



OFFICE OF THE INTEGRITY COMMISSIONER

May 28, 2014

City Council
City of Hamilton

RE: Complaint of Misconduct against Councillor Chad Collins

Complaint

The Complainant has filed a complaint with the Integrity Commissioner against Councillor Chad Collins alleging that during his tenure as the Chair of the Board of Trustees of the Hamilton Waterfront Trust (HWT), Councillor Collins failed in his duty to diligently manage the affairs of the HWT during the fiscal year ending December 31, 2005 and was thereby in contravention of Section 9 of the City of Hamilton Code of Conduct which states that:

Members of Council shall make every effort to participate diligently in the activities of the agencies, boards, and commissions to which they are appointed.

There are two (2) allegations of violations of Section 9.

Allegation #1:

The Complainant had received documentation from an anonymous source. This documentation included a copy of a management letter dated June 5, 2007 from the auditors of the HWT to Councillor Chad Collins in his position as Chair of the Board of Trustees. This letter identified eight (8) serious deficiencies in internal controls which would lead to an adverse opinion of the financial statements of the HWT for the fiscal year ending December 31, 2005.

The list included the following deficiencies:

- 2004 Audit Adjustments;
- Accounting Software;
- Invoicing Procedures;
- Access to the Safe;
- Postings for the Williams Coffee Pub Sales;
- Bank Reconciliations;

Use of Contractors;
Accounts Payable Sub Ledger.

According to the Complainant, Councillor Collins, as Chair of the Board of Trustees, had concealed the contents of this letter from the City of Hamilton and had thereby contravened his duty to the City of Hamilton and to the Hamilton Waterfront Trust as required by Section 9.

Allegation #2:

The HWT, under the Chair of Councillor Collins, had failed to provide the City of Hamilton with Annual Audited Financial Statements for the Years 2002 to 2007, as required by the Deed of Trust and had thereby contravened Section 9.

Investigation

The Complainant was interviewed and copies of all documentation received by the Complainant were obtained. City of Hamilton staff were also interviewed and additional documentation was collected from City staff, including all financial statements of HWT for the fiscal years ending December 31, 2002 -2012 inclusive. HWT Staff were interviewed and other relevant documentation was also obtained from the HWT. In addition to those sources, other sources were interviewed and a variety of documentation was obtained. Of particular importance to this investigation is the Deed of Trust that established the HWT in 2000 and described the duties of the Trustees relative to the operation of the HWT.

Councillor Collins was also interviewed in relation to the allegations.

The HWT was created in 2000 as part of the settlement of litigation between the Hamilton Harbour Commissioners (HHC), now the Port Authority (PA), and the City of Hamilton. A Deed of Trust was entered into which created the Hamilton Waterfront Trust (HWT) to carry out functions specifically related to the West Harbour, the Waterfront Trail and the East End Gateway. The HHC provided an initial contribution of \$6.3 million to be used exclusively for these purposes. The Deed of Trust provided for the appointment of Trustees and required the HWT to deliver an annual report and audited financial statements to both the City of Hamilton and the PA.

The Deed of Trust also authorized the HWT to raise additional money and accept donations of money or property and use these for the purposes of the HWT. The HWT was also permitted to invest its assets and retain the proceeds of these investments. The HWT may also dispose of assets acquired so long as the proceeds of disposition are used for the purposes of the HWT.

The HWT has the power to enter into contracts for goods and services and the purchase/disposition of land and other assets. The only restriction on this power is that no Trustee shall have any direct or indirect conflict of interest in relation to any contract

or investment decision made by the HWT. There is no stated requirement for any public tendering or procurement process for the acquisition of any land, good or service.

The HWT is incorporated under the Ontario Corporations Act as a Not-for-Profit organization and is a registered charity under the Federal Income Tax Act. Notwithstanding that the HWT is required to provide the City of Hamilton and the PA with an annual report and audited financial statements, the HWT is a separate entity independent of the City of Hamilton and the PA in its business operations.

