

**CITY OF BIRMINGHAM
BOARD OF ETHICS AGENDA
NOVEMBER 20, 2020
1:00 PM
VIRTUAL MEETING ON ZOOM
MEETING ID: 996 5685 2194**

I. CALL TO ORDER

Chairperson James Robb

II. ROLL CALL

Alexandria Bingham, City Clerk Designee

III. APPROVAL OF MINUTES

A. Approval of minutes of September 11, 2020

IV. UNFINISHED BUSINESS

A. Consideration of the draft opinions for ethics complaint #2020-01

VI. NEW BUSINESS

- A. Selection of new chair
- B. Report on consultation with other cities concerning ethics ordinances

VII. PUBLIC COMMENT

VIII. ADJOURN

NOTICE: Individuals requiring accommodations, such as mobility, visual, hearing, interpreter or other assistance, for effective participation in this meeting should contact the City Clerk's Office at (248) 530-1880 (voice), or (248) 644-5115 (TDD) at least one day in advance to request mobility, visual, hearing or other assistance.

Las personas que requieren alojamiento, tales como servicios de interpretación, la participación efectiva en esta reunión deben ponerse en contacto con la Oficina del Secretario Municipal al (248) 530-1880 por lo menos el día antes de la reunión pública. (Title VI of the Civil Rights Act of 1964).

I, Alexandria Bingham, the duly appointed City Clerk Designee for the City of Birmingham, certify this meeting notice was posted at all four entrances into the Municipal Building, and to www.bhamgov.org on November 17, 2020.

Alexandria Bingham

**CITY OF BIRMINGHAM
BOARD OF ETHICS MINUTES
SEPTEMBER 11, 2020
151 MARTIN, BIRMINGHAM
MEETING ID:**

I. CALL TO ORDER

Chairperson Robb called the meeting to order at 9:30 a.m.

II. ROLL CALL

Present: James Robb, Chairperson
John Schrot, Board Member
Sophie Fierro-Share, Board Member

Absent: None

Also Present: Donna M. Klein, Complainant
City Commissioner Clinton Baller, Respondent
Attorney Matt Erard, Counsel for the Respondent

Administration: City Manager Valentine, City Clerk Designee Bingham, City Attorney Kucharek.

III. APPROVAL OF MINUTES

A. Approval of Board of Ethics meeting minutes of September 1, 2020

The following corrections/amendments were noted:

1. Page 1, Roll Call: Include Sheldon Klein, husband and Counsel for the Complainant, as present.
2. Page 1, Section V, 1st Paragraph: Replace respondents with respondent's.
3. Page 1, Section V, 1st Paragraph: "Evidence in Record" should read "Evidence in the Record".
4. Page 2, replace the word "several" with the word "five". Adding, "he emailed these documents labeled Respondent's Exhibits A-E, respectively to Ms. Bingham who forwarded them to the board and Ms. Klein during the hearing.
5. Page 2, add list of exhibits submitted by Counsel for the Respondent during the call for additional documents at the hearing.
6. Page 2, replace Discussion with respect to Jurisdiction with Consideration of Respondent's Motion for Summary Decision with respect to Jurisdiction.
7. Page 3, second to last sentence, replace the word "relevant" with the word "resolved".
8. Page 3, insert "this matter is subject to this board's jurisdiction".
9. Page 3, replace "Discussion with respect to violation of the Code of Ethics" with "Consideration of respondent's motion for Summary Decision as to whether the complaint sufficiently demonstrates a violation".
10. Page 4, Paragraph 1, item 3, asserted the term "official conduct".
11. Page 4, mid page, replace "to" with "as" in reference to Mr. Erard's Exhibit C
12. Page 4, Paragraph 5, line 4, replace "is" with "are" in reference to specific allegations.
13. Page 4, Last sentence, replace "determines" with "has determined".

14. Page 4, "Consideration of Respondent's Motion for Summary Decision for Lack of a Genuine Issue of Material Fact".
15. Page 5, Mid Page, replace "several" with "posts" add "allegedly" to critical.
16. Page 5, Last Paragraph, remove "What party was in favor?"
17. Page 8, remove the phrase "agent of destruction" from the record.
18. Page 9, Seventh Line, replace "nor were there homonyms" with "there was nothing ad hominem".
19. Page 9, Ninth Line, replace "an elected is never okay" with "elected: Is it okay or not?"
20. Page 9, Last Paragraph, Line 2, replace "my" with "her".
21. Page 10, First Paragraph, replace "at" with "given".
22. Page 10, Last Paragraph, replace "ordinances" with "sections of the ordinance".

MOTION: Motion by Member Fierro-Share, seconded by Member Robb:
To approve the minutes of September 1, 2020 as corrected.

ROLL CALL VOTE:	Ayes,	Member Fierro-Share Member Schrot Chairperson Robb
	Nays,	None

MOTION: Motion by Member Schrot, seconded by Member Fierro-Share:
To allow the participants to comment on the proposed minutes.

ROLL CALL VOTE:	Ayes,	Member Schrot Member Fierro-Share Chairperson Robb
	Nays,	None

Commissioner Baller, respondent and Mr. Erard, counsel for the respondent, objected to statements in the minutes as written.

Ms. Klein, complainant, objected to statements in the minutes as written.

Chairman Robb withdrew the prior motion to adopt the minutes.

MOTION: Motion by Member Fierro-Share, seconded by Member Schrot:
To adopt the minutes of the September 1, 2020 meeting as amended.

ROLL CALL VOTE:	Ayes,	Member Fierro-Share Member Schrot Chairperson Robb
	Nays,	None

IV. UNFINISHED BUSINESS

None.

V. NEW BUSINESS

A. ETHICS COMPLAINT HEARING

1. 2020-01 Complaint: City Commissioner Clinton Baller, submitted by Donna M. Klein

Chairman Robb opened by noting that the record was closed at the end of the parties' summation at the September 1, 2020 meeting.

Correspondence from Mr. Bloom, resident, and Ms. Klein, complainant, sent to the City Clerk after that point were not accepted into the record.

MOTION: Motion by Chairman Robb, seconded by Ms. Fierro-Share:
To reopen the record to receive Ms. Klein's email of September 8, 2020, and Mr. Erard's email describing Mr. Baller's correction to the prior edition of his newsletter, and to receive the Attorney General's opinion cited by Mr. Erard.

Ms. Klein withdrew her correspondence of September 8, 2020 to the City Clerk and objected to reopening the record.

MOTION: Motion by Chairman Robb, seconded by Member Schrot:
To deny reopening the record to provide evidence of Mr. Baller's correction to the prior edition of his newsletter.

ROLL CALL VOTE:	Ayes,	Chairperson Robb Member Schrot Member Fierro-Share
	Nays,	None

MOTION: Motion by Member Schrot, seconded by Ms. Fierro-Share:
To reopen the record for Mr. Erard's offering of the Attorney General Opinion, dated some years ago, to support his case.

Ms. Klein objected to reopening record.

Member Schrot reiterated that there is not additional testimony or argument involved in receiving the Attorney General Opinion into the record.

ROLL CALL VOTE:	Ayes,	Member Schrot Member Fierro-Share Chairperson Robb
	Nays,	None

DELIBERATIONS

Member Fierro-Share expressed her thoughts about the Ethics Ordinance relative to the public and private conduct of public officials with respect to the complaint. Concluding that the complaint is a private dispute between the parties and that there was no violation of the Ethics Ordinance.

