.ca



The City of Vancouver acknowledges that it is situated on the unceded traditional territories of the xʷməθkʷəy̓əm (Musqueam), Snw̓x̓wú7mesh (Squamish), and səliłwətał (Tsleil-Waututh) Nations.



Elections – Q & A

This Q & A provides guidance with respect to the 2022 City of Vancouver (the “City”) municipal election and the applicable [Code of Conduct](#), City by-laws, policies, legislation, and jurisprudence. In the event of any inconsistency, the requirements in the legislation, City by-laws, policies, and Code of Conduct govern.

Election Cycle Key Dates

Date	Event
January 1 to September 16	Election period
July 18 to September 16	Pre-campaign period
August 30 to September 9	Nomination period
September 9	Declaration of candidates
September 13	End of Challenge period of candidates & endorsements
September 16	Last day to withdraw from the election Deadline for Court to hear nomination challenge or elector endorsements Random Ballot Name Order draw
September 17 to October 15	Campaign period
October 15	General Voting Day
October 19	Official Results declared
November 7	Inauguration of new elected officials
November 18	End of Challenge period for elected candidate or validity of the election
January 13	Campaign financing filling due

Code of Conduct Section 6.11 – “In the period 90 days prior to general voting day, the Integrity Commissioner may suspend any investigation underway until the day after the general voting day.”

This period runs from July 18, 2022 until October 16, 2022.

Code of Conduct Section 6.10 – “The Integrity Commissioner must reject a complaint received regarding a Council member seeking re-election in the period from the last day of the nomination period to the general voting date.”

This period runs from September 9, 2022 until October 15, 2022.

Key Reminders from the Code of Conduct

- Section 4.11 prohibits the use of “City resources” in “Election Activities.” City resources include:
 - City land
 - Facilities
 - Equipment
 - Supplies
 - Services
 - Employees
 - Other resources
- Section 4.12 prohibits the use of “City employees” in “Election Activities.” This includes a prohibition against:
 - Compelling City employees to engage in partisan political activities, or
 - Subjecting City employees to threats or discrimination for refusing to engage in such activities
- In addition to the sections of the Code of Conduct that apply specifically to “Election Activities,” during an election cycle, Council members should:
 - Uphold the standards and values required of their office (Part 2 – Standards and Values)
 - Meet all obligations with respect to communications and confidentiality (Part 3 – Communications and Confidentiality)
 - Avoid engaging in conflicts of interest (Part 4 – Conflicts of Interest)

Questions and Answers

Q1: Are candidates for election able to express an opinion on public hearing items before, or during, the public hearing?

A: There is nothing in the Code of Conduct that expressly prohibits a candidate for election from expressing an opinion on public hearing items, including during the public hearing. However, Section 4.1 of the Code of Conduct requires compliance with the conflict of interest requirements set out in sections 145.2 to 145.911 of the [Vancouver Charter](#).

Section 145.3(2) of the [Vancouver Charter](#) says Council members must not remain at a meeting (or any part of a meeting), participate in the discussion of a matter, vote on a question in respect of a matter, or

attempt, in any way, including before, during, or after a meeting, to influence the voting on a matter, if they have an interest in the matter that constitutes a conflict of interest.

Section 145.2(2) broadly defines a conflict of interest as: (a) a direct or indirect pecuniary interest in a matter; or (b) an interest in the matter that constitutes a conflict of interest.

The decision in *Allan v Froese*, [2021 BCSC 28](#) ("*Froese*") provides useful guidance on this issue. In *Froese*, allegations of a conflict of interest were brought against elected officials in the Township of Langley when they actively participated in matters before Council in which they allegedly had a pecuniary interest. The elected officials had received campaign contributions from individuals connected to development companies while those companies had various projects before Council for consideration and approval. The BC Supreme Court ultimately dismissed the petition in favour of the respondent elected officials because there was insufficient evidence to conclude that the elected officials had a direct or indirect pecuniary interest in the matters in issue, stating that:

[102] I agree with the respondents' submission that elected officials are expected to have opinions about civic priorities and policies and to campaign on those positions. A candidate who receives campaign contributions from supporters of their positions and then carries out their promises when elected does not, without more, breach the conflict of interest provisions of the [Community Charter](#). As the case authorities establish, electors have a democratic right to make campaign contributions to a candidate they believe will support policies or platforms they wish to see enacted or undertaken.

In considering the findings in *Froese*, it is reasonable to assume that the expression of an opinion on a public hearing alone would generally not amount to a conflict of interest, given that "elected officials are expected to have opinions about civic priorities and policies and to campaign on those positions." Of course, Council members should be vigilant in ensuring that opinions expressed on public hearing items do not otherwise amount to a conflict of interest and run afoul of Part 4.1 of the Code of Conduct and sections 145.2 to 145.911 of the *Vancouver Charter*.

