

Q&A on Duties of Board of Governors Members

1. When does confidentiality apply to Governors?

Confidentiality obligations to relate to material and discussions that occur in closed sessions which are subject to confidence. Please see the [Board Procedures](#) available on the Board of Governors' website which describe open and closed sessions in detail.

In addition, courts have held that the fiduciary duty owed by Governors includes a duty to maintain the confidentiality of Board proceedings (subject to a Board decision to disclose details of proceedings). For example in *Peoples Department Stores Inc. (Trustee of) v. Wise*, the Supreme Court of Canada held:

“[Directors] must maintain the confidentiality of information they acquire by virtue of their position.”

The confidentiality obligations imposed on Governors at Carleton is the same as at any other institution and University in Canada.

2. Are there a lot of closed sessions?

In general, every Board meeting consists of an open session accessible by the public and a closed session in which confidential matters are discussed. Every Board in the country handles sensitive matters dealing with issues such as personnel, legal matters and contracts through closed sessions. No Board of Governors allows members to speak publicly about in-camera closed sessions. This has been the university's consistent policy and was recently reaffirmed by board members.

3. What are the fiduciary duties owed by Governors?

The fiduciary duty and the standard of care owed by Governors can be summarized as follows:

Directors of a corporation, in exercising their powers and discharging their

duties to the corporation shall:

- a) act honestly and in good faith with a view to the best interests of the corporation; and
- b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The fiduciary duty requires that directors must act “*with a view to the best interests of the corporation.*” It is worth emphasizing that “best interests” are what the Board as a whole decides and not what an individual director believes.

The Supreme Court of Canada described the content of the fiduciary duty as follows:

The statutory fiduciary duty requires directors and officers to act honestly and in good faith *vis-à-vis* the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally.

4. What amendments were made to the Statement of General Duties, Fiduciary Responsibilities and Conflict of Interest (“the Statement”) that Board members sign?

The confidentiality obligations set out in section II in the Statement have been the same since adopted in 2008.

There were other amendments made for example to commenting as outlined below but they did not materially change the obligations of members:

Previous Version

During her or his term of office, it is generally considered inappropriate and not in the best interests of the University for a Governor to comment in any forum, including print or electronic media of any form, outside a meeting of the Board or one of its Committees on a decision reached by the Board or any of its Committees. In the event of a request for comment, the Governor should refer the matter to either the President, the Chair of the Board or the University Secretary.

Current

During her or his term of office, it is inappropriate and not in the best interests of the University for a Governor to comment in any forum, including print, social or electronic media of any form outside a meeting of the Board or one of its Committees, on matters considered or discussed by the Board or any of its Committees. In the event of a request for comment, the Governor should refer the matter to either the President, the Chair of the Board or the University Secretary.

The spirit and intention of the document has not changed. The Statement should be read in conjunction with Board bylaws and procedures, as well as relevant statutes such as the Carleton University Act, the Ontario Corporations Act and common law.

4. Can a board member publicly comment on Board business?

Generally, No. There are official minutes and spokespeople who comment on Board discussions and decisions. Like at every institution, Board members are required to respect the integrity of the Board and decisions made.

5. Isn't that restricting freedom of speech?

No. Free debate is encouraged and occurs during both open and closed meetings of the Board.

Proper governance requires fulsome, candid discussion and debate by Board members at meetings, without fear of being misquoted or maligned following the meeting.

The role of a Governor includes a responsibility to actively participate in debate and discussion of Board and Board committee business and then, once decisions have been taken, to respect them in accordance with their fiduciary duty owed to the University.

6. What are the concerns regarding Prof. Gorelick's blog postings?

The blog posts have been problematic. Inaccurate and false statements have been made about members, meetings, discussions and decisions of the Board are neither appropriate nor legal, according to advice obtained by the Board. The conduct is inconsistent with the fiduciary duty owed by a Board member, which requires all member's to act honestly, in good faith, loyally and the best interests of Carleton University.

Personal blogs that attack fellow Governors and university staff and dissent on matters the Board has decided are simply inconsistent with the role and legal obligations of a Governor.

7. How can Prof. Gorelick represent faculty members if he can't blog about the Board meetings?

It is important to understand that the Board, its responsibilities and those of its members are set out in the Carleton University Act, the Ontario Corporations Act and the common law. The Statement Governors are required to sign reflect the duties set out in the statutes and common law.

The Board, composed of a mix of volunteer community members and members drawn from within the university, such as Prof. Gorelick, are legally mandated to act in the best interests of the university as a whole and not as a representative of any group, stakeholder or particular interest. The Board members are not elected representatives of a constituency nor do they report to a constituency. The Board is not a democratically elected body such as a legislature. Boards are not representative bodies in that

sense. Board members are fiduciaries, not politicians. They are required to always act in the best long-term interests of the institution.

A fundamental governance principle is the requirement for governors to be independent. It would be contrary to this fiduciary responsibility to have “representatives” of particular constituencies voting at the direction of their organizations, or solely based on the interests of constituencies. Regardless of how someone gets to the Board table, or who put them there, once a person becomes a Board member, his or her loyalty must lie with the best, long- term interests of the university.

The law requires all members of the Board to set aside their professional or personal interests, relationships, allegiances or beliefs and act only in the best interests of the University. A Board member who favours or acts as a representative of one or more individuals or groups of stakeholders in the University is in violation of their fiduciary duty.

While faculty members are free to express themselves, once a faculty member becomes a governor, he or she is required to adhere to the same duties and responsibilities as all governors with respect to board business.

We have canvassed other Canadian Universities. We are aware of no other Canadian University that allows Board members to publicly blog on Board discussions, meetings or decisions.

8. Is Carleton imposing more stringent obligation on board members than those at other institutions?

No. All universities and institutions require their Board members to comply with fiduciary and confidentiality obligations. Carleton University is no different and the obligations and responsibilities expected of Governors at Carleton are the same as in every other University.

The Board of Governors has always been and remains committed to openness and transparency in University governance. Open and fulsome discussion of matters is the norm at Carleton and the Board.

9. If Prof. Gorelick continues to blog, what will happen?

It is at the Board's discretion to determine what the next steps will be. All Governors except for Prof. Gorelick have signed the Statement of General Duties, Fiduciary Responsibilities and Conflict of Interest.