Member Schrot shared his observations about the task and authority of the Board of Ethics with respect to public trust and confidants. He concluded that he does not view Commissioner Baller's communications and conduct to undermine public trust, confidence,

or the integrity of City government. He opined that Ms. Klein did not establish the use or appearance of use of public office for private gain or privilege. He cautioned Commissioner Baller to insure that his personal activities do not create a conflict with his public duties; and suggested that the City of Birmingham engage guidelines or policies for appointed and elected officials using social media. Finally, he did not find that there was a violation of the City of Birmingham's Ethics Ordinance.

Chairperson Robb expressed his principal concerns with respect to this complaint:

1. Commissioner Baller's personal newsletter signed with his public title without a disclaimer.
2. Testimony about NextDoor, a private community based social networking platform, and the reposting of confidential posts between the leads of this network. Noting that Commissioner Baller used information that did not belong to him that resulted in the public ridicule of Ms. Klein.
3. Commissioner Baller's refusal to provide the source of the confidential posts, when asked, without valid objection obstructed the work of the Board of Ethics.

Review of the Applicable Sections of the Ethics Ordinance

Section 2-320: Public Policy

Chairperson Robb opined that there is a violation of this section demonstrated by Commissioner Baller's conduct of republishing private information of the votes and comments of the leads as to whether to delete the post and using his public title in private communications. He cited the Wysz decision to support his opinion.

Member Schrot expressed that while he would have liked Commissioner Baller to answer the question regarding the source of the information obtained from NextDoor, there is no evidence that when Commissioner Baller received the information it was still private. With respect to using his title in the signature block, Commissioner Baller is now aware of the confusion that the action caused, should there be such conduct in the future would evidence intent to violate the ordinance. Therefore, Member Schrot does not believe that there was a violation of this section of the ordinance. He went on to recommended that the Ethics Board engage in an ethical training session wherein the board uses the thirty-three prior opinions to annotate acceptable and non-acceptable conduct for newly elected City officials.

Member Fierro-Share agreed that the use of Commissioner Baller's official public title in the signature block without a disclaimer is in violation of the ethics ordinance.

MOTION: Motion by Chairman Robb:

To retain jurisdiction over this matter because Commissioner Baller's failure to answer the questions occurred during the course of the board's consideration of the case and under Rule 319, the board is required to determine whether the respondent's conduct as alleged in the complaint or demonstrated at the hearing is in breach of the Code of Ethics and to reopen the record under Rule 317, which allows for post hearing briefs and would allow any party to submit a brief to the Clerk within 14 days of today limited to the following questions:

1. In refusing to answer the questions put to him at the hearing about whether he received the information depicted on page 2 and 3 of Exhibit A and whether he

solicited or received it unsolicited did he violate any of the following sections of the ordinance:

- a. Sentence 2, of Section 2-320 Earning and Honoring Public Trust by Integrity and Conduct during the hearing.
- b. Paragraph 1, of Section 2-321 Complying with the laws of the Nation, State, and City and observing in Official Acts the highest standard of ethical conduct. Discharging their duties of office faithfully regardless to personal consideration and recognizing that their Official Conduct should be above reproach.
- c. Paragraph 2, of Section 2-231 Safeguarding the public confidence by being honest, fair, and respectful of all persons with whom they have conduct by avoiding official conduct which may tend to undermine respect for City Officials, employees, and the City as an institution.
- d. Part 5, of Section 2-232.3 Adversely affecting the confidence of the public or the integrity of City government.

After the briefing deadline, the board would reconvene to make determinations on whether Commissioner Baller's conduct as alleged in the complaint or demonstrated in the hearing is in breach of the Code of Ethics.

Member Schrot expressed that he does not believe that the public's trust was adversely affected by Commissioner Baller's conduct because there were so few public comments on this matter; and asked how the proposed briefs would add to the proceedings.

Chairperson Robb explained that the motion is with respect to the process of appearing before the Ethics Board.

Member Schrot argued that Rules of Procedure 209 and Rule 212 both state that the parties "may" not "shall". Rule 314 states that the respondent "may" present evidence to support defense and not "shall".

Chairperson Robb pointed out that Commissioner Baller appeared at the hearing and questions were put before him on an Exhibit that he submitted, and his counsel introduced to the board.

Member Fierro-Share recommended that the board resolve the case in front of them and not complicate the proceedings.

Chairperson Robb withdrew the motion.

MOTION: Motion by Chairman Robb:

That Commissioner Baller did violate the Ethics Ordinance by using his official title in the signature block of his personal newsletter, using the Wisz case as a precedent.

Member Schrot expressed that in the context of Ms. Klein's complaint; she did not state any confusion by the signature block or thought that Commissioner Baller was attacking her as an official of the City. In the context of whether it was a misuse of position or a conflict of using official position to secure request or preferential treatment, then it is a legitimate inquiry. He fails to find that there was intent to use his official position to secure special consideration.

Chairperson Robb agreed that there was no evidence of intent to use his official position to secure special consideration; however, he believes that there was a technical violation.

Member Fierro-Share again, agreed that there was a violation of Section 2-324.2 for using his title in the signature block of his personal newsletter without a disclaimer.

Member Robb, expressed that using an official title in personal communications is not a violation of the Ethics Ordinance.

It was determined that there was no violation of Ethics Ordinance, Section 2-320.

Section 2-321, Paragraph 2 – Safeguarding the Public Confidence by being honest, fair, and respectful of all persons and property with whom they have contact.

Member Schrot expressed that the proofs have shown that the conduct of Commissioner Baller has effected the confidence of the City and other individuals but does not believe it has adversely affected public confidence. He offered that Commissioner Baller must recognize that as a City Official he has to be careful in his conduct with others. While there is a better way to handle this situation, his conduct did not rise to the level of being dishonest, unfair, or disrespectful; and thus did not find a violation of the Ethics Ordinance.

Member Fierro-Share concurred with Member Schrot.

Chairperson Robb disagreed with Member Schrot and Member Fierro-Share.

Section 2-323.1 – Commissioner Baller using Official Title on Personal Newsletter

Member Schrot, no violation.

Member Fierro-Share concurred, no violation.

Chairperson Robb agreed, no violation.

Section 2-323.4 – Adversely Affecting the Confidence of the Public or Integrity of the City Government

Member Fierro-Share did not find evidence of Commissioner Baller's private conduct effecting public confidence in this instance. Private disputes does not undermine the City as an Institution or Government.

Chairperson Robb disagrees based on previous commentary.

Section 2-324, A2 – Representing Personal Opinion of that of the City.

Member Fierro-Share expressed that there was a violation because Commissioner Baller did not include a disclaimer in his communications that used his official title.

Member Schrot disagrees that there is a violation because he does not have evidence that he was stating that his opinion was that of the City against Ms. Klein.

Chairperson Robb concurred with Member Schrot, and noted that there could be risks of people interpreting his use of title in his personal opinions as that of the City.

Section 2-324, A8 – Use of Official Position to Secure Special Consideration.

Member Schrot expressed that the reference to him being a City Commissioner was not the essence of the complaint. It was a complaint about Commissioner Baller's conduct in publishing gossip. While not wise to reference his title or position in the communication, it was not intended to gain an advantage.

Member Fierro-Share expressed that it is not a violation.

Chairperson Robb concurred with Member Fierro-Share, but pointed out that because the board does not know from whom Mr. Baller received the screenshots or whether he solicited them because he refused to answer those questions, further leaves the board not knowing if he may have attempted to use his position to secure a privilege.

Member Fierro-Share agreed to write the opinion.

MOTION: Motion by Member Schrot, seconded by Member Fierro-Share:
The board determines on this record that Commissioner Baller has not violated the Ethics Ordinance for the reasons set forth in the various opinions to be written. Ms. Fierro-Share volunteered to write the majority opinion; Mr. Schrot has volunteered to write the opinion with respect to Section 2-234 or any section indicating Mr. Baller using his title in his newsletter, and Chairperson Robb will offer dissent.

