

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

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

DISSENTING OPINION

November 20, 2020

I respectfully dissent from the majority opinion of the Birmingham Board of Ethics. Commissioner Baller violated multiple sections of the city's ethics ordinance.

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 the comments from others he published about her, caused her such humiliation and embarrassment that she felt the need to bring a complaint to this Board. Although 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: it is not so much about 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 published 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 for 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 say who gave him those confidential communications and whether he solicited them or received them unsolicited.

Ms. Klein alleged 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, she 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 questions of whether, in seeking or obtaining the confidential information, Commissioner Baller impermissibly used public office for personal gain or benefit, used it to seek special consideration or advantage, or 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), 2-324(a)(8). Commissioner Baller's 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.

I thus concur in the result, but not the rationale, of those portions of the majority opinion that find that Commissioner Baller's actions did not violate sections 2-323(1) and 2-324(a)(8), which forbid him to use his public office for private benefit or seek an advantage or preferential treatment. But this is so only because, due to Commissioner Baller's unjustified refusals to answer questions put to him, the evidence in the record was insufficient to support such a finding.

FINDINGS OF FACTS

This case warrants recitation of the relevant facts. I 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 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. Nextdoor’s policy guidelines elaborate on the “Do not engage in harmful activity” prohibition as follows:

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 others’ 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 offered 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 Nextdoor member, 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 his 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 withdrew 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 did not submit that complaint to Nextdoor, and she does not know who did.

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," that 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 outside 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 outside [*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, 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 communications 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 communications 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 already 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 the comments of others he republished 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 that 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 this section by acting dishonestly, unfairly, and disrespectfully.

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. He then used 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 identify the person who gave him the information further supports this finding. A fair conclusion is that he was trying to protect that person’s identity because he knew she violated 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 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 even 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 when he later 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 by Commissioner Baller’s multiple postings about her, the negative comments from others he republished about her, and communications she received from people she knew. Commissioner Baller tried to minimize the extent of the harm by arguing that only a few people commented about her. But the affront was neither trivial nor minimal. It was very real to Ms. Klein. On this record, I am unwilling to apply a *de minimis* exception to the ordinance’s requirement that city officials be respectful of others.

The majority opinion advances the proposition that Commissioner Baller is not responsible for the speech of others. That proposition is inapplicable in this case because Commissioner Baller republished the offensive comments of others about Ms. Klein. By law, 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 the discussions they must

hold to perform 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 enforce 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. 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*, denoting 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 flowed from 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. And leaving 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 clearly govern a city official's private conduct. Accordingly, I believe that to impose the "official acts" or "official conduct" limitation on the first clause of section 2-321 ¶ 2 misreads the ordinance.

Commissioner Baller's failure to be honest, fair, and respectful of both Ms. Klein and the Nextdoor organization itself 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 show diminished confidence. Commissioner Baller violated the ethics ordinance.

Violation of Section 2-323(5).

Section 2-323(5) of the Ethics Ordinance 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 to serve a vendetta or 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 against Ms. Klein the private, confidential information of Nextdoor that he was not entitled to possess. 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 explicitly 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), 2-323(1), and 2-324(a)(8).

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 or to obtain or seek any special consideration or advantage, 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), 2-324(a)(8).

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 Mr. Baller's account for violating policy, so he likely knows that Nextdoor would permanently disable the account of the person who gave him the information. But these adverse inferences alone are not sufficient to establish 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