Candidates for election speaking on public hearing items should also be mindful of whether expressing their opinion may result in **a reasonable apprehension of bias**. A helpful decision in determining whether the conduct of a Council member may create a reasonable apprehension of bias is the British Columbia Court of Appeal's decision in *Save Richmond Farmland Society v Richmond*, [1989 CanLII 2718 \(BCCA\)](#) ("*Save Richmond*"), which was affirmed by the Supreme Court of Canada in *Save Richmond Farmland Society v Richmond (Township)*, [\[1990\] 3 SCR 1213](#).

In *Save Richmond*, the issue was whether a certain Alderman could properly participate in the process leading to the passage of a by-law if his mind was made up before the decision-making stage of the process was reached. Justice Lambert found that despite the public statements made by the Alderman about "his mind being made up" prior to a vote on the matter, there was enough contextual information to support a factual finding that the Alderman was not totally closed to new information or persuasion. Justice Lambert concluded that since the Alderman "retains the capacity to be influenced by a yet unheard and perhaps unexpected argument," that the Alderman "will not be disqualified from participation in this

particular process of zoning by-law consideration ...” The majority for the Supreme Court of Canada accepted Justice Lambert’s findings and restated the test for bias (as was first determined in *Old St. Boniface Residents Assn. Inc. v Winnipeg (City)*, [\[1990\] 3 SCR 1170](#)), as “a member of a municipal council was not disqualified by reason of bias unless he or she had prejudged the matter to be decided to the extent of being no longer capable of persuasion.”

Save Richmond also made clear that in addition to the requirement to keep an open mind, candidates for election may run into issues arising from a reasonable apprehension of bias, if they act “improperly in the sense of having been procured to vote in a certain way” (*Save Richmond* at paragraph 29).

In summary, candidates for election may express opinions on public hearing items, before or during public hearings. However, in doing so, they should exercise caution and avoid engaging in conduct that amounts to a conflict of interest or that creates a reasonable apprehension of bias.

Q2: Are board members of a political organization allowed to express an opinion on public hearing items before or during a public hearing?

A: Given that board members of a political organization are not elected officials, the Code of Conduct and the *Vancouver Charter* do not apply. We are not aware of a reasonable basis in law that would prevent such board members from speaking before or during a public hearing about developments coming before council.

Statements by a board member of a political organization could be problematic, however, if the statements are such that they create a reasonable apprehension of bias by appearing to tarnish the objectivity of a Council member seeking re-election.

Q3: Can political staff (paid through discretionary funds) help create a monthly newsletter relating to City activities?

A: There is nothing in the Code of Conduct that prohibits political staff paid through discretionary funds from helping to create a monthly newsletter for constituents.

Issues can arise when materials, such as newsletters, created using City resources (e.g. political staff paid through discretionary funds), are used to advance a Council member’s personal interests, including campaign or similarly partisan interests. For example, in *Di Ciano (re)*, [2019 ONMIC 14](#) (“*Di Ciano*”), Councillor Di Ciano was found to have breached the City of Toronto’s (“CoT”) code of conduct provision prohibiting the use of CoT resources for personal reasons when he employed a Mailchimp account (a software system to automate and manage e-mail distribution) normally used to communicate with his constituents, and which was managed and paid for with CoT resources, to send out campaign materials. In reaching her decision, Integrity Commissioner Jepson made clear that “To meet the standards in the Code of Conduct, members of Council must take care to maintain a clear separation between their campaign and City Work.”

What if that newsletter is held by an online account belonging to a political party?

The question of whether the newsletter can be distributed through an automated distribution system, for example Mailchimp, operated by the Council member's political party is more novel. Despite that novelty, the fundamental principles from *Di Ciano* still apply – Council members must take care to maintain a clear separation between their campaign and City work.

For example, if the political party were to use the Mailchimp account to upload the City-owned newsletter distribution list so that they could distribute campaign or other party materials to “fresh” contacts, such an action would be problematic and may result in a determination that the Council member breached their obligations under Part 4 of the Code of Conduct.

However, if the only cross-over between the newsletter and the political party is that the newsletter is housed using a Mailchimp account paid for by the political party, without more, it is unlikely that such a situation would amount to a breach of the Council member's obligations under Part 4 of the Code of Conduct.