Chairman Robb withdrew the motion to restate it, by consensus.

MOTION: Motion by Chairperson Robb, seconded by Member Schrot:
The Board of Ethics determines that Commissioner Baller did not violate the Ethics Ordinance raised and discussed during the case.

MOTION: Motion by Chairperson Robb, seconded by Member Schrot:
To amend the motion by adding by majority vote.

MOTION: Motion by Chairperson Robb, seconded by Member Schrot:
The Board of Ethics by majority vote determines that Commissioner Baller has not violated the Ethics Ordinance.

ROLL CALL VOTE: Ayes, Member Schrot
Member Fierro-Share
Nays, Chairperson Robb

MOTION: Motion by Chairperson Robb, seconded by Member Schrot
The board determines that Ms. Fierro-Share would write the majority opinion on the issues, except with respect to Commissioner Baller's use of his title on his personal newsletter; Mr. Schrot would write the majority opinion on that, and Chairperson Robb will offer a written dissent.

ROLL CALL VOTE: Ayes, Chairman Robb
Member Schrot
Member Fierro-Share
Nays, None

MOTION: Motion by Chairperson Robb,
That the board retain jurisdiction over this matter because Commissioner Baller's failure to answer the questions that occurred during the consideration of the case. Under Rule 319, the board may determine whether the respondent's conduct as alleged in the complaint or demonstrated at the hearing is in breach of the code of ethics. That the board reopen the record under Rule 317, which allows post-hearing briefs and the parties be permitted to submit post-hearing briefs if they wish. Either party would submit the brief to the City Clerk by the close of business on Friday, September 25, 2020, 5:00 p.m. with the brief being limited to the following questions:

1. In refusing to answer the questions put to him about whether he received the information depicted on pages 2 and 3 of respondent's Exhibit A and whether he solicited the information or received it unsolicited, did Commissioner Baller violate any of the following sections of the ordinance:
 - a. Section, 2-320.2 Earning and honoring public trust by integrity and conduct.
 - b. Paragraph 1, Section 2-321 – Complying with the laws of the Nation, State, and the City. Observing in their Official Acts the highest standard of ethical conduct in discharging the duties of their offices faithfully regardless of personal consideration and recognizing that their official conduct should be above reproach.
 - c. Paragraph 2, Section 2-321 – Safeguarding Public Confidence by being honest, fair, and respectful of all persons and property with whom they have contact and by avoiding official conduct which may tend to undermine respect for City Officials, employees, and for the City as an institution.
 - d. Section 2-323.5 – Adversely Affecting the Confidence of the Public or the Integrity of the City Government.

After briefing, if the motion is granted, the board will reconvene to make the determination of whether Commissioner Baller's conduct in refusing to answer those questions is a breach of the code of ethics.

Motion failed for lack of a second to the motion.

VI. PUBLIC COMMENT

- Mr. Erard, counsel for the respondent, commented on the discussion in reference to the Wisz case.
- Christie Barrett, resident, commented on the proceedings and commended Commissioner Baller for his transparent public communications.
- David Bloom, Resident, commented on the prior hearing and based on the recent campaign literature that he received, he does not see how Commissioner Baller putting his title on his newsletter is a violation of anything.
- Ms. Klein expressed that the previous two comments are an example of what Commissioner Baller has unleashed into the community by addressing her in his newsletter. She further noted that now others are calling her a bully and harassing her and she is shocked at the board's decision.

Chairman Robb thanked all of the participants.

VII. ADJOURN

MOTION: Motion by Chairperson Robb, seconded by Mr. Schrot:
To adjourn the meeting.

ROLL CALL VOTE: Ayes, Member Schrot
Chairperson Robb
Member Fierro-Share

Nays, None

The meeting was adjourned at 1:53 p.m.

Alexandria Bingham, City Clerk Designee
/vc

CITY OF BIRMINGHAM
BOARD OF ETHICS
COMPLAINT 2020-01
September __, 2020

I. Introduction

Donna Klein, a resident of Birmingham, filed a Complaint against Clinton Baller a City Commissioner, alleging he violated the Ethics Ordinance.

This Complaint presents difficult and serious issues. Difficult because the Complaint involves social media usage, the particular rules governing one social media site, free expression, the communal desire for good—sometimes called “ethical”—government and the text of the Birmingham Ethics Ordinance. Serious because the incident which forms the basis of the Complaint has inflamed the passions of the parties to this Complaint and caused emotional distress for both and it may not be the last time a City official’s activities on social media cause controversy.

The Board of Ethics held two meetings on this matter, each lasted approximately 4 hours. At the first, we considered several motions of the parties and listened to testimony and argument from the parties. At the second we discussed the testimony and documents and debated how to rule on the Complaint. This matter is unusual both because of the length of time we have devoted to it and because it is the first time we have had three different opinions on whether there has been a violation of the Ethics Ordinance.

II. Statement of Facts

The Complainant is active in the local administration of NextDoor, a social media site. Clinton Baller, a City Commissioner since November 2019, has been active on NextDoor since before his election. Mr. Baller also maintains a Facebook page. Earlier this year a NextDoor user made a commercial post that attracted considerable attention within the NextDoor community, not all of it positive. As a result of negative comments, the poster took his post down. Mr. Baller thought this was unfortunate and said so in a post on NextDoor. This resulted in his permanent removal from NextDoor.

Mr. Baller wanted to explain his sudden absence from a forum he had been active on. He explained his side of the story on his Facebook page and in an email newsletter that he periodically circulates with his views about various items of local and national significance. Both the Facebook page and the newsletter expressed the view that his banishment was unjustified and stated that the Complainant had outsize influence in his banishment, serving as a “lead” with both policing and judging powers. This prompted others to post comments on Mr. Baller’s Facebook page, some extremely uncomplimentary about the Complainant. Mr. Baller’s posts

contained screen shots of a conversation among certain Nextdoor leads that is supposed to be confidential. The testimony does not establish how Mr. Baller obtained the screen shots and whether they were in fact still confidential when he posted them. The Complainant learned of Mr. Baller's references to her and was extremely distressed as she believed Mr. Baller's explanation of her role in his banishment was inaccurate in several important respects, singled her out for public shaming for something she did not do, and the resulting commentary caused her private conduct to become a public issue in a way that was most hurtful. During the hearing, Mr. Baller acknowledged at least one of his statements was untrue, though he believed it to be true at the time he made it. Mr. Baller's communications listed his name and the fact that he is a Birmingham City Commissioner.

Ms. Klein filed this Complaint against Mr. Baller alleging violations of the Birmingham Ethics Ordinance. She believes his conduct was dishonest, disrespectful and has destroyed confidence in the integrity of City officials.

III. Question Presented

Do the social media comments of a City Commissioner about events on a social media site involving himself, but not pertinent to City business, and that (i) contain at least one factual inaccuracy, (ii) name a private citizen and (iii) result in embarrassment to that citizen, violate the Birmingham Ethics Ordinance?

IV. Answer and Analysis

We often confuse ethics and law. When people think about "ethics", they often think of standards of morals or virtue. People understand law to regulate conduct rather than morality. Ethics set out minimum standards for public or professional behavior. Unlike religious systems of belief, ethics for governmental officials don't judge morality. When we call a law an Ethics Ordinance, it can create confusion. Are we regulating specific conduct or morality? This is not the first time a complainant has come to the Ethics Board seeking a judgment that a public official has behaved unfairly, dishonestly or disrespectfully.