There are five (5) Trustees appointed to the Board. This included two (2) City Councillors, one (1) member of the Port Authority and two (2) private citizens. Councillor Collins was the Chair of the Board of Trustees from its inception until 2010 and was the Chair during the period in which the allegations were made.

In the course of the investigation, I have interviewed City of Hamilton staff, HWT staff, and auditors and reviewed a large volume of documents, including financial statements, minutes of the HWT as well as video streaming of Council Meetings and other committee meetings.

The management letter referred to in Allegation #1 was presented to the Board of Trustees on July 10, 2007 at which time the Executive Director of the HWT was directed by the Board to comply with the audit recommendations and improve the accounting function and internal controls.

The following is a list of the deficiencies contained in the management letter which may result in an adverse opinion of the financial statements for the year ending December 31, 2005.

Deficiency	Description	Recommendation	Response
<p>2004 Audit Adjustments</p>	<p>At the commencement of the audit, it was identified that the complete 2004 audit adjustments had not been posted to the Trust accounting records. As a result, the integrity of the accounting records is questionable from the start of the fiscal year.</p>	<p>At the conclusion of each annual audit, any adjustments must be made to the accounting records.</p>	<p>Agreed and rectified the situation. Before preparation of 2006 financial statements adjusting entries will be posted.</p>

Deficiency	Description	Recommendation	Response
<p>Accounting Software</p>	<p>The trust uses the QuickBooks accounting software. This software is appropriate for an individual who has a thorough knowledge of bookkeeping and accounting. Unfortunately, the software allows backdating of transactions without a sufficient audit trail. As a result there is an unreconciled difference of \$18,885 between the 2004 audited net assets and the 2005 opening net assets as indicated in the Trust's accounting records. This unreconciled difference has been classified with Project materials and labour on financial statements.</p>	<p>The determination of the accounting software to be used should form part of the internal review as indicated previously.</p>	<p>Agreed and comply with the Recommendation. The discrepancy in the net assets has been identified and resolved.</p>

Deficiency	Description	Recommendation	Response
Invoicing	The invoice for project P5-Confederation Park West for work completed in the fall of 2005 was not issued until December 15, 2006 to the Hamilton Conservation Authority in the amount of \$1,134,998 plus GST.	We recommend projects of this magnitude be reviewed on a regular basis such that invoicing may be prepared on a more timely basis.	Agreed and comply with recommendation. With qualification delay due to legal and contractual disagreement with Contractor.
Access to Safe	During our attendance at your offices it appeared that many individuals have access to the office safe and its contents. Although the safe is locked and is opened by keypad entry, the access to its contents by many individuals is an internal control weakness that increases the possibility of misappropriation of assets	We recommend the number of individuals who have access to the safe be reduced and have keypad code changed on a regular basis.	Agreed and comply with recommendation. Clarity: Safe is secured at the manager of H.H.Q., and Hamiltonian's office. Safe in question is a coin inventory for Williams Coffee Pub where employees of W.C.P. require change frequently. However, combination of the safe will be changed and restricts number of persons. Furthermore, safe in question has been relocated directly behind the manageress of W.C.P.

Deficiency	Description	Recommendation	Response
<p>Williams Coffee Pub Sales Postings</p>	<p>During our review we noted that both the PST and GST charged to customers were included in the posting to the coffee pub's sales account. A journal entry was posted in December 2005 to allocate the PST and GST amounts from sales to the respective liability accounts.</p>	<p>We recommend that all sales taxes be posted directly to their respective tax accounts and not to the sales accounts. The PST should also be remitted to the Ministry of Finance on a monthly basis. GST should also be reported with regular filings. This issue has been raised in previous correspondence.</p>	<p>2004 was the first year of Operation on a smaller scale. 2005 started expanding and construction. However, it is a franchise, and Williams dictate the operation. Therefore mid 2006 Williams have implemented their own software called, "Clearview" to keep track of all transactions. Thus, information is posted to QuickBooks from Clearview. Posting PST and GST in question has been rectified.</p>
<p>Bank Reconciliation</p>	<p>During our review it was noted that the bank accounts were not being reconciled on a monthly basis. In fact the year end bank reconciliations were not performed until several months after the yearend.</p>	<p>We recommend that monthly bank reconciliation be performed on a timely basis to ensure that all transactions have been recorded. The investment accounts of the trust should also be reconciled on a monthly basis to ensure accurate records. This is a critical internal control.</p>	<p>Agreed and Comply with Recommendation.</p>

