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CITY OF PETERBOROUGH INTEGRITY COMMISSIONER,  
GUY GIORNO

**Citation:** Clancy v. Therrien, 2021 ONMIC 12

**Date:** July 6, 2021

## REPORT ON COMPLAINT

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## COMPLAINT AND INQUIRY

1. The Chief Administrative Officer, Sandra Clancy (Complainant), alleges that the Mayor, Diane Therrien (Respondent), contravened five provisions of By-Law Number 19-028, the City of Peterborough Council Code of Conduct.
2. Upon receiving the Complaint, I commenced an inquiry into the allegations under paragraph section 10 c), section 13, and section 15 of the Code.
3. This was a lengthy inquiry, involving interviews with many witnesses (in addition to the Complainant and Respondent), the review of much documentation, and consideration of detailed submissions from the parties. I am mindful, however, that the Complainant and the Respondent hold, respectively, the most senior staff position and the most senior elected position in the City, and that, following the presentation of this report, their continued working relationship will remain important to the City. I am also aware that much of the evidence I reviewed related to meetings that were closed under section 239 of the *Municipal Act*.
4. Subsection 223.6 (2) of the *Municipal Act* states that I may disclose in this report such matters as in my opinion are necessary for the purposes of the report. In my opinion, in this particular context, it is necessary to make clear the issues and my conclusions, but appropriate to limit the descriptions of the evidence and the positions of the parties to general summaries.

## SUMMARY

5. The central allegation is that, in a series of events culminating on February 12, the Respondent pressured the Complainant, and wrongly claimed to speak for Council, in an attempt to get the Complainant to retire earlier than she had otherwise planned.
6. The associated allegations are that, around the same time, the Respondent spoke unfairly and disrespectfully about the performance of the staff in general and the Complainant in particular.
7. The Respondent's position on timing of the Complainant's retirement was not shared by a majority of Council. The Complainant was informally aware of this fact. Nothing came of the February 12 discussion. The Complainant continues to hold office.
8. The decision making of Council, acting as the employer, is not subject to the Code of Conduct. It is true that the decision of the majority constitutes the decision of Council, but being in the minority does not mean being in contravention of the Code. Council Members may take positions on how the employer (Council) should manage the

employment relationship, without the Integrity Commissioner second-guessing their leadership of the municipal corporation.

9. Even if a constructive dismissal were to occur (and I make no finding that this was the case), it would be an employment law matter subject to employment law remedies. Constructive dismissal is not covered by the Code.

10. In this case, when Council became aware of the Respondent's February 12 discussion with the Complainant, Council confirmed that it does not intend to dictate the timing of the Complainant's retirement.

11. As for the other allegations, the Respondent spoke emphatically and with a sense of urgency about a subject – access to housing – that is a political priority for her and important to the community as a whole. In doing so, she did not engage in harassment, abuse, bullying, or intimidation, and she did not fail to show respect for the staff.

## **BACKGROUND**

### **Retirement**

12. The Complainant joined the City's staff in 1985. Before this Complaint was filed, she had intended to retire at some point in the medium term (likely late this year), and to give Council sufficient notice to permit an orderly transition that includes recruitment of an appropriate replacement. The Complainant believed six months' notice would be appropriate. She informed the Respondent of her intention and her belief last year.

13. At a closed meeting in December 2020, the Respondent briefed Council on her discussion with the Complainant. Most Council Members recall being informed that the Complainant was likely to retire in late 2021.

14. Council Members recognized that timing was ultimately a personal decision of the Complainant, but some suggested that the Respondent have a private discussion to obtain more information about the Complainant's anticipated timing. While Council provided no formal direction to this effect, the view of Council was that the decision on when to retire was the Complainant's alone.

15. Until late February, the Respondent and Complainant held a regular one-on-one meeting, usually on Tuesday, with nobody else present. At their January 26 meeting, the Respondent spoke to the Complainant about her anticipated retirement, and said it was important that the timing of any retirement take place in a manner that is sensitive to the municipal calendar, including the annual budgetary cycle and the November 2022 municipal elections.