Elements of virtue and law are both present in the Ethics Ordinance. This can cause difficulties in applying the Ordinance. We all hope for a virtuous government run by virtuous public officials. I think this is a worthwhile civic statement. But I don't think the Ethics Ordinance was intended to or can effectively regulate whether a public official's conduct is in all respects virtuous. Sections 2-320, 2-321 and 2-323 challenge public officials to behave with fairness, honesty and respect—a sort of shorthand for virtue. But we as a community haven't agreed on what exactly virtue consists of. Our numerous religious traditions and secular

institutions show this, as does the disagreement of the parties in this case. There is no agency that we all would willingly agree to judge whether we are virtuous or not. Certainly, judging virtue is beyond this Board's capability.

The Birmingham Ethics Ordinance in its simplest terms aims to assure the citizens of Birmingham that they can have confidence in their government by prohibiting the use of public office for private gain; requiring public officials to disclose conflicts of interest and avoid taking official action where a conflict of interest exists; making decisions only through official channels; and by not making the public believe their personal opinion is City policy unless the City has formally adopted a policy approving that opinion. The Ethics Ordinance resides within the framework of existing state, local and federal law. It is not an overriding mandate that supersedes all other rights.

Because of these points, I do not believe that, with one exception, the Ethics Ordinance regulates the actions of City officials in purely private disputes. Therefore I don't find it necessary to analyze Mr. Baller's conduct under the broad, aspirational standards of Sections 2-320, 2-321 or 2-323 or to determine what NextDoor's policies are or whether Mr. Baller's statements about his banishment from NextDoor are accurate or inaccurate. Nonetheless, I will examine the particular sections of the Ethics Ordinance that could be triggered by this Complaint.

The Board of Ethics has identified six specific sections of the Ethics Ordinance that might apply to the facts of this Complaint. All or a majority of us have concluded that Mr. Baller's conduct does not violate the Ethics Ordinance, thus the Board's formal judgment is that the Complaint must be dismissed in its entirety, though at least one of us would find a violation of four of the six Ordinance sections. This Opinion sets out the majority opinion, though it also identifies the one instance where I diverge from the majority.

Section 2-320

Section 2-320 is the very first section of the Ethics Ordinance. It announces that public office is a public trust and states that each public official "must earn and honor the public trust by integrity and conduct." It notes that the Ethics Ordinance "proscribes actions incompatible with the public interest...." These are lofty sentiments, not easily translated into neat behavioral categories that everybody would agree on. What exactly is the "public trust"? How do we measure it? What level of agreement within the community establishes whether and when any particular elected official has it or loses it? I believe that Section 2-320 does not reach private conduct like the conduct which is involved in this case. Even if it does, Mr. Baller's communications, whatever I or any Board member think of them, are not so clearly outside the bounds of private behavior as to be clearly incompatible with the public interest.

Notably, Section 2-320 obligates the City to "provide its officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants." No evidence was presented to us that any such guidelines exist or, if they do, that

Mr. Baller violated them. Given the increasing importance of social media, the City Commission may wish to adopt guidelines for public officials' use of social media.

The Board finds that Mr. Baller's conduct does not violate Section 2-320.

Section 2-321

When originally adopted in 2003, Section 2-321, entitled "Responsibilities of Public Office", contained language that the official and private conduct of City officials "should be above reproach." In 2016, on this recommendation of this Board, the City Commission amended Section 2-321 to remove the reference to private conduct. It was our belief that the requirement that private conduct be "above reproach" was too vague to apply and inappropriate for an ordinance regulating official conduct.

The last sentence of Section 2-321 states that "All city officials and employees shall safeguard public confidence by being honest, fair and respectful of all persons and property with whom they have contact, *by maintaining non-partisanship in all official acts, and by avoiding official conduct which may tend to undermine respect for city officials and employees and for the city as an institution.*"

The Complainant says that while some of the Ethics Ordinance's broad language is limited to official action, the quoted language is not and Mr. Baller's statements were neither honest (because some were untrue) or fair (because they misleadingly suggested that it was her fault that Mr. Baller was banished from NextDoor), nor respectful (because he gratuitously named her for the purpose of shaming or bullying her). I cannot agree that this sentence of the Ordinance applies to private conduct for two reasons. The first is that the quoted language is a single sentence that has a primary and a dependent clause. The primary clause taken alone may not be limited to official action, but the dependent clause (italicized to identify it) is strictly limited to official actions. The Ordinance says public officials have to be honest, fair and respectful by maintaining non-partisanship in official acts and by avoiding certain official conduct. The conduct we have heard about is entirely private. The Ethics Ordinance does not seek to regulate city officials in their private dealings. There is wisdom in this. The Ethics Board is ill-equipped to be a forum to settle private disputes by declaring one of the contestants ethical or unethical. Beyond that, even if the words of the primary clause are not limited to official action, the conduct complained of here--which I don't necessarily condone--does not violate that standard. Honesty does not and cannot mean accuracy in all things. By becoming a public official a person does not become subject to being judged unethical if they make a factual mistake. Similarly, respect does not mean that a public official can't disagree with a constituent, even vehemently or that the public official's opinions can't offend. Respect means the public official must listen, endeavor to understand the point of view of the other person and respond. But the official can disagree and should do so if that is their honest belief. Public officials can't treat citizens as if they don't exist or that their views don't matter or ridicule them for personal characteristics unrelated to the substance of the dispute. Some of the

comments by persons other than Mr. Baller, may be disrespectful, but his were not. Unless Mr. Baller arranged for the publication of the offensive commentary, he is not responsible for the speech of others. We have no evidence that he did this.

The Board finds that Mr. Baller's conduct does not violate Section 2-321.

Section 2-323 (1)

Section 2-323 (1) prohibits the use of public office for private gain. "Private gain" means "any interest or any benefit, in any form, received by a city...official." (2-322). Mr. Baller did not use his public office to gain any benefit in this private dispute.. While he listed his City Commissioner title in his communication, that did not gain Mr. Baller any advantage. The evidence before us shows Mr. Baller wanted to justify himself but he used persuasion and his view of the facts, not his office, to try to achieve that goal.

The Board finds, unanimously, that Mr. Baller's conduct does not violate Section 2-323(1)

Section 2-323(5)

Section 2-323(5) states that it is the intention of the Ethics Ordinance that city officials avoid any action, "whether or not specifically prohibited in Section 2-324" which might create the "appearance ofaffecting adversely the confidence of the public or the integrity of city government." For the reasons I have already mentioned, I do not believe the Ethics Ordinance regulates Mr. Baller's communications about purely private matters.

Board member John Schrot agrees that Mr. Baller has not violated Section 2-323(5), but for a different reason. He believes that Mr. Baller's conduct has not, in fact, affected adversely public confidence. Mr. Schrot noted that the evidence showed Mr. Baller's communications may have been exposed to 13,000 Birmingham residents, yet only a very few people commented on Ms. Klein, and not all of those were negative. Mr. Schrot concluded that there was no reason to believe that the confidence of the public at large in the city government was affected in any way by Mr. Baller's conduct. While I do not think it was necessary to engage with this issue, I concur in his opinion. I have no doubt that the Complainant has lost confidence in Mr. Baller and perhaps in the government for failing to curb or punish his conduct. But I see no basis for concluding that Mr. Baller's private conduct in this instance affects public confidence in the city as an institution. Commissioners come and go. Not all citizens agree with every Commissioner in all respects. Private disputes of this nature between individuals—even when one is an elected official-- are not the kind of thing that tends to undermine public confidence in the city as an institution or its government unless there is a separate and distinct violation of Section 2-324 of the Ethics Ordinance.

Mr. Schrot determined that it was also relevant that Mr. Baller did not intend to ridicule the Complainant. I don't think he did, but I also don't think we need to determine at this time if intent is an element of any section of the Ethics Ordinance.