Deficiency	Description	Recommendation	Response
<p>Use of Contractors</p>	<p>During our review we noted that the Trust used a few contractors on a regular basis. These contractors submitted “biweekly” Time Sheets” and had access to Trust credit cards.</p>	<p>We recommend that all contractor relationships be reviewed to see if an employee / employer relationship actually exists. The use of time sheets, corporate credit cards and lack of other sources of income for the contractor would indicate an employee/employer situation may exist and the statutory deductions of CPP and EI would be required. Contractors that have several customers, bill the trust by the job completed for labour and materials provided would support a contractor situation. If a contractor relationship does exist, the Trust should ensure that the contractor has a workers compensation clearance certificate.</p>	<p>Agreed and Comply with Recommendation.</p> <p>Clarity: Two contractors referred to have been covered under W.S.I.B. However, others will be covered and comply with recommendation</p>

Deficiency	Description	Recommendation	Response
<p>Review of Accounts Payable Sub Ledger</p>	<p>There were numerous accounts payable invoices still set up as liability even after they had been paid</p>	<p>To ensure the accuracy of the accounting records and good cash flow, both the accounts receivable sub ledger and the accounts payable sub ledger should be reviewed on a regular basis for any unusual or old entries. These entries should then be investigated and dealt with accordingly.</p>	<p>Agreed and Comply with Recommendation.</p> <p>Clarity: There is a timing difference that will be completed and will be reviewed for unusual entry or entries</p>

These are very serious internal control deficiencies and are a reflection of the accounting skills and financial supervision of the staff at HWT. At the time, the HWT did not have a professional accountant on staff. The office staff at HWT were experienced in accounting and bookkeeping operations however were not accounting professionals with an accounting designation such as a CA, CGA or CMA.

The independent auditors recommended that due to the complexity of its operations, HWT hire a professional accountant with a strong accounting and internal control background to supervise the accounting function. Cost did not permit HWT to hire a full time professional accountant. However, to rectify the situation and to mitigate the risk of future accounting deficiencies, the HWT hired, on a part-time basis, a professional accountant and professor from Mohawk College with strong accounting and internal control skills to review accounting procedures and supervise the accounting function. They also have on staff a full-time bookkeeper, trained in QuickBooks Accounting Software to perform the day-to-day bookkeeping and accounting functions.

The deficiencies noted above were identified by the independent auditor during his audit of the fiscal year ending December 31, 2005. The deficiencies were presented to the Board on July 10, 2007. These are serious deficiencies and as the auditor pointed out, failure to rectify the deficiencies would result in an adverse opinion on the financial statements which would call into question the financial stability of the HWT.

The auditor provided recommendations to rectify the deficiencies and bring the financial operations into a condition whereby the financial statements would present fairly the financial position of the HWT. The Board instructed the Executive Director to implement

the auditor's recommendations. This was completed with the assistance of the auditors. As a result, the financial operations were revised to comply with the recommendations of the auditors and to meet auditing standards.

The financial statements for the fiscal year ending December 31, 2005 were completed and audited by independent auditors in accordance with Generally Accepted Auditing Standards. This audit was completed on June 29, 2008 and presented to the Board of Trustees. This Auditor's Report did not contain an adverse opinion nor were there any deficiencies identified.