16. During this discussion the Complainant reiterated an intention to retire in Fall 2021. The Respondent felt that this timing would be too late. She told the Complainant that the time needed to bring a new CAO up to speed might conflict with the City's budget cycle.

17. Either following this meeting, or around the same time as the meeting, the Respondent communicated individually with various Council Members about requiring the CAO to retire earlier, subject to an appropriate package.

18. The regular meeting between the Respondent and the Complainant that would have been held Tuesday February 9, was rescheduled to Friday, February 12. The parties have different recollections of the specifics of the conversation, but both agree on the following points: Retirement was again discussed. The Respondent said she was acting as a "messenger" from Council, collectively, and explained that retirement during the summer would be preferable timing. The Respondent said six months' notice of retirement was not required; the Complainant could give Council just two months' notice.<sup>1</sup> The Complainant asked if she was being terminated, and the Respondent clarified that this was not the case. Both individuals felt the discussion was uncomfortable and difficult.

19. At the time of the February 12 meeting, the Complainant was aware, from other Council Members, that the Respondent and various individual Council Members had been discussing her retirement. The Complainant was also aware that requiring her to leave early (subject to an appropriate package) probably lacked majority support on Council. Nonetheless, the February 12 discussion left her feeling hurt and uncertain. The Complainant shared these feelings with several Council Members.

20. General Committee met in closed session on February 22. Its decision was to confirm that the Complainant would determine the timing of her own retirement, and Council would not force an earlier departure. Council, as the General Committee, instructed the Respondent to meet privately with the Complainant, as soon as possible, to clarify and confirm Council's position.

21. During or following the February 22 closed meeting, the Respondent texted the Complainant in an attempt to arrange a private meeting the next day "to sort through some of the miscommunication." The Complainant replied the next morning, February 23, that she was double booked and needed to reschedule the regular Tuesday meeting that would otherwise have occurred that day. The Complainant states that because of what occurred ten days earlier, she was, and still is, unwilling to meet the Respondent alone.

22. In fact, to this day, the Complainant and the Respondent have not held another one-on-one meeting. Consequently, the Complainant has not heard officially of Council's position. Some Council Members have, however, informally communicated Council's position to the Complainant.

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<sup>1</sup> The Complainant recalls two months being said, and the Respondent did not disagree.

23. On March 1, the Complainant emailed the rest of Council to let them know she is not comfortable speaking to the Respondent about her retirement.

24. On March 1, the Complainant took a brief phone call from the Respondent. She says the call appeared to come from an unknown caller, and she would not have picked up if she knew it was the Respondent.

25. On March 2, the Complainant filed this Complaint.

### **Affordable Housing Report**

26. The other allegations relate to comments made by the Respondent, largely in the context of a report about governance models for the construction of new affordable housing.

27. Access to housing is an important priority of the Respondent, and it figured significantly in her 2018 campaign platform.

28. In 2019, Council approved *A Home for All: Peterborough 10-Year Housing and Homelessness Plan Review*. Targets include achieving “Functional Zero for Chronic homelessness” by 2025, and “meet[ing] all housing needs” by 2029. To meet the second target, the City and County will need 2,680 new affordable rental units, 580 new Rent-Geared-to-Income supportive housing units, and 796 new affordable homeownership units.<sup>2</sup>

29. Peterborough Housing Corporation is both Peterborough’s largest provider of Rent-Geared-to-Income housing, and a local leader in affordable housing development.<sup>3</sup> Over ten years, Peterborough Housing Corporation is proposing the construction of 929 affordable units and 164 market units, and the redevelopment of 311 social housing (Rent-Geared-to-Income) units that have reached the end of their useful lives.<sup>4</sup> The anticipated capital cost is \$467.7 million, of which \$327.3 million would be financed by debt.<sup>5</sup>

30. Ontario Regulation 403/02 under the *Municipal Act* limits to 25 per cent of annual revenue (calculated by the Ministry of Municipal Affairs according to section 3 of the Regulation) the amount that a municipality may spend to meet debt and financial obligations. City Council has adopted a Debt Management Policy that is even more conservative than the provincial Regulation: The Policy limits annual debt repayment to

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<sup>2</sup> *A Home for All: Peterborough 10-Year Housing and Homelessness Plan Review*, p. 31.