The Board finds that Mr. Baller's conduct does not violate Section 2-323(5)

Section 2-324(a)(8)

Section 2-324(a)(8) prohibits any city official from using his or her official position to obtain or seek to obtain any special consideration, advantage or preferential treatment beyond that which is available to every other citizen. No evidence was presented that Mr. Baller tried to get preferential treatment due to his status as a City official. He acted as did any other citizen in posting on Facebook and sending out a newsletter. Those avenues are available to anybody who chooses to belong to Facebook or has an email account.

The Board finds, unanimously, that Mr. Baller's conduct does not violate Section 2-324(a)(8).

Section 2-324(a)(2)

Section 2-324(a)(2) says that "no official or employee of the city shall represent his or her personal opinion as that of the city." Mr. Baller noted he is a City Commissioner on both the Facebook page and the email newsletter. These were intentional acts. He changed the Facebook page after his election to include this designation and he included it in the newsletter he wrote. That is not a problem. He could have been criticized had he not identified himself as a City Commissioner. The question is whether the designation could create confusion as to whether he represented his personal opinion as that of the city. My two colleagues do not believe Mr. Baller's use of his title in the Facebook page or the newsletter violates Section 2-324 (a)(2). They believe that the communications did not create confusion because they are obviously Mr. Baller's personal thoughts. He nowhere says his views are City policy. Thus, the Board has determined that there is no violation here.

I don't agree. My judgment is that the use of his City title in a private communication does create a significant risk of confusing personal and official opinion. Our Advisory Opinion 2009-02 is relevant to this discussion, even though it is not exactly like this case. In that Opinion we concluded that an appointed city board member could advocate on certain public

issues and use his title “if he states that it is his personal opinion and not that of the [City Board]”. P.2

Mr. Baller is allowed to speak on private matters like this. He is allowed, but not compelled, to use his title as a City Commissioner. If he chooses to identify himself as a City Commissioner he must avoid giving the impression that his personal opinions are those of the City by including a disclaimer to the effect that the opinions expressed are his personal opinions and are not the opinions of the City, the City Commission or any other City official. While not agreeing with my opinion that a violation exists, the entire Ethics Board concurs in the wisdom of City Commissioners using a disclaimer any time they use their City title in private communications that are disseminated publicly.

This is a technical violation that must be understood in the context that newly elected City Commissioners are probably not required to read all 33 of the Opinions this Board has issued or given a summary of all those that directly affect Commissioners. The Ethics Ordinance recognizes the difficulty a situation like this presents when, in Section 2-320 it mandates giving City officials “adequate guidelines for separating their roles as private citizens from their roles as public servants.” The City Commission or Administration may wish to consider including in any orientation they give newly elected Commissioners guidance concerning when to use a disclaimer.

The Board finds that Mr. Baller did not violate Section 2-324(a)(2).

V. Conclusion

Mr. Baller complied with the Code of Ethics. The Complaint is dismissed

Sophie Fierro-Share

John Schrot

**CITY OF BIRMINGHAM
BOARD OF ETHICS
COMPLAINT 2020-001**

**Donna Klein, Complainant
City Commissioner Clinton Baller, Respondent**

DISSENTING OPINION

Draft of October 15, 2020

I respectfully dissent from the principal majority opinion of the Birmingham Board of Ethics. I join in a separate opinion that addresses one particular issue.

SUMMARY

The majority opinion focuses on what the respondent in this case, Birmingham City Commissioner Clinton Baller, wrote about the complainant, Ms. Donna Klein. I join in the majority's view that his writings, and comments he published about them, caused her such humiliation and embarrassment that she felt the need to bring a complaint to this Board. Though the majority does not condone what Commissioner Baller wrote, it measures his words against its construction of the ethics ordinance and concludes he did not violate its provisions.

I see the case differently. I view it as not so much what Commissioner Baller *wrote* as what he *did* to violate the ethics ordinance. The evidence demonstrates that Commissioner Baller used private information he was not entitled to possess — confidential communications amongst moderators of the social media site Nextdoor obtained in violation of its governing rules and in breach of trust — to embarrass and humiliate Ms. Klein, who is one of those moderators. The evidence shows that he did so in retaliation for her voting to remove one of his posts, following which the Nextdoor company permanently terminated his account.

Ms. Klein and her fellow moderators had confidentially discussed and voted on whether a certain post Commissioner Baller made on Nextdoor should be deleted for violating the company's content policies. This was the latest of multiple posts by Commissioner Baller the moderators had removed because of his policy violations. Under Nextdoor's rules, of which Commissioner Baller was on notice, the moderators had the authority as a group to remove the offending post, and their discussions and votes on the question were to remain confidential. Yet Commissioner Baller obtained those confidential discussions from someone and used them to harm Ms. Klein in his personal dispute with her. Tellingly, Commissioner Baller obstructed the Board of Ethics' inquiry by refusing to answer questions about who provided him with those confidential communications and whether he solicited them or received them unsolicited.

Ms. Klein's complaint framed the issue by alleging that Commissioner Baller's actions failed to safeguard public confidence and might result in, or create the appearance of, affecting adversely the confidence of the public. Complaint, at 3, 6. Among other things, the complaint alleged:

Commissioners have access to confidential personal and private information from citizens and businesses. Baller showed complete disregard for privacy and [Nextdoor] regulations when he chose to use this information for his petty purposes. How can anyone trust what he will do with documents presented to him as a commissioner if he has a secret vendetta or private interest?

Id. at 3.

For the reasons set forth throughout this opinion, I would hold that, in obtaining and using the confidential information against Ms. Klein, Commissioner Baller violated at least three sections of the city's ethics ordinance:

- Commissioner Baller failed to earn and honor the public trust by integrity and conduct. Code of City Ordinances, § 2-320.
- Commissioner Baller failed to safeguard public confidence by being honest, fair and respectful of all persons and property with whom he has contact. *Id.* § 2-321, ¶ 2.
- Commissioner Baller failed to avoid any action that might result in, or create the appearance of, affecting adversely the confidence of the public or the integrity of the city government. *Id.* § 2-323 (5).

The complaint and hearing testimony also raised the question of whether Commissioner Baller may have impermissibly used public office for personal gain and failed to avoid any action which might result in, or create the appearance of, using it for private gain. *Id.* §§ 2-320 (3), 2-323 (1). His groundless refusals to answer questions at the hearing about whether he solicited the confidential Nextdoor information and from whom he received it effectively foreclosed the Board's inquiry.

FINDINGS OF FACTS

This case is warrants exposition of the many relevant facts. I would make the following factual findings.

1. The Parties.

Complainant Donna Klein is a long-time resident of Birmingham. Respondent Clinton Baller is a Birmingham city commissioner, elected to office in November 2019. Both have been subscribers to a social media platform called "Nextdoor."

2. Nextdoor and its Policies.

Nextdoor is an on-line social networking service for neighborhood-based groups. Its owner is a private corporation based in California that operates similar social media groups throughout the nation. It bills itself as "the neighborhood hub for trusted connections and the

exchange of helpful information, goods, and services.” Attachment to Complaint, at 2. “Nextdoor’s purpose is to cultivate a kinder world where everyone has a neighborhood they can rely on, and our mission is to be the neighborhood hub for trusted connections and the exchange of helpful information, goods, and services.” *Id.*

The Nextdoor platform is used by groupings of residents called, as one might expect, “neighbors” who live within a short radius of defined neighborhoods, sometimes consisting of only a few blocks. Complaint, at 2. Users may post to and read content on all close neighborhood sites within a prescribed radius, which can even be situated outside of Birmingham. *Id.* There are at least 40 Nextdoor neighborhoods in Birmingham. *Id.*

Users subscribe for access to Nextdoor by registering with their real names. *Id.*; Attachment to Complaint, at 3. They agree to follow Nextdoor’s use regulations and community guidelines. Complaint, at 2. The core community guidelines are:

1. Be helpful in conversations
Share this space in a constructive way. Be kind, not judgmental, in your conversations.
2. Be respectful of your neighbors
You’re speaking to your real neighbors. Strong communities build on strong relationships.
3. Do not discriminate
We do not tolerate racism, hateful language, or discrimination of any kind.
4. Do not engage in harmful activity
We prohibit any activity that could hurt someone, from physical harm to scams.
5. Promote local commerce the right way
We have created designated spaces for members and local businesses to sell products and services.
6. Use your true identity
Nextdoor is built on trust – we want everyone to know they’re communicating with their real neighbor, and therefore require you to use your true identity.

