



OFFICE OF THE
INTEGRITY COMMISSIONER
FOR THE VANCOUVER PARK BOARD

REPORT TO
VANCOUVER PARK BOARD, COMPLAINANTS AND RESPONDENTS

In this matter of

AN INTEGRITY COMMISSIONER INVESTIGATION
ALLEGATIONS, FINDINGS & DECISIONS

Submitted by Lisa Southern
Integrity Commissioner
Vancouver Park Board

August 2, 2024

Background

On March 27, 2024, Trevor Ford, Chief of Staff, Office of the Mayor, and David Grewal, Senior Advisor, Office of the Mayor (the “Complainants”), submitted a complaint (the “Complaint”) against Vancouver Park Board Commissioners Brennan Bastyovanszky and Scott Jensen (the “Respondents”) to the Integrity Commissioner under sections 1.1e), f), and g) of the *Park Board Code of Conduct Policy* (July 18, 2022) (the “Code of Conduct Policy”).

The Complainants alleged the Respondents breached the Code of Conduct Policy when they arranged for Commissioner Bastyovanszky to listen to two telephone conversations between Commissioner Jensen and the Complainants without the Complainants’ knowledge and recorded those conversations without the Complainants’ knowledge or consent.

I examined the Complaint in the context of the Code of Conduct Policy and the law. This report is issued in accordance with section 5.31 of the Code of Conduct Policy. In this report, I summarize my process and the evidence, make findings of fact with respect to the allegations set out in the Complaint, and conclude there was no breach of the Code of Conduct Policy.

Process

On March 27, 2024, I received the Complaint. I conducted a preliminary assessment of the Complaint and determined the allegations set out in it, if true, may constitute a violation of the Code of Conduct Policy. Accordingly, on April 2, 2024, the Respondents were given notice of the Complaint.

After informal discussions, I determined informal resolution was not possible and the matter should proceed to a formal resolution process (i.e., an investigation; see sections 5.24 to 5.28 of the Code of Conduct Policy).

On April 30, 2024, the Respondents provided a written response to the Complaint through their legal counsel. The Complainants were given an opportunity to respond to those submissions, which they did on June 18, 2024.

I have considered all of the submissions and evidence provided.

Summary of Complaint

The Complaint alleged the Respondents breached sections 1.1e) respect, f) responsibility, and g) transparency of the Code of Conduct Policy, because:

- The Respondents, or one of them, recorded a telephone call between Mr. Ford and Commissioner Jensen on September 20, 2023, without Mr. Ford’s knowledge or consent. Mr. Ford believed he was speaking with Commissioner Jensen in confidence, and, instead, Commissioner Bastyovanszky was present for the call; and
- The Respondents, or one of them, recorded a telephone call between the Complainants and Commissioner Jensen on November 24, 2023, without the Complainants’ knowledge or consent. The Complainants believed they were speaking with Commissioner Jensen in confidence, and, instead, Commissioner Bastyovanszky was present for the call.

Issue

The issues I must decide are:

1. Whether the phone calls were recorded and, if so, the circumstances in which this occurred; and
2. Whether either or both of the Respondents contravened sections 1.1e), f), and/or g) of the Code of Conduct Policy in relation to the phone calls.

Summary of Complainants’ Submissions

The Complainants submitted that:

- On September 20, 2023, the Respondents, or one of them, recorded a telephone call (the “September Call”) between Mr. Ford and Commissioner Jensen without Mr. Ford’s knowledge or consent and Commissioner Bastyovanszky listened in on the call; and
- On November 24, 2023, the Respondents, or one of them, recorded a telephone call between the Complainants and Commissioner Jensen (the “November Call”) without the Complainants’ knowledge or consent and Commissioner Bastyovanszky listened in on the call.

The Complainants’ submissions did not distinguish between the act of recording or listening in, and I have referred to both of these acts as “Recordings” for ease of reference. The Complainants alleged the Respondents acted in bad faith and for political purposes.