There were also no deficiencies noted in the audited financial statements for the fiscal years ending December 31, 2002, December 31, 2003 or December 31, 2004 nor were there any deficiencies noted in the audited financial statements for the fiscal years ending December 31, 2006 through to December 31, 2012 inclusive.

My investigation into the financial statements as well as the noted deficiencies did not uncover evidence of fraud or other malfeasance on the part of HWT staff or the Board.

Section 8(o) of the Deed of Trust states that

At the end of each fiscal year of the Trust the Trustees shall prepare and submit to each of the City and the Commissioners an annual report which shall include audited financial statements and any other statements that the City or the Commissioners may require.

Section 12 of the Deed of Trust states that

The Trustees shall appoint an auditor and shall keep accurate and detailed accounts and records of all receipts, disbursements, investments and transactions relating to the Trust Fund, and shall prepare or cause to be prepared all financial statements required by law to be prepared for the Trust Fund from time to time. Without limiting the generality of the foregoing, the Trustees shall prepare and file with each of the City and the Commissioners an annual financial report accompanied by the auditor's report thereon for the Trust Fund as soon as practicable after the end of the fiscal year of the Trust, and shall also provide to the each of the City and Commissioners such information and material respecting the Trust Fund as either of them may in writing request from time to time.

According to Section 12, the Trustees are required to forward the financial statements to the City as soon as practicable after the end of the fiscal year. However, the Trustees sit on the Board. They do not manage the day to day operation or administrative functions of the HWT. That responsibility is delegated to the Executive Director under Section 5(iv) of the Deed of Trust, which gives the Trustees the power, discretion and authority to appoint:

Professional Assistance

To employ and pay for such professional, expert, specialized or other assistance as the Trustees may consider advisable in the discharge of their duties as Trustees.

The financial statements for the fiscal years ending December 31, 2002 through to December 31, 2007 inclusive were not provided to the City of Hamilton until October 10, 2008 after being requested to do so by the City of Hamilton. See the schedule below.

The Annual Report and audited financial statements for subsequent years have been provided to the City annually in a timely manner. In addition the Executive Director of the HWT appears before Council to present the report and financial statements. These actions are in compliance with the Deed of Trust. See the schedule below.

The following is a schedule of completion of the financial statements for the HWT for the fiscal years noted and the dates in which they were submitted to the City:

<u>Fiscal Year End</u>	<u>Date Completed</u>	<u>Date Submitted</u>
December 31, 2002	May 26, 2003	October 10, 2008
December 31, 2003	July 20, 2004	October 10, 2008
December 31, 2004	September 28, 2005	October 10, 2008
December 31, 2005	June 29, 2008	October 10, 2008
December 31, 2006	March 18, 2008	October 10, 2008
December 31, 2007	July 18, 2008	October 10, 2008
December 31, 2008	May 21, 2009	June 23, 2009
December 31, 2009	April 16, 2010	May 11, 2010
December 31, 2010	July 25, 2011	November 10, 2011
December 31, 2011	June 25, 2012	September 6, 2012
December 31, 2012	May 7, 2013	July 11, 2013

Section 8(o) of the Deed of Trust places on the Trustees the burden of providing financial statements to the City and the Commissioners.

In the normal course of business, forwarding financial statements to the City and the Commissioners is an administrative function. The Trustees do not perform the day to day administrative functions for the HWT. That is delegated to the Executive Director.

Financial statements were not forwarded to the City or the Commissioners for the years ending December 31, 2002 through to December 31, 2007 inclusive. There is no evidence to suggest that this was a deliberate act to mislead the City or the Commissioners but was an administrative oversight by the Executive Director which was also missed by the Trustees, the City and the Commissioners. It was not until September 2008 that the City requested the financial statements, at which time the Executive Director forwarded them to the City for their perusal.