Attachment to Complaint, at 3. The policy guidelines elaborate on the “Do not engage in harmful activity” prohibition:

- We prohibit any activity that could hurt someone, from physical harm to scams.
1. Appropriately report suspicious activity
 2. No threats to the safety of others
 3. No fraud or spam
 4. No illegal or regulated goods or services
 5. No violations of privacy[.]

Id. at 4. The guidelines further elaborate on the “No violations of privacy” prohibition by providing that “[t]o ensure every member’s privacy, do not post or share private information without permission.” *Id.* Specifically forbidden as a violation of privacy is the act of “[r]eposting information originally posted on Nextdoor without obtaining the author’s permission. This includes reposting or sharing screenshots of content with additional neighborhoods on Nextdoor or outside of Nextdoor.” *Id.*

Nextdoor has two primary kinds of users: “members” and “Leads.” Members are the typical users who may post content and read other’s content. Leads are members with added capabilities and responsibilities as moderators. They are described as “volunteers . . . who take a special interest in cultivating a healthy community in their Nextdoor neighborhood.” *Id.* at 7. Nextdoor’s policy guidelines describe the Leads’ roles:

Leads help to cultivate a neighborly community on Nextdoor by:

- Welcoming new neighbors
- Growing the neighborhood
- Starting conversations
- Supporting local businesses
- Keeping neighborhood information up to date
- Keeping conversations neighborly[.]

Id. As moderators of the site:

Leads are granted extra capabilities to help them do the things listed above and make their neighborhood run smoother. Those capabilities include:

- Voting to remove messages that they believe violate Nextdoor Guidelines
- Adjusting neighborhood boundaries
- Verifying unverified members
- Editing the About section on the neighborhood feed
- Promoting other members to Lead status[.]

Id.

Significantly, “Leads do not have the ability to remove members, place members in read-only mode, or affect a member’s account in any way. Only Nextdoor Support can take those actions.” *Id.* Nextdoor retains the power to remove content; suspend, delete, or deactivate a member’s account or limit privileges; or otherwise refuse service to a member who violates its terms of service. *Id.* at 10.

There can be multiple Leads within a neighborhood group; the group at issue in this case has several of them. *Id.* at 7, 13, 17-18. Nextdoor gives its Leads certain tools for keeping conversations neighborly:

One of a Lead's most important responsibilities is facilitating and moderating neighborly conversations in their neighborhood. Leads are given extra tools to help enforce Nextdoor's Community Guidelines. Leads have the ability to:

- Review reported content
- Report content
- Remove content
- Close a discussion
- Change the category of the post[.]

Id. at 8. The guidelines include a check on the Lead's own conduct. If a Lead is posting problem messages, members may report him or her to Nextdoor Support. *Id.* at 5.

3. Ms. Klein's Role in Nextdoor.

Ms. Klein is a Nextdoor Lead. Complaint, at 2. She owns two homes in Birmingham and has two separate Nextdoor accounts: she is a Lead on one account and a member on the other. Holding two accounts is permissible under Nextdoor's guidelines. As a member, Ms. Klein may (as any member may) initiate a report that a post violates those guidelines. *Id.* As a Lead, she may initiate a report and may also vote with other Leads on whether any given post violates the guidelines and should be deleted. *Id.* If Ms. Klein initiates the report from her Lead account, that report automatically counts as a vote to delete the post. If another member or Lead initiates the report, she may vote for or against deletion. Ms. Klein does not have the ability to remove members, place them in read-only mode (which would allow them to read but not post content), or affect their account in any way. *Id.* at 5. Only Nextdoor can take those actions. *Id.* at 5, 7.

4. Confidential Nature of the Leads' Discussion and Votes.

It was undisputed in this case that the reporting and deliberation process for an asserted violation of Nextdoor's community guidelines is strictly confidential. If a member reports content for a guideline violation, the author of the reported content is notified by e-mail, but the reporting member is never identified. Attachment to Complaint, at 6. Nextdoor's confidentiality is stated clearly and absolutely: "**We never disclose your name to the author.**" *Id.* (emphasis added).

After the report of an offending post is filed, the Leads discuss and vote on whether to remove the post. Those discussions and votes are also kept confidential to protect the identity of the participants and promote free discussion. Leads are advised on what to expect after they vote:

When you vote on a piece of content that someone else has reported, **the member will not be notified of your vote.**

If your vote triggers the removal of content, the member will be notified that their content has been removed. **The author will not be informed about the identity**

of either the member(s) who made the report or of the Lead(s) who removed their content. Leads should not reveal the identity of a content reporter to the member whose content was reported.

Id. at 9 (emphasis added).

Commissioner Baller had access to Nextdoor's confidentiality policy and was on notice of it. During the hearing, neither he nor his counsel presented evidence or argument that the discussions and votes of the Leads were public or that Nextdoor had either waived confidentiality or approved release of the confidential information to him. It was unrebutted on the record that the information Commissioner Baller circulated about Ms. Klein was confidential.

5. Nextdoor's Removal of Commissioner Baller's Posts and Termination of his Account for Violating its Policy.

As a member of Nextdoor, Commissioner Baller posted content from time to time. Testimony at the hearing showed that the Leads had previously removed some of his posts for violating the community guidelines. At one point, the company suspended his account after it also determined he violated one or more of those guidelines. Later, the company reinstated Commissioner Baller's account.

On April 26, 2020, Commissioner Baller posted a message on Nextdoor with the title "Neighbor deletes post after being falsely accused of profiteering." He was referring to Mr. Sarmed Faraj, a Nextdoor member who posted that he had acquired and was willing to sell a quantity of protective face masks to help address the COVID-19 situation. Exhibit B to Respondent's Answer to the Complaint, at 3. Shortly afterwards, Mr. Faraj removed his own post due to negative commentary received from other members. *Id.* Commissioner Baller's post reposted a screenshot of Mr. Faraj's withdrawn post and submitted it to more than 58 Nextdoor neighborhoods. *Id.* His post supported Mr. Faraj's efforts and was critical of those who had responded negatively about Mr. Faraj. *Id.*

Ms. Klein reported through both of her Nextdoor accounts that Commissioner Baller's post violated Nextdoor's community guidelines. *Id.* Her reasons were threefold: because Mr. Faraj had chosen to delete his own post, Commissioner Baller did not have the right to repost a screenshot of it; Commissioner Baller was inserting himself into an argument that Mr. Faraj tried to remove and seemingly wished to avoid; and Commissioner Baller was neighbor-shaming those who had made negative comments about Mr. Faraj's post. *Id.* The Leads voted to remove Commissioner Baller's post. *Id.*

Shortly after, someone submitted a complaint to Nextdoor about Commissioner Baller. On April 28, 2020, Nextdoor notified him that the company had permanently disabled his account:

We permanently disabled your account after we received a complaint regarding your recent content and found that you had violated our Community Guidelines on disagreements and conflict.

Exhibit A to Respondent's Answer to the Complaint, at 1. Ms. Klein is not the person who submitted that complaint to Nextdoor, and she does not know who did. his account.