<sup>3</sup> Report CSSS21-003, Governance Alternatives to Support Affordable Housing Development (February 16, 2021), p. 4.

<sup>4</sup> KPMG, Governance Alternatives for Community Housing Development: Final Report (February 5, 2021), pp. 8-9.

<sup>5</sup> *Ibid.*

15 per cent of the City's net revenues; tax-supported debt payment is limited to 8 per cent of net revenues and included in the 15-per-cent limit.<sup>6</sup>

31. Under Public Sector Accounting Board standard PS 1300, the “government reporting entity” of a municipal government includes corporations controlled by the municipality.<sup>7</sup> This means that debt of Peterborough Housing Corporation is consolidated on the City’s financial statements and affects the City’s overall borrowing capacity under the Debt Management Policy and O. Reg. 403/02.

32. Since 2018, the staff of the City and Peterborough Housing Corporation have been exploring a solution that would allow PHC to finance the project without affecting the City’s debt capacity. PHC proposed the creation of a new, not-for-profit corporation that would own and control the project, but the new corporation’s debt would appear on the City’s financial statements unless the new corporation were entirely outside the City’s control. As a recent staff report explained:

This approach would not be without risk mainly due to governance and control of the new corporation. Staff [of the City] determined that further investigation was required to understand the potential risks and to investigate possible alternatives.<sup>8</sup>

33. The City staff engaged KPMG to advise on the business case for a new, not-for-profit corporation, and to identify alternative governance structures.<sup>9</sup>

34. During their January 26 meeting (see paragraph 15 of this report), the Respondent raised with the Complainant the status of the KPMG report on the Peterborough Housing Corporation proposal. The Respondent said she understood that the KPMG report had already been received by the staff, and asked for it to be brought to the February 8 General Committee meeting or a special General Committee meeting on February 16. The Respondent added that funding was available to the City under the National Housing Strategy, but at risk because of delay, which she called irresponsible, even shameful.

35. The next day, January 27, the Respondent attended the Administrative Staff Committee (ASC) meeting. The ASC is a committee comprised of the senior staff of the City, and is defined as such in the Procurement By-law.<sup>10</sup> In 2019, the Respondent had begun to show interest in the ASC and to request the agenda in advance of meetings. She attended the meeting on an intermittent basis.

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<sup>6</sup> Policy # 0029, Debt Management, section 2.2, online: <https://www.peterborough.ca/en/city-hall/resources/Documents/Debt-Management-Policy.pdf>

<sup>7</sup> Public Sector Accounting Board, PS 1300, Government Reporting Entity.

<sup>8</sup> Report CSSS21-003, note 3, p. 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> By-law Number 18-084, Procurement By-law, s. 2.1: “**Administrative Staff Committee** means a committee comprised of the Chief Administrative Officer, Commissioners of the City Departments, and other staff the Chief Administrative Office[r] deems appropriate, which has Approval Authority as set out in this By-law.”

36. During the January 27 ASC meeting, the Respondent again expressed concern about what she considered to be a delay in bringing the KPMG report to Council. The Complainant describes the comments as a “rant” while the Respondent concedes that she may have been “emphatic” in expressing frustration with perceived delays. Other attendees described the situation as “very uncomfortable” for all present, but especially uncomfortable for the Complainant.

37. At a subsequent meeting with senior staff members, the Respondent again expressed her frustration with the perceived delay in of the report.