According to the Complainants, they believed they were speaking with Commissioner Jensen in confidence and the Recordings constituted a gross breach of trust and violation of privacy, which is a tort under section 1 of the *Privacy Act*, RSBC 1996, c 373. The Complainants relied on *Shalagin v Mercer Celgar Limited Partnership*, 2023 BCCA 373, para 42 for the proposition that surreptitious recordings in the employment context are a gross breach of trust and a violation of privacy. The Complainants alleged that

this breach of trust and violation of privacy also breached sections 1.1e), f), and g) of the Code of Conduct Policy.

Further, as both of the Complainants at the relevant time were (and remain) employees of the City of Vancouver (“City”), they submitted that the Respondents breached section 1.1f) because they intentionally tried to deceive City employees, which significantly undermined public confidence in Park Board governance.

Also, according to the Complainants, the Respondents breached section 1.1g) because underhanded and deceitful conduct meant the Respondents did not conduct their duties in an open and transparent manner.

Finally, the Complainants submitted that the Recordings violated section 1.1e) because the Respondents used the Recordings to initiate a complaint against the Complainants with the City in relation to a political dispute with the Mayor regarding the future of the Park Board, and by doing so they did not treat employees with respect or without abuse, bullying, or intimidation.

The Complainants submitted that the breaches were serious and should be sanctioned accordingly, including as set out in sections 5.37e) to h) of the Code of Conduct Policy.

Summary of Respondents’ Submissions

The Respondents submitted that the Complaint was retaliation by the Complainants in response to a complaint made under the City’s *Code of Conduct By-law No. 12886* against Mayor Ken Sim by Commissioner Bastyvovszky (the “Complaint Against the Mayor”).

The Respondents submitted that the Recordings were made as part of Commissioner Jensen’s ordinary administrative practices, and did not disclose any improper political purpose. Further, they submitted that Commissioner Bastyvovszky was not present for the September Call and was not responsible for the November Call’s recording.

The Respondents also submitted that:

- The Complainants asserted bad faith or political purposes without evidence and contrary to the transcripts of the Recordings;
- The Complainants were not Park Board employees or subject to supervision by the Respondents;



- Producing direct evidence of misconduct through proper channels such as my Office did not constitute disrespect, abuse, bullying, or intimidation if that evidence could not seriously be disputed;
- Seeking to hold individuals accountable could not be construed as conduct undermining confidence or transparency; and
- Privacy rights as employees and the *Privacy Act* did not operate to provide individuals accused of wrongdoing with punitive power absent a harm to them that did not result from their own misdeeds. BC Information and Privacy Commissioner Order F24-12 indicates disclosure of public employee conduct is not an unreasonable invasion of third-party privacy.

According to the Respondents, the Complaint assumed two incorrect principles: (1) any recording in an employment context made without the consent of a person was a breach of privacy rights; and (2) a tort for breach of privacy applied in these circumstances.

The Respondents distinguished *Shalagin* because it involved an employee recording people at work indiscriminately, was not concerned with a whistleblower or with circumstances of harassment, and was decided in the employment context (whether the employer had just cause for dismissal). They said if I found Commissioner Jensen was a City employee, then he was a whistleblower and thus the usual duties of loyalty to an employer did not apply.

With respect to the *Privacy Act*, the Respondents said the Complainants offered no analysis to support their allegation of a breach under section 1. They added, in any event, that the qualifications in sections 1(2), 1(3), 2(2) and 2(3)(b) of the *Privacy Act* applied with the result that there was no violation.

Although Section 1(1) says a violation of privacy is actionable, that statement is qualified by sections 1(2) and (3) as follows:

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

Sections 2(2)(a) to (d) list specific circumstances in which there is no violation of privacy under the *Privacy Act*. Section 2(3)(b) says a publication is excepted from the *Privacy Act* if privileged in accordance with the rules of law about defamation.