6. Commissioner Baller's Attacks on Ms. Klein.

On June 18, 2020, seven weeks after Nextdoor permanently disabled his account, Commissioner Baller distributed an e-mail newsletter called "Clinton Baller for City Commission," which he publishes occasionally. Among the newsletter's items was one titled "NEXTDOOR SHOWS ME THE DOOR." Exhibit B to Respondent's Answer to the Complaint, at 2. It begins with: "I've been booted again, this time permanently, from the social media website Nextdoor." *Id.* Below that, he summarized his version of what transpired surrounding Mr. Faraj's deleted post. *Id.* In the next paragraph, Commissioner Baller added the following about Ms. Klein:

Surprising to me was to discover that Donna Klein, a Nextdoor neighbor, seems to hold outsize sway over what goes down on Nextdoor. She has two profiles, one in Midvale and one in Torry, and she is a neighborhood "lead" in both. That gives her the right to vote on reported posts. And on Nextdoor, judges are also apparently permitted to be police, so as you can see in the screenshots below, she not only reported my post twice, but also voted to remove it, which helped lead to my banishment.

Id.

Commissioner Baller then appended the referenced screenshots depicting the confidential discussions amongst the Nextdoor moderators. Those screenshots contained the names, neighborhoods, private comments, and confidential votes of the various Leads who voted for or against removing his post. *Id.* at 3.

Commissioner Baller's statement that Ms. Klein was a Lead in both profiles is false. She was a Lead on one, but not both, and she was entitled to vote as a Lead only once. His statements that she "holds outsize [*sic*] sway" and that "judges are also apparently permitted to be police" are misleading given that Ms. Klein is a Lead on only one account, thus making her ownership of a separate member account irrelevant to the Leads' decision to remove his post. Below this passage about Ms. Klein, Commissioner Baller republished his April 28 post about Mr. Faraj's post, both of which had previously been deleted from Nextdoor. *Id.*

Commissioner Baller then twice again published this content about Ms. Klein, including the private comments and confidential votes of the Nextdoor Leads, on a Facebook site he controls, Facebook.com/baller4bham, and on a Facebook feed he manages via Baller4Birmingham.com. Complaint, at 3-4.

Sometime later in June, Ms. Klein learned of Commissioner Baller's publications about her through a friend at a social gathering. Upon finding the content, she saw comments posted to

Commissioner Baller's Facebook site critical of her, including the following remarks:

- "Don't know Donna, but she's got way too much time on her hands...."
- "I do not know Donna either. But I am almost in Clinton's position. I have been booted from ND for silly reasons. . . . I truly believe Donna is behind my removal."
- "Wow. This is just wrong!! Like so many things going on, just wrong!"
- "Control freak...I feel sorry for her family."

Id. at 3. One reader posted the following comment critical of Commissioner Baller himself:

Clinton, I don't know the people listed on your post on Nextdoor, but I'm a little disappointed to see an elected public official such as yourself public-shaming, by name, other members of our community.

Id. at 4. Commissioner Baller responded to that reader as follows

If you consider my expression of facts about Donna Klein to be shaming, then it is because you see something shameful about her behavior. The only opinion I expressed was that she seems to hold outsized power on Nextdoor.

Id. But he was not merely expressing his "opinion." He was republishing and perpetuating on his site the others' negative comments about Ms. Klein. And he did so over a byline bearing his city title:

Clinton Baller
Birmingham City Commissioner
822 Shirley Rd.
Birmingham, MI 48009

Id. at 6.

Commissioner Baller conceded at the hearing that his motivation in criticizing Ms. Klein was personal. Although he initially said that he intended only to provide commentary about how Nextdoor was administered, and specifically how its content is moderated and how disputes get handled, he never addressed those concerns to Nextdoor as he had a right to do. Rather, he targeted Ms. Klein directly. And although Ms. Klein was not the only Lead who voted to remove his post, he targeted only her.

7. Effect of Commissioner Baller's Postings About Ms. Klein.

Commissioner Baller republished screenshots of the Nextdoor moderators' confidential discussions and votes on whether to delete his post for violating Nextdoor's community guidelines. His publications detailed specifically how Ms. Klein and other Leads discussed and voted on the question. Those discussions and votes were internal, private, and intended to be kept confidential amongst the moderators.

Commissioner Baller received the screenshots from someone who possessed rights to view the moderators' confidential comments and votes on the question. He received that information although he was not even a member of Nextdoor, the company having terminated his account.

The documentary record shows that whoever provided the screenshots to Mr. Baller was not authorized to do so. Mr. Baller offered no testimony that she was. She provided the information to him in breach of trust. Because the community guidelines are available to members and non-members alike, Mr. Baller knew or should have known that the disclosure to him was unauthorized. This conclusion is buttressed by the fact that, when asked to identify who gave him the confidential information, Commissioner Baller refused to answer. He offered no valid grounds for his refusal. When asked whether he received the screenshots unsolicited or whether he solicited them from someone else, Commissioner Baller again refused to answer without offering valid grounds.

Given Commissioner Baller's refusal to answer those questions, the Board of Ethics may legally infer that he solicited the confidential information, that the person who gave it to him was not authorized to do so, and that he knew the disclosure was not authorized. Whether he solicited the information goes to his motivation toward Ms. Klein, but also is relevant on whether, as alleged in the complaint, a conflict existed between his private interests and the public interest and thus whether he was using his public office for private gain.

In republishing the confidential information, Commissioner Baller made comments about Ms. Klein which, as alleged in her complaint and demonstrated at the hearing, embarrassed her and her friends and subjected her to public ridicule and scorn. After reading Commissioner Baller's content and comments about her, Ms. Klein felt embarrassed, humiliated, and demeaned. The incident has been upsetting and stressful to both her and her friends. Commissioner Baller published his comments in three different platforms, which tended to broaden the readership and magnify the harm. And though he could have removed the hurtful comments about her which others posted on his site, he did not.

CONCLUSIONS AND DISCUSSION

Violation of Section 2-320.

Section 2-320 of the Ethics Ordinance requires Commissioner Baller to "earn and honor the public trust by integrity and conduct." I find on this record that Commissioner Baller violated section 2-320. For personal purposes, he retaliated against a citizen of the city by using confidential information he knew or should have known he was not entitled to possess to embarrass and humiliate her. He did not show the level of integrity and conduct required of a city official.

Violation of Section 2-321 ¶ 2.

Section 2-321 ¶ 2 of the Ethics Ordinance requires Commissioner Baller to “safeguard public confidence by being honest, fair and respectful of all persons and property with whom [he has] contact.” I find on this record that Commissioner Baller failed to safeguard public confidence and violated section 2-321 ¶ 2 in several respects.

Commissioner Baller acted dishonestly by obtaining confidential information from a third party who, based on the uncontroverted record in the case, had no right to give it to him, and using that information against Ms. Klein to his advantage. His quarrel with Ms. Klein was a private matter, not a public issue over which he might have a responsibility as a public official. The information was property Nextdoor entrusted to its agents. One of those agents misappropriated that property and gave it to him. Commissioner Baller used the misappropriated property to harm Ms. Klein. That is dishonest conduct. His refusal at the hearing to disclose the identity of the person who gave him the information further supports this conclusion. A fair conclusion is that he was trying to protect that person’s identity because he knew that she was violating Nextdoor policy in giving it to him.

Commissioner Baller acted unfairly toward Ms. Klein by disregarding Nextdoor’s rules and policies about confidentiality. Those rules that are designed to promote frank discussions between Nextdoor’s moderators on questions of deleting posts and other site management matters. He was on notice that the information was not his to use, yet he used it. The fact that someone improperly gave it to him is no defense. It was unfair for him to use it.