38. On February 16, the General Committee of Council held a special meeting to consider the KPMG report and an accompanying staff report. A representative of KPMG attended to present the findings of the review and to answer questions. A recording of the meeting is available online.<sup>11</sup>

39. The following are the comments of the Respondent at the conclusion of the KPMG presentation:<sup>12</sup>

I’m a bit frustrated, honestly, and I told you this when we spoke, that the criteria that you’re talking about is control and debt, and I told you that the criteria that I have as a Mayor, and as a Member of Council, is housing people in our community as quickly and as safely as possible, and so that’s where I’m coming from, and the frustration that I have, is about hearing all of these recommendations, including the fact that when you have these risk considerations in this time line, and I flagged this for you before, saying that the criteria was control for the City. So, we know that the City having control over things, government having control over things, often means things move quite slowly, and so, for me, control is not the most important thing, the most important thing is building housing units as quickly as possible and getting people into safe, affordable housing. So why is there this disconnect?

Also, Council has been fairly out of the loop about this KPMG report. PHC has also been out of the loop of this KPMG report, and when you’re talking about the potential courses of action, really, you’re just describing one course of action, steps for one potential course of action, and I flagged that for you before, so that’s my frustration. I’m asking you that question now. Control, to me, is not the most important, the most important thing is: How do we get homes built for people as quickly as possible?

[presenter’s response omitted]

So, and I agree that the execution is of utmost importance, and PHC has won provincial and national awards in terms of actually getting housing built, and, so, in your report, on page 14, at least in the one I have dated January 12th, it talks about, “Full Integration with the City [option] and Status Quo [option] provide direct City control over housing” has been provided the highest rating, and so, again, I don’t know who decided this rating system, because I would not tell you as Mayor of the

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<sup>11</sup> Special General Committee meeting (February 16, 2021), recording, online, <https://tinyurl.com/3yf7fe69>

<sup>12</sup> *Ibid.*, from 41:34 to 50:47.



City that the City having the control is the highest priority, because PHC has been housing people for years, winning awards for years, and getting housing built and people into safe and affordable housing for years.

I know this isn't on you, Oscar, and we've talked about this, but my frustration, as you know, is palpable, and it's coming across right now because this is the recommendation, when you talk about potential courses of action, it's really just one potential course of action that you're giving us the steps for. PHC has not had the opportunity to come and explain to us their business case, explain to us what they have done, and that is a problem for me and, I think, for other Members of Council.

Housing is the utmost importance in, not just our city – and I know that you experience this in Sudbury where you live – housing and the housing crisis is not unique to Peterborough, but it is something that is felt every day, especially today, when it is minus 25, and we have people who have nowhere to live. So, for me, another 18 months to establish a bureaucracy is very frustrating when we have Peterborough Housing that has been doing this for years.

[presenter's response omitted]

My question was: Who said that that is the highest rating? Because it was not Council. So, was it staff? If that's the case, we need to know, because Council would not say that control is the highest point of rating. I think I can speak for all of Council. We have different perspectives on debt, and control, and whatever, but I think all of us agree that we need to house people safely, and affordably, and as quickly as possible.

[presenter's response omitted]

My frustration is not necessarily directed at you. We had a very good conversation about it. We also have a federal Member of Parliament that's very willing to try and advocate for funds here. We do have a provincial Member of Provincial Parliament that is missing from the equation, so that is something that I will highlight again, that we have a Municipal Affairs and Housing Ministry that needs to come to the table. I know, Oscar, that you have been doing a great job on this front, but this is the frustration that I'm bringing to you, and the concerns that I have, and for me control is less important than actually getting people into housing. We have a seven-year wait list for one-bedroom apartments, and that's beyond the pale, and I know that's not unique to Peterborough, but this is what we have to deal with.

40. About ten minutes later, the Respondent raised a point of privilege and asked why certain decisions appeared to have been made without Council involvement.<sup>13</sup>

Point of privilege, Mr. Speaker, Mr. Chair. You're talking about, and, Oscar, this is a question maybe for staff, when you're talking about that they've already decided that it will be these properties happening first, how come it sounds like this is a done deal when Council is only debating this tonight? And that's not necessarily to you, that might be to our CAO or to our Commissioner of Community and Social Services, but that is quite a frustrating piece of information, I think, for us to know.

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<sup>13</sup> *Ibid.*, from 1:01:07 to 1:01:39.

