Memorandum

To:	**Members of Council for the City of Winnipeg**
From:	**Integrity Commissioner**
Date:	**July 14, 2021**
Re:	**Advisory Bulletin Regarding Council Members' Use of Social Media**

At the end of 2019 Council asked me to prepare a report and recommendations regarding the best way to provide Members of Council ("Members") with guidance regarding their use of social media.

Accordingly, I spent time in 2020 researching relevant authorities, consulting with Integrity Commissioners and ethics advisors in other jurisdictions, with the provincial Ombudsman and with lawyers in both Canada and the United States who have dealt with issues relating to elected officials' use of social media.

Most importantly I consulted extensively with the Members of Council both on an individual basis and as a group.

As the Members know from our discussions on this matter, I was originally planning to recommend that Council pass a social media policy which would be attached to and become part of the *Code of Conduct for Members of Council (*"the *Code*"). My reason for that recommendation was because a policy would provide Members with certainty as to how to conduct themselves when using social media and, unlike an Advisory Bulletin which is something the Integrity Commissioner issues at their discretion, the process of passing a policy would require Members to focus on the issues, using much the same process they followed when they drafted the *Code*, in 2017 and 2018.

Over the last 18 months, the work that was done by Members with my office has allowed for meaningful dialogue on the issues relating to Members' use of social media during the performance of their duties of office.

However, in recognition of the fact that the technology of social media is new and evolving as is the landscape regarding social media generally, from a political, legal and social perspective, I decided it would be premature for Council to pass a policy and amend the *Code*, insofar as it relates to their use of social media.

Further, because the rules in the *Code* apply to Members' conduct when they use social media in the same way as they do to their conduct at any other time when they perform their duties of office, I decided it was not necessary to pass a policy.

However, knowing that Members had asked for more guidance in this area, I decided that the most useful thing for me to do at this time would be to publish an Advisory Bulletin as I have done on other topics in the past.

While I do not ordinarily place Advisory Bulletins on the agenda for Council's public meetings, I decided to do so in this case because the Bulletin was prepared in response to Council's specific request for more guidance regarding Members' use of social media and to reflect the significant discussions that the Members have been having with the Integrity Commissioner on an area which is of broad public interest.

The Bulletin will also be posted on the Integrity Commissioner's page on the City of Winnipeg's website, along with the other Advisory Bulletins that have been issued.

In preparing this Bulletin, as I said, I consulted with Integrity Commissioners from other jurisdictions across Canada and reviewed relevant legal and other scholarly authorities. I also communicated with the lawyers who brought legal actions against the Mayor of Ottawa and former President Donald Trump, on behalf of individuals whose communications were blocked by those politicians.

In the course of my research, I noted that in Canada, governments, public policy forums and the courts are all taking a closer look at how activity on social media should be regulated for both users and the platforms themselves. Examples of this include the following:

- the Public Policy Forum recently issued a report entitled: *Canadian Commission on Democratic Expression – Harm Reduction: A Six Step Program to Protect Democratic Expression Online* (January 2021) in which it identified six recommendations in answer to the question: "How to reduce harmful speech on the internet without impairing free speech?"

- the Prime Minister of Canada in his mandate letter to the Minister of Canadian Heritage stated that he expected the Minister will:

  > "Create new regulations for social media platforms, starting with the requirement that all platforms remove illegal content, including hate speech, within 24 hours or face significant penalties. This should include other online harms such as radicalization, incitement to violence, exploitation of children, or creation or distribution of terrorist propaganda."; and

- the Ontario Superior Court recently issued a decision which recognizes a new common law "tort of internet harassment", acknowledging that "it is only the most serious and persistent of harassing conduct that arises to a level where the law should respond to it."[1]

Freedom of Speech

The issue of whether an elected official can block a social media user without violating the user's right to freedom of speech as protected under the *Canadian Charter of Rights and Freedoms*[2] has not yet been decided by a Canadian court. The closest opportunity occurred in 2018, when several individuals sued the Mayor of Ottawa, alleging that he had violated their *Charter* rights by

[1] *Caplan v Atas*, 2021ONSC 670, at para.174
[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(24), section 2

blocking them from his Twitter account, thereby "preventing them from accessing important information, expressing their views on matters of public concern and denying them access to a platform for public debate".[3] The matter was resolved without a court ruling when the Mayor simply agreed to unblock the individuals.

While the idea of social media as a protected space for free expression is a relatively new one in Canada, as it relates to elected officials, the issue has been addressed by the courts in the United States. In one high profile case, former President Donald Trump was found to have violated the First Amendment to the United States Constitution when he blocked individuals from his "personal" twitter account, @realDonaldTrump.[4] The court ruled that based on the way in which the account was being used, it was a "public forum" and it was, therefore, unconstitutional for the President to restrict access to that account simply because people had expressed differing opinions and viewpoints.

During my dialogue with Members of Council, I frequently heard them express concerns about the need to protect the safety and utility of their social media communications. They were concerned, for example, about being subjected to conduct from members of the public that amounted to abuse and harassment or threats to their wellbeing.

I note that in Canada, the rights guaranteed by the *Charter of Rights and Freedoms* are subject to reasonable limits.[5] For example, the laws which criminalize hate propaganda are considered to be a reasonable limit on the right to freedom of expression.[6] That said, the issue of what an elected official can legally do to protect themselves on social media when they are acting in their public capacity, has not been tested in a Canadian court.

As I set out in the Bulletin, when faced with content that is offensive to the Members, for any reason, I encourage them to be as minimally restrictive as possible and to use methods such as "muting" or "hiding content". When Members receive content which amounts to hate speech or discrimination, they are also encouraged to report that speech to the respective social media platform or, where necessary, to the police.

As Integrity Commissioner, the only area over which I have jurisdiction to regulate in the sense of accepting complaints about Members' conduct, is with respect to their compliance with the *Code*.

A Member's decision to restrict a user's access to their social media account or to mute or hide content does not fall within the rules of the *Code* at this time. Therefore, while this Bulletin, in addition to providing guidance on how the *Code* will be applied to a Member's use of social media, provides requested information about steps Members may consider taking to protect themselves and other users from being subjected to hate speech or threatening content, as Integrity Commissioner I will not accept complaints about a Member's decision to, for example, mute or block a user unless their conduct in doing so otherwise engages the *Code*.

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[3] Ontario Superior Court of Justice file no. CV-18-00078124-0000, *Taman et al v Watson*

[4] *Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (Supreme Court)*

[5] *Canadian Charter of Rights and Freedoms, supra,* at section 1

[6] *R. v Keegstra*, [1990] 3 SCR 697 (SCC)

In providing the guidance and information in the attached Bulletin, I also acknowledge that Members' staffing resources are limited and that it may be difficult, therefore, for them to monitor and regulate their social media accounts.

Finally, because the technology of social media is new and evolving and questions about how and whether the *Canadian Charter of Rights and Freedoms* applies to elected officials' use of the technology have not been determined by Canadian courts, I anticipate that the guidance and information I provide on this topic will be amended as the legal, political and social landscapes relating to social media, evolve.