The Respondents submitted that it was not reasonable in the circumstances to conclude the Complainants were entitled to privacy because:

- The Complainants made no effort to confirm they were speaking in confidence for the September Call or the November Call, Commissioner Jensen had no warning or notice that the discussion would take the direction it did, and he thus did not know he should ensure he was alone;
- The Respondents gave my Office the Recordings as part of my investigation as City Integrity Commissioner and thus the disclosure to me was not wilfully made in circumstances where a violation of privacy was obvious or intended, citing *Duncan v Lessing*, 2018 BCCA 9 at paras 63-64, 86;
- Section 2(2)(a) says an act or conduct consented to by someone entitled to consent is not a privacy violation and Commissioner Jensen consented to Commissioner Bastyovanszky's presence on the November Call;
- Section 2(2)(b) says an act or conduct incidental to the exercise of a lawful right of defence of person or property is not a privacy violation and Commissioner Bastyovanszky's Complaint Against the Mayor, which put the Recordings in issue, was brought in defence of his reputation;
- Section 2(2)(c) says an act or conduct authorized or required under a BC law, by a court, or by any court process is not a privacy violation and my decisions are administrative and under the statutory authority of the *Vancouver Charter*, SBC 1953, c 55;
- Section 2(2)(d)(ii) says an act or conduct of a public officer engaged in an investigation in the course of their duty under a BC law is not a privacy violation and providing the Recordings to me in my investigation falls under this category; and
- If giving the Recordings to me was a publication, then it would fall under section 2(3)(b) because it would be covered by absolute privilege based on the fact it was provided to me for my investigation.

Finally, the Respondents submitted that in the alternative, their conduct was done in good faith and in reliance on the City's *Code of Conduct By-law No. 12886*, and as such, did not warrant sanction.

Summary of Complainants' Reply Submissions

The Complainants took issue with the Respondents' allegation that the Complaint was retaliatory to the Complaint Against the Mayor. They reiterated the Complaint showed the Respondents breached sections 1.1e), f) and g).

The Complainants submitted that the Respondents acted in bad faith because they planned to surreptitiously record the November Call. They said I should reject the Respondents' assertion that they did not plan to eavesdrop or record the November Call between the Complainants and Commissioner Jensen. They said the assertion was unsupportable because on that day, the Complainants had a brief call with Commissioner Jensen who said he would call them back, which he did 35 minutes later, and this was when the recorded discussion took place.

The Complainants also said Commissioner Jensen did not share the Recordings only with me as Integrity Commissioner but also with Commissioner Bastyovanszky.

The Complainants submitted that the Respondents' attempt to normalize regular, non-consensual recording of discussions should be of serious concern to me, and required a finding of misconduct so others did not adopt it. Also, they said the Respondents' status as elected officials did not give them a license to violate others' privacy.

Further, the Complainants submitted that my task was to determine whether the Respondents breached the Code of Conduct Policy and to find a violation, and I did not have to find their actions resulted in the tort of invasion of privacy or were grounds for dismissal.

The Complainants accepted they were not Park Board "staff" as defined in the Code of Conduct Policy but said the Respondents were required to treat members of the public respectfully as well as staff (section 1.1e)) and the fact the Complainants were not staff did not preclude me from relying on the principles in *Shalagin*.

Material Facts

The Respondents provided recordings of what occurred during the September Call and the November Call.

The Respondents acknowledged Commissioner Jensen made the Recordings without the knowledge of (respectively) Mr. Ford or Mr. Ford and Mr. Grewal. They acknowledged Commissioner Bastyovanszky was present for the November Call, but denied he was present for the September Call. The Complainants had no knowledge about whether Commissioner Bastyovanszky listened to the September Call.

I find as follows:

- Commissioner Bastyovanszky filed the Complaint Against the Mayor in relation to alleged political interference with the Park Board;
- Commissioner Bastyovanszky relied on the Recordings in his Complaint Against the Mayor and Commissioner Jensen provided them to me in my investigation of that complaint;