41. When Councillor Parnell moved to defer consideration of the report, the Respondent spoke to the motion as follows:<sup>14</sup>

I will support the deferral, not until April, but until March and, I'm looking at my calendar now. We brought this forward in February at a special meeting because housing is such an important issue that we had a special meeting to deal with it, and nobody's going anywhere because we're in COVID, so I don't think that in March there will be a problem in dealing with it potentially on the 15th. There's also five Mondays in March to deal with this, and, to Councillor Clarke's point, I appreciate that, yes, you and Councillor Riel have had many conversations with staff. We've heard from Council that we have not heard from our CAO and from our Commissioners about this proposal, about what this means for the City in terms of, not just finances, but again, my primary concern is not about finances, but is about how do we get people housed as quickly as possible, and I've told that to staff, numerous times. That's why we had this special meeting in February because this report, and to Councillor Parnell's question, this original proposal from PHC, was on our CAO's desk for over a year, and we needed to deal with it, and so here we are. I had to push for it to come before Council and, so, yes, there are a lot of questions that need to be answered and it is a huge decision, so I understand that, yes, we need to have our due diligence, we need to answer these questions, so I will support a deferral, not until April but until March, because again, the CMHC funding and construction season, all of that will not really be contingent on three weeks or whatever. We still have several months to deal with this, but we need to get it moving ASAP, and we do have these questions that we need to have answered. So, I will support Councillor Parnell's deferral, again, not until April, but until March, if that's possible and, again, I think that all of Council can agree we will have a special meeting to deal with it as we have done tonight, and we can do, on one of the two weeks in March that we don't have a normal General Committee meeting scheduled, and we will invite PHC to come present because, again, they are the missing piece in what we've heard tonight, and the County. This is a very big decision and we're only hearing half of the story.

42. At one point, Members discussed whether the County's input should be sought. Speaking in favour of County participation, the Respondent stated, "to not have them at the table, and not have them part of this discussion, is problematic, and that's something that reflects on us, and on staff, in terms of bringing them into this conversation."<sup>15</sup>

43. Councillor Clarke and Councillor Riel, the Housing co-chairs, said they would have preferred that a decision be made that evening. The Respondent addressed their concerns directly, making clear that in her view the deferral did not reflect on their work:<sup>16</sup>

I think the deferral does not speak to what you [Councillor Riel] and Councillor Clarke have done. Indeed, this is a huge issue and Council has felt out of the loop on what has been going on, and that's not a testament to the work that you and Councillor Clarke have done. That's a bigger issue that we've been trying to deal with behind

<sup>14</sup> *Ibid.*, from 1:35:59 to 1:38:24.

<sup>15</sup> *Ibid.*, from 1:46:00 to 1:47:21.

<sup>16</sup> *Ibid.*, from 1:54:28 to 1:56:15.

the scenes, in terms of what's going on staff-wise, and with the consultants. Again, not trying to disparage everybody, but this is not to speak to anything you have done. This is a huge issue, housing is a primary issue that a lot of us have campaigned on and, so, to have all the questions answered that we have, I think, is paramount, and to make sure that we have the County and other partners in the loop on what is happening and, again, I have been out of the loop on a lot of the issues with this particular report until the last month when I pushed to be in the loop on it, so I do not blame Council for feeling that they also have many questions on it that remain to be answered. So, that has nothing to do with you [Councillor Riel] or Councillor Clarke. This is the way that politics works, and sometimes things get deferred because people need more answers. So, that is where we're at, and I take exception to the fact that we don't have faith in you, because we do but, certainly, Council needs to have all the answers to the questions that we have, to make this huge decision, not even just financially, but, again, how are we going to house people, most affordably, most effectively, in the most time-efficient manner possible.

## **POSITIONS OF THE PARTIES**

### **Complainant's Position**

44. The Complainant alleges that the Respondent used her position as Mayor to improperly influence a staff member, namely, the Complainant, and to interfere with the Complainant's duties as CAO, contrary to section 15 of the Code, which reads as follows:

15. No Member may use or attempt to further her or his authority or influence by intimidating, threatening, coercing, commanding or influencing improperly any staff member or interfering with that person's duties, including the duty to disclose improper activity.