Where this matter becomes more complicated is with respect to the Council member's obligations under sections 3.6 and 3.7 of the Code of Conduct. Section 3.6 states that Council members “must access and use city information only in the normal course of their duties” and section 3.7 states that “A member must retain records and other information in accordance with the procedures, standards, and guidelines established by the city, including Records Management By-law No. 9067, as amended, and must assist the city in good faith in responding to all requests for information made pursuant to the *Freedom of Information and Protection of Privacy Act*.” In addition to sections 3.6 and 3.7 of the Code of Conduct, hosting a “City” newsletter on a Mailchimp account operated or paid for by a political party may raise concerns under privacy and other related legislation, for example, the [Freedom of Information and Protection of Privacy Act](#).

There are also important City policies that apply to hosting the newsletter, including the [Privacy Policy: ADMIN-029](#) which, among other things, requires that “all Personal Information in the City's Custody and Control must be stored and accessed within Canada” and the [Technology Acceptable Use Policy: ADMIN-035](#) which, among other things, requires the use of “City approved technology assets” when collecting, storing, and sharing City information.

Given the applicable City policies, and the requirements referenced in section 3.7, we encourage Council members to seek fact-specific advice if they are storing information or data obtained, or created, through the use of City resources in a location accessible by third parties, such as their political party.

Q4: What happens if a member of the public calls my City office to ask about my campaign?

A: A simple administrative action is unlikely to amount to a breach of the Code of Conduct. An elected official cannot control the requests made by members of the public, so it is a reasonable use of City resources to redirect occasional public inquiries pertaining to a Council member's personal interests, such as campaign interests, to the appropriate forums. If, however, a candidate for election purposefully

directs inquiries about their campaign to their City office with the expectation that City personnel or other resources would be used to address those inquiries, such an action would likely be an inappropriate use of City resources and may breach section 4.11 of the Code of Conduct.

The same principle applies when it comes to the use of City resources like laptops, email accounts, or even physical office space. If such resources are used for the purposes of redirecting the occasional and unsolicited inquiry relating to personal matters of a Council member, it is unlikely such incidental use of City resources would amount to a breach of the Code of Conduct. If, however, a Council member fails to clearly separate their work as a Council member with their campaign interests and entwines City resources with campaign interests, that Council member is at a high risk of breaching the Code of Conduct.

Q5: Can City staff volunteer, or work, for my campaign on their own time?

A: While the Code of Conduct clearly prohibits Council members from using City staff for campaign purposes while City staff are at work, there is nothing in the Code of Conduct that could be interpreted as preventing City staff from assisting with campaign activities on their own time, bearing in mind the restrictions in Section 4.12 of the Code of Conduct. Section 4.12 prohibits a Council member from compelling City employees to engage in partisan political activities. In other words, so long as a Council member does not “compel” City staff to assist with their campaign for election, and as long as the staff member does not perform tasks relating to the campaign while they are at work for the City, it is unlikely their involvement in a candidate for election’s campaign will run afoul of the Code of Conduct.

It bears mentioning that the Code of Conduct does not apply to City staff. Instead, City staff conduct is under the purview of the City and is regulated by [Code of Conduct Policy Number: AE-028-01](#), the Code of Conduct for City staff. Section 5 of the Code of Conduct for City staff provides guidance with respect to participation in “Political Activity” and, excepting Section 5.8 which prohibits the “City Manager, General Managers and their equivalents” from engaging in “any public Political Activity other than voting in an election”, the Code of Conduct for City staff is aligned with the following City intranet statement with respect to City staff engaging in “Political Activity”:

As an employee of the City of Vancouver, you are allowed to engage in political activity during your personal time, but you cannot engage in political activities during work hours. Your involvement should not impair or perceive to impair your ability to perform your duties in a politically-impartial manner. Examples of political activity include:

- *Carrying on any activity in support of, within, or in opposition to a political party*
- *Carrying on any activity in support of or in opposition to a candidate before or during an election period*
- *Seeking nomination as or being a candidate in an election before or during the election period*

Considering the above, having City staff (excepting the City Manager, General Managers and their equivalents) assist with a candidate for election’s campaign is unlikely to run afoul of the Code of Conduct, so long as their assistance is on their own time and does not involve the use of City resources.

Helpful links

[Code of Conduct](#)

[Vancouver Charter](#)

[Local Government Act](#)

[Code of Conduct Policy Number: AE-028-01 \(Code of Conduct for City staff\)](#)

Interpretation

This document is a “living” document and will be updated from time to time to reflect new questions brought forward by Council.

It is intended to be a high-level document to assist in ensuring consistency in conduct and expectations among Council members prior to the October 2022 Election.

This document is not intended to supplant fact-specific advice from Rosemary Hagiwara, Chief Election Office (Rosemary.Hagiwara@Vancouver.ca), City of Vancouver legal counsel, independent legal counsel, or the Office of the Integrity Commissioner.

You are encouraged to send further inquiries relating to the election to our office at IntegrityCommissioner@Vancouver.ca.