- Commissioner Jensen recorded the September Call with Mr. Ford without Mr. Ford’s knowledge or consent and did not tell Mr. Ford he had a recording of the September Call. Commissioner Bastyovanszky did not listen in to this conversation;
- During the September Call, Mr. Ford referenced an “ethics complaint” against Commissioner Bastyovanszky, stating that a “written complaint” against the Commissioner that “is being referred to Ethics Commissioner... that’s the degree it is at.” Commissioner Jensen had already been made aware by a senior leader at the Pacific National Exhibition (“PNE”) that there was a concern that Commissioner Bastyovanszky had obtained backstage access to an event at the PNE on September 2, 2023 (the “PNE Incident”), and had understood that what was being sought was for him to have a coaching discussion with Commissioner Bastyovanszky, which he had already done;
- On September 26, 2023, the senior leader from the PNE filed a complaint against Commissioner Bastyovanszky with the Integrity Commissioner Office (the “PNE Complaint”);
- No formal investigation was conducted into the PNE Complaint as it was written as hearsay or double hearsay. On September 27, 2023, I advised the Complainant in writing of their options under the Code of Conduct Policy, and advised that in order to conduct our preliminary assessment, and determine if a formal investigation was required, we would need some first-hand information, such as statements or interview notes from the witnesses who were referenced (a security guard, a venue manager, and a Director) and/or their contact information so that we may reach out to them to assess their first-hand accounts of the nature of their interactions and communications with Commissioner Bastyovanszky. We reminded the Complainant of the need for confidentiality. We held a subsequent in-take call with the Complainant to further explain the process. We had no further communication from the Complainant until December 2023, and they eventually elected for the avenue of confidential advice (informal discussion) under section 5.1 of the Code of Conduct Policy.
- Commissioner Jensen, with Commissioner Bastyovanszky present, recorded the November Call without the Complainants’ knowledge or consent. The Complainants did not know Commissioner Bastyovanszky was listening in and the Respondents did not tell the Complainants they had a recording of the November Call.
- During the November Call, the Complainants told Commissioner Jensen he should support the Mayor’s choice for the next Park Board Chair and referred to an “active investigation” by my Office into Commissioner Bastyovanszky, that the investigation would become public, and that the Commissioner’s conduct would “disallow” him from being Chair. As set out, there was no active investigation by my Office.

- Commissioner Jensen provided copies of both Recordings to Commissioner Bastyovanszky.
- The Complainants are City employees and are not in an employment relationship with the Respondents.

Analysis

For the reasons below, I dismiss the Complaint.

Making the Recordings was not illegal. Someone may record a conversation legally so long as at least one party to the conversation knows about the recording (*Criminal Code*, s 184(2)(a); see also *Lam v Chiu*, 2012 BCSC 440 at paras 20, 25). As noted above, Commissioner Jensen was present while the Recordings were being made. Although such a recording may be considered unfair or unethical, it is legal and can be admissible in court or other proceedings such as integrity commissioner investigations (see, for example, *Karygiannis (Re)*, 2021 ONMIC 39; *Dhillon (Re)*, 2020 ONMIC 19; *Li Preti v Angimeri*, 2007 ONMIC 2).

However, the question for me is whether the Respondents breached the Code of Conduct Policy when Commissioner Bastyovanszky listened to the November Call without the Complainants' knowledge or consent and the Respondents made the Recordings without the Complainants' knowledge or consent.

Sections 1.1e), f), and g) say Park Board Commissioners must uphold the standards and values of:

e) respect: a Member must treat members of the public, one another, and Staff respectfully, without abuse, bullying or intimidation and ensure that the work environment is free from discrimination and harassment;

f) responsibility: a Member must respect and comply with the Acts of the Parliament of Canada, the Legislature of British Columbia, including the Vancouver Charter, city by-laws, and applicable city policies, and avoid conduct that, reasonably, undermines, or has the potential to undermine, public confidence in Park Board governance;

g) transparency: a Member must conduct their duties in an open and transparent manner, except where this conflicts with their duties to protect Confidential Information.

Alleged breach of the Code of Conduct Policy because the Recordings were made in bad faith and for political purposes

The Complainants said the Recordings were made in bad faith and for political purposes.