45. The Complainant further alleges that the Respondent has engaged in a pattern of harassment contrary to section 10, paragraph c) of the Code:

#### **Conduct Respecting Others**

10. Each Member has the duty and responsibility to treat members of the public, each other Member and staff appropriately and without abuse, bullying or intimidation, and to ensure that the City's work environment is free from discrimination and Harassment. Without limitation, a Member must not:

...

c) engage in any Harassment of any other Member, any member of staff or any member of the public.

46. The Code defines "Harassment" to mean, "any comment, conduct, action or gesture that is unwelcome or that ought reasonably known to be unwelcome that could affect a person's dignity or a person's psychological or physical health."

47. The Complaint also alleges that the Respondent has failed to show respect for the City staff, contrary to section 13 of the Code:

**Conduct Respecting Staff**

13. Each Member must show respect for staff, and for their professional capacities and responsibilities.

48. The original Complaint also alleged violations of section 10, paragraph a), and section 12 of the Code but, as explain below, I exercised my discretion not to consider those provisions.

49. The Complainant submits detailed submissions to support the position that section 15, section 13, and paragraph 10 c) were contravened. I have carefully considered those submissions, but in this report I describe the submissions on retirement only generally. The Complainant points out that the authority to make employment decisions belongs to Council as a whole, not any individual member. She provides detailed reasons to support her view that the Respondent was not speaking for Council. She also refutes in detail the Respondent's arguments about transition planning.

50. On the issue of the affordable housing report, the Complainant's position is that: The Respondent inappropriately used the Administrative Staff Committee meeting, to which she was invited only as an observer, to discuss the timing of the KPMG report. The Respondent used the ASC meeting in an attempt improperly to influence the staff and other Council Members did not share the Respondent's concern about delay. The report was not delayed; the issue was complex, and it was appropriate to move cautiously.

51. Finally, the Complainant believes that the Respondent's comments on February 16: unfairly blamed the staff in general and the Complainant in particular for delay on the affordable housing file, wrongly suggested that the report sat on the Complainant's desk for a year, contradicted the Complainant on the need for County participation, and spoke disrespectfully of the local MPP and the Provincial Government.

**Respondent's Position**

52. The Respondent acknowledges that under the Ontario system of municipal governance, a Mayor is just one voice at the table:

As Mayor, I have only one vote on Council, like all my fellow Councillors, although I have a city-wide constituency and each of them was elected by an individual ward. The Act does not grant me, as Mayor, with any particular executive nor administrative authority. To pursue the platform which my constituents entrusted me to advance, I must win the support of the majority of Councillors regarding policy directions and staff regarding their implementation.

53. The Respondent made detailed submissions on the retirement issue, and I have carefully considered them. In summary, the Respondent explains that she was reflecting

a collective perspective, not merely personal opinion. She also submits that while Council is the decision-making authority, it is not inconsistent with Council's authority for a Mayor to gather information through "uncomfortable conversations". She explains that her phone call the Complainant was pursuant to Council's instruction.

54. The Respondent acknowledges frustration at what she perceived as staff delays in bringing the affordable housing report forward to Council. She characterized the statement that the report had "sat on our CAO's desk for a year" as an "infelicitous expression" that was not intended to "fix blame" on the Complainant personally. The Respondent says the CAO was mentioned as representative of the staff generally. The Respondent regrets that her wording "apparently invited this misunderstanding" but she does not regret expressing concern about delay.

55. The Respondent disagrees that anything inappropriate was said at the February 16 meeting and she relies on the online recording.

## **PROCESS FOLLOWED**

56. In operating under the Code, I follow a process that ensures fairness to both the individual bringing a Complaint (Complainant) and the Council Member responding to the Complaint (Respondent).

57. I received the Complaint on March 2. I explained the process to the Complainant, and asked her to confirm her intention to proceed. On March 5, she confirmed her intention. Consequently, March 5 is the official Complaint date.