Commissioner Baller acted disrespectfully toward Ms. Klein by subjecting her to public ridicule, through a posting on which he described himself as “Birmingham City Commissioner,” about what he later conceded was a private dispute he had with her and not a public issue. At the hearing, he first denied having a dispute with Ms. Klein, explaining that his concerns were about the concentration of decision-making authority Nextdoor places in its Leads as moderators of the site. But that explanation failed when he admitted he never presented his concerns to Nextdoor itself and conceded that the matter was personal with her. Commissioner Baller’s disrespect for Ms. Klein is further shown by the fact that Ms. Klein was not the sole moderator who voted to remove his offending post. Yet he targeted only her.

Ms. Klein was embarrassed and humiliated both by Commissioner Baller’s multiple postings about her, the negative comments others made about her, and communications she received from people she knew. Commissioner Baller sought to minimize the extent of the harm by arguing it involved only a few people who commented about her. But the affront was neither trivial nor minimal. It was very real to Ms. Klein. On this record, I would be unwilling to apply a *de minimis* exception to the ordinance’s requirement that city officials be respectful of others.

The majority opinion states the proposition that Commissioner Baller is not responsible for the speech of others. I disagree that it applies to this case. Commissioner Baller republished the offensive comments of others about Ms. Klein. A person who repeats or republishes harmful matter can be held liable as if he had originally published it. *See, e.g.,* RESTATEMENT (SECOND)

OF TORTS § 578. Commissioner Baller's failure to remove the comments by others critical of Ms. Klein further evidences his intent to harm her. His disrespect for her violated the ordinance.

Commissioner Baller also acted disrespectfully toward Nextdoor itself by using its private information for his own purpose. That information was not his to possess or use. His publication of the votes and comments of the Leads will naturally chill their discussions while performing their moderator tasks in the future. His actions undermine Nextdoor's processes, limit its utility, and diminish its value to our community. Commissioner Baller's refusal to disclose to the Board the identity of the person who gave him the information likewise undermines Nextdoor's ability to operate according to its rules.

Commissioner Baller's counsel contended at the hearing, and the majority opinion states, that section 2-321 ¶ 2 is limited solely to review of his "official acts" or "official conduct" and thus does not govern private action. I disagree. I believe the provision reads to the contrary:

All city officials and employees shall safeguard public confidence by being honest, fair and respectful of all persons and property with whom they have contact, by maintaining non-partisanship in all official acts, and by avoiding official conduct which may tend to undermine respect for city officials and employees and for the city as an institution.

Code of City Ordinances, § 2-321, ¶ 2. The majority reasons that the provision is a single sentence containing a primary and a dependent clause. Under that reasoning, the second (and third) clause of the sentence, which is limited to official acts or official conduct, would modify the first clause by imposing the "official" limitation.

I disagree that there is a similar limitation on the first clause. Each of the three clauses is preceded by the word *by*. That word is used to denote three separate ways by which Commissioner Baller must "safeguard public confidence." The first is "*by being honest, fair and respectful of all persons and property with whom they have contact.*" The second is "*by maintaining non-partisanship in all official acts.*" And the third is "*by avoiding official conduct which may tend to undermine respect for city officials and employees and for the city as an institution.*"

I read these three clauses as being independent. The language of the sentence is plain and unambiguous and must be "enforced according to its terms." *Sibelius v. Cloer*, 569 U.S. 369, 381 (2013). "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). This rule is "at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000).

The majority correctly notes that the Birmingham City Commission added the "official" concept to the provision when it amended the ethics ordinance in 2016. Those amendments came following a recommendation by the Board of Ethics itself. Had the city commission wished to modify the first clause to impose the "official" limitation, it could have done so. To leave the first clause free of that limitation is consistent with other sections of the ethics ordinance,

including section 2-323(5) discussed below and the various other conflict of interest provisions, which also govern the private conduct of the city's officials. Accordingly, I believe that to impose the "official acts" or "official conduct" limitation on the first clause of section 2-321 ¶ 2 is an incorrect reading of the ordinance.

Commissioner Baller's manifest failure to be honest, fair, and respectful of his constituent, Ms. Klein, and of the Nextdoor organization resulted in his failure to safeguard the public confidence. Ms. Klein's complaint and testimony, as further noted in the next section of this opinion, were more than enough to make that showing of diminished confidence. Commissioner Baller violated the ethics ordinance.

Violation of Section 2-323 (5).

Section 2-323 (5) of the Ethics Ordinance which requires Commissioner Baller to "*avoid any action . . . which might result in, or create the appearance of: [a]ffecting adversely the confidence of the public or the integrity of the city government.*" (Emphasis added). I find on this record that Commissioner Baller violated this provision.

Ms. Klein's complaint and testimony raised a valid concern about whether Commissioner Baller would use confidential information possessed by the city for improper purposes, including for his own personal purposes. She alleged that Commissioner Baller's use of Nextdoor's private information for his own purposes engenders mistrust. Her fear is that he may use the confidential personal and private information of city citizens and businesses entrusted to him as a commissioner for a vendetta or a private interest. Complaint, at 3.

The point is well taken. Commissioner Baller's actions tended to adversely affect the confidence of the public and the integrity of city government. He showed no compunction in using private, confidential information, which he was not entitled to possess, against Ms. Klein. I find that a reasonable citizen could fear that Commissioner Baller might use city information in his possession against them or for his own benefit.

Perhaps Commissioner Baller never considered whether the confidential information was not his to use. Perhaps he never considered how his use of that information could adversely affect the public confidence. But as an official elected to the highest level of our city's government, he should have considered his actions. Commissioner Baller certainly knows that the ethics ordinance requires city officials to safeguard the public's confidence. Just last year, he himself brought two complaints against other city officials on that basis. *See* Board of Ethics Decisions 2019-03 and 2019-04.

The ethics ordinance forbids *any* action, whether official or private, that even *might result in or create the appearance of* adversely affecting the public confidence. Commissioner Baller's conduct created precisely the risk of adverse effect on the public's confidence the ordinance is designed to prevent.

Possible Violations of Sections 2-320 (3) and 2-323 (1).

Finally, the complaint suggested a possible conflict between Commissioner Baller's private interests and the public interest and thus raised a concern for whether he was using his public office for private gain. Complaint, at 3. The ethics ordinance forbids city officials from using public office for personal gain, and it affirmatively requires them to avoid any action that might result in, or create the appearance of, using their office for private gain. Code of City Ordinances, §§ 2-320 (3), 2-323 (1).

The concern arises from the evidence that someone with access to the confidential Nextdoor information gave it to him improperly. If that person gave it to Commissioner Baller to gain favor with him, or if Commissioner Baller solicited it using his public office as leverage, he may have violated the ordinance.

When questioned, Commissioner Baller refused to say who gave him the confidential information or whether he solicited it. Those questions were relevant to his motivation for his multiple repostings of the confidential discussions and votes of the Nextdoor moderators. Neither he nor his lawyer offered a valid objection. He simply refused to answer.

Commissioner Baller's groundless refusals to answer those important questions are sufficient to allow the Board to draw the adverse inference that he solicited the confidential information and, consistent with the unrebutted documentary record, that the provider of the information was not authorized to give it. Nextdoor permanently disabled his account for violating policy; he likely knows that Nextdoor would permanently disable the account of the person who improperly gave him the information. But these adverse inferences alone do not compel a conclusion that he used his public office for private gain. More evidence would be needed before that determination could be made. Had he disclosed the identity of the person who gave him the confidential information, the Board could have recessed the hearing and asked that person to tell us what she knew. Commissioner Baller's unjustified obstruction foreclosed that inquiry.

CONCLUSION

For these reasons, I would find that Commissioner Baller violated the ethics ordinance.

James D. Robb