The Complainants did not expand on these allegations. The Complainants were silent about how a political purpose *per se* may be offside the Code of Conduct Policy. I reject the Complainants' unsupported position that if the Recordings were made for any political purpose, they would be contrary to the Code of Conduct

Policy, but I have considered whether the Recordings were made in bad faith or for an unethical, unfair, unreasonable, or improper political purpose.

There is no evidence to support the Complainants' assertion that the Respondents made the Recordings in bad faith or for an unethical, unfair, unreasonable, or improper political purpose.

The only facts the Complainants pointed to in support of their allegation were that the Recordings were made without their knowledge when they thought they were speaking in confidence and were kept secret until the Complaint Against the Mayor. The fact the Recordings were made without the Complainants' knowledge and not disclosed to them until later does not, without more, establish the Complainants' allegation.

The Respondents said Commissioner Jensen made the Recordings because the Respondents were concerned about what they perceived to be ongoing pressure tactics by Mr. Ford around Park Board decision making, and they were concerned about the accuracy of some of the information coming from Mr. Ford in this context.

The Complainants referred to the Respondents and the Mayor being involved in a political dispute about the Park Board, which supported the Respondents' submission about why they made the Recordings. The Respondents' submission was also consistent with the fact that before this Complaint, Commissioner Bastyovanszky filed his Complaint Against the Mayor, which alleged the Mayor, through the Complainants, tried to interfere in Park Board governance.

The Court of Appeal and the trial court in *Shalagin* referred to the recordings in that case as unethical (at paras 11, 34, and 43). I distinguish *Shalagin* on the facts because the unethical finding in that case was based on recordings involving many unknowing coworkers and supervisors in the employment context, over a long period of time, which included confidential human resources information. Further, I am not to assess the conduct from an employment context. Rather, I am to assess the conduct against the terms of the Code of Conduct Policy and the law. The evidence does not establish the Respondents made the Recordings in bad faith or for an unethical, unfair, unreasonable, or improper political purpose.

Alleged breach of the Code of Conduct Policy because the Recordings were a breach of trust and conduct actionable under the *Privacy Act*

Even without bad faith or an unethical, unfair, unreasonable, or improper purpose, did making the Recordings violate the Code of Conduct Policy? The Complainants said it did because the Recordings were a breach of trust and actionable conduct under section 1 of the *Privacy Act*.

Breach of Trust

I find the Recordings were not a breach of trust.

Shalagin does not say a recording like the ones made in this Complaint would be a breach of trust.

In *Shalagin*, an employee routinely recorded his conversations with coworkers and supervisors for almost 10 years and in doing so captured sensitive family details and non-work-related discussions. The Court found the employer had cause (after-acquired) for terminating the employee's employment, because the employee's behaviour was inconsistent with the trust necessary for an employer / employee relationship and such conduct violated the privacy interests of those recorded and discussed (at para 45).

The Court's finding in *Shalagin* about a breach of trust in the employment relationship does not apply here. The Respondents to this Complaint did not make the Recordings in an employment situation. The Complainants were not employees of the Respondents. They were not even employees of the Park Board.

The Privacy Act

While I do not find that any of the exceptions in section 2 of the *Privacy Act* apply, I am not satisfied the information disclosed and the circumstances at hand were such that the Complainants were reasonably entitled to privacy.

Entitlement to privacy is not automatic. Under sections 1(2) and (3) of the *Privacy Act*, entitlement to privacy exists only if a reasonable person would have an expectation of privacy under the circumstances of the case considering the lawful interests of others, and the nature, incidence, and occasion of the act or conduct, including the relationship between the parties (see, for example, *Duncan* at paras 77 to 80).

The Complainants did not have a reasonable expectation of privacy with respect to the September Call and November Call. In the Complaint, the Complainants took the position they called Commissioner Jensen in their capacity as City (but not Park Board) employees. If the Complainants were acting in a public capacity as City employees when making the telephone calls, they had no reasonable expectation of privacy. The telephone calls were not private if they were work related (*Karygiannis (Re)*).