58. That day, I issued a Notice of Inquiry, informing the parties that I was conducting an inquiry under section 223.4 of the *Municipal Act*. The Notice identified section 13, section 15, and paragraph 10 c) as the basis of the inquiry.

59. I exercised my discretion under the *Municipal Act* not to inquire into the allegation under section 12, which provides that, "No Member may maliciously or falsely injure or impugn the professional or ethical reputation of any member of staff." Even if the facts as alleged were proved, they would not, in my view, amount to a contravention of section 12.

60. I also declined to inquire into the allegation under paragraph 10 a), which refers to "indecent, abusive or insulting words or expressions." The Complaint did not identify any specific words or expressions.

61. I received the Mayor's Response on March 15.

62. I received the Complainant's Reply on March 28 and revised Reply on April 1. I shared the revised Reply with the Respondent on April 5.

63. During the interview stage of the inquiry, I invited each party to participate in an oral interview by telephone or videoconference, accompanied by legal counsel if she wished. I interviewed both parties on April 13. The Respondent was accompanied by legal counsel.

64. I issued a delegation under Part V.1 of the *Municipal Act* to Paul Burbank, a lawyer who works with me, authorizing him to interview witnesses. He interviewed Council Members and staff members during the weeks of April 19, April 26, and May 3. Some witnesses shared relevant documents with the inquiry.

65. I reviewed and relied on the recording of the February 16 General Committee meeting.

66. A portion of one allegation relates to how the Respondent treated the presenter of the KPMG report. The presenter was invited to participate in an interview but did not accept the opportunity.

## **FINDINGS OF FACT**

67. Findings of fact are based on the civil standard of the balance of probabilities. Findings appear in the Background section of this report, and also below.

68. I find that the Respondent had a mandate from Council to ascertain the Complainant's retirement plans, but that the articulation of a position on retirement timing did not reflect a Council decision.

69. I find as a fact that previous Mayors have been invited to Administrative Staff Committee meetings, though not all attended them.

70. I find that the Respondent insisted that the affordable housing report be brought forward without delay, but I also find that the Respondent only attempted to influence the timing. The Respondent made no attempt to influence the staff recommendations. While the Respondent took control of the meeting to make her points about timing, her comments were not demeaning to anyone.

71. I find that there were legitimate reasons why it took so long for the affordable housing report (KPMG report) to be presented to the General Committee. Councillor Pappas, Chair of the Finance Committee, stated that the "timeline [for the report] was frustrating but the work was excellent," and that he found the analysis reassuring given the significant sums of money involved.

72. Councillor Riel, Housing Co-Chair and a board member of Peterborough Housing Corporation, explained that the KPMG review was central to the objective of using

housing funds effectively. He said that the process was intended to “protect the City, with oversight *by* the City,” and that experts were engaged to help get the structure of the new entity right.

73. Having reviewed the recording of the February 16 General Committee meeting, I find as a fact that the Respondent spoke reasonably, respectfully, calmly, professionally, and politely.

## ISSUES AND ANALYSIS

74. I have considered the following issues:

- A. Did the Respondent contravene section 15 of the Code by using authority to influence a staff member improperly or by interfering with duties?
- B. Did the Respondent contravene section 13 of the Code by failing to show respect for the staff, including the Complainant?
- C. Did the Respondent contravene paragraph 10 c) of the Code by engaging in harassment?

### **A. DID THE RESPONDENT CONTRAVENE SECTION 15 OF THE CODE BY USING AUTHORITY TO INFLUENCE A STAFF MEMBER IMPROPERLY OR BY INTERFERING WITH DUTIES?**

75. No.

76. On the issue of the housing report, I note, as one employee witness pointed out, that the Respondent did not try to influence the recommendations or content of the staff report. Her only objective was to speed up the timing of presentation to Council. (Any reference to speed is relative, as the analysis and report had been underway for so long.)

77. In my view, section 15 of the Code, which is similar to provisions in other