The Deed of Trust refers to the Trustees as having the responsibility to ensure the City and the Commissioners are provided with an annual report and financial statements and does not articulate the duties of the Chair, except to call meetings, distribute the agenda and preside over those meetings.

Councillors are often appointed to Chair a variety of committees and organizations and many are not familiar with the duties and responsibilities required of the Chair of those committees or organizations. If the committees or organizations do not specifically enunciate the duties of the Chair, Councillors then rely on the City of Hamilton's Procedural By-Law for direction in performing their duties. The Procedural By-Law also does not articulate specific duties of the Chair.

Conclusions

Based on the evidence compiled and reviewed and in accordance with the civil standard on the balance of probabilities, it is the Commissioner's conclusions that:

1. For the fiscal year ending December 31, 2005, Councillor Collins and the Trustees recognized the seriousness of the deficiencies identified by the auditor and were diligent in responding to the management letter by ensuring that procedures were amended and that the recommendations of the auditors were implemented.

By responding to the management letter and implementing the recommendations of the auditor, the Trustees and management of the HWT ensured that the Auditor's Report for the fiscal year ending December 31, 2005 met the auditing standards and did not contain an adverse opinion.

Notwithstanding that the HWT is required to provide the City of Hamilton with an Annual Report and audited financial statements, it is an entity, independent of the City of Hamilton in the operation of its business. As Chair of the Board of Trustees, Councillor Collins' duty is to the HWT and has a duty to respond conscientiously to the management letter from the auditors, as do all Trustees.

The Trustees fulfilled their duty to the HWT by ensuring the deficiencies were rectified and the financial statements presented fairly the financial position of the HWT. There is no obligation for the Trustees to provide the City with the list of deficiencies. Thus, the Trustees did not conceal those deficiencies from the City.

2. The City of Hamilton did not receive the financial statements for the fiscal years ending December 31, 2002 – 2007 inclusive until October 10, 2008. These statements were provided after a formal request was made to the HWT to provide the statements in accordance with the Deed of Trust. The Deed of Trust requires that an annual report and audited financial statements be provided to the City of Hamilton.

This is an administrative function that was delegated to the Executive Director and there is no evidence to suggest that the failure to provide the said statements was a deliberate act to conceal the deficiencies but was an administrative oversight by the Trustees and the Executive Director.

Findings

Based on the evidence compiled and reviewed and in accordance with the civil standard on the balance of probabilities, it is the Commissioner's findings that:

1. Councillor Collins, as well as the Trustees, responded to the management letter from the auditors by rectifying the deficiencies to ensure the financial statements met the auditing standards and presented fairly the financial position of the HWT. As an independent entity, the Trustees of the HWT did not have an obligation to inform the City of the deficiencies. The Trustees were conscientious in ensuring the deficiencies were rectified, the recommendations of the auditor were implemented and the financial statements for the year ending December 31, 2005 met the auditing standards. Thus, Councillor Collins did not contravene Section 9 of the Code of Conduct.
2. There was no evidence to suggest that the failure to provide the City and the Commissioners with an annual report and audited financial statements for the fiscal years ending December 31, 2002 – 2007 inclusive was a deliberate act to conceal deficiencies. The administrative function of providing those statements was delegated to the Executive Director and it was an administrative oversight by the Trustees and the Executive Director. Thus, Councillor Collins, as Chair of the Trustees, did not contravene Section 9 of the Code of Conduct.

In my view, this complaint was presented by the Complainant in good faith and was neither vexatious nor frivolous. As a result, the Complainant is to be reimbursed the fee for filing this complaint.

Recommendation:

It is recommended that the City, liaise with the DeGroot School of Business at McMaster University, and develop an in-service training module or course of instruction or manual for Councillors to familiarize them with the duties of the Chair of committees or other organizations.



Earl D. Basse, FCPA, FCMA – Integrity Commissioner

cc: City Clerk
Complainant
Councillor Collins
Members of Council