If, conversely, the Complainants made the September Call and November Call outside of their work duties, then there was still no reasonable expectation of privacy. The information they conveyed did not involve anything personal about themselves, although it did contain information about Commissioner Bastovanszky. It also did not involve confidential information about them and the Complainants did not ask Commissioner Jensen to keep the content of the discussions confidential. In fact, during the September Call, Mr. Ford referred to a purported complaint to my Office about Commissioner

Bastyovanszky and told Commissioner Jensen to discuss this with Commissioner Bastovanszky and a City Council member. Thus, based on the circumstances and relationship of the parties, there was no express or implied obligation on Commissioner Jensen to keep what they said to him confidential (see, for example, *No Limits Sportswear Inc. v 0912139 B.C. Ltd.*, 2015 BCSC 1698, para 15).

While it is true the Complainants did not have to establish a breach of trust or a breach of the *Privacy Act*, they grounded their Complaint in these allegations, and I dismiss these aspects of the Complaint.

Below, I review the alleged breaches of the Code of Conduct Policy based on the remaining specific grounds in relation to sections 1.1e), f), and g).

Section 1.1e)

Under section 1.1e) of the Code of Conduct Policy, the Respondents, as Park Board Commissioners, must not disrespect, abuse, bully, or intimidate members of the public, each other, or Park Board staff, and must ensure the work environment is free from discrimination and harassment.

The Complainants acknowledged they were not Park Board staff under the direction of the Respondents. However, section 1.1e) of the Code of Conduct Policy requires Commissioners to treat others with respect and not abuse, bully, intimidate, harass, or discriminate against anyone.

‘Harassment’ is defined in the City’s *Respect in the Workplace Policy ADMIN-050* and includes bullying and intimidation. It is any conduct or comment by a person that the person knew or ought to have known would cause another person to be humiliated or intimidated, and that could have a demonstrative negative impact on the workplace or individual.

The Recordings do not meet this definition. The Complainants did not show, or even explain, how they were humiliated or intimidated by the Respondents making the Recordings and submitting them in the Complaint Against the Mayor. They also did not give any indication about how providing my Office with the Recordings in my investigation had a demonstratively negative impact on them or their workplace.

The City equates harassment with disrespectful conduct (see the City’s *Respect in the Workplace Policy ADMIN-050* and the City’s *Respect in the Workplace* webpage¹). As I find making the Recordings was not harassment, I also find it was not disrespectful conduct.

¹ City of Vancouver, “Respect in the workplace” (last visited 31 July 2024), online: < <https://vancouver.ca/your-government/respect-in-the-workplace>>.



Section 1.1f)

The Complainants said the Respondents breached section 1.1f) because the Respondents intentionally tried to deceive City employees on multiple occasions, which significantly undermined public confidence in Park Board governance.

The Complainants have overstated the situation. They did not ask, nor were they told, that they were speaking in confidence or that this was a private space in which to have a conversation. They made assumptions. Regardless, while I concede that it may be possible in some circumstances for this kind of conduct to reasonably undermine, or have the potential to undermine, public confidence in Park Board governance, I do not find that to be the case on these facts, with these two occasions and in the context in which they occurred. Moreover, as I find the Recordings were not made in bad faith or for an unethical, unfair, unreasonable, or improper political purpose, I find the Respondents' conduct did not breach section 1.1f).

Section 1.1g)

The Complainants said the Respondents breached section 1.1g) because underhanded and deceitful conduct meant they did not conduct their duties in an open and transparent manner.

The requirement for Commissioners to fulfill their duties in an open and transparent manner means they must do their work out in the open so the public can see what they are doing and the decisions they make and can hold the Park Board accountable. This value is incorporated in the *Vancouver Charter* by requiring meetings and decisions be made in public (with some limited exceptions) and prohibiting conflicts of interest.

Section 1.1g) does not apply in the context of the Recordings where the Complainants engaged in political discussions with Commissioner Jensen about what either they or the Mayor (or both) may have wanted Commissioner Jensen to do.

Conclusion

For the above reasons, I dismiss the Complaint.

All of which is respectfully submitted.

Lisa Southern, Barrister & Solicitor*
Integrity Commissioner, Vancouver Park Board

Dated: August 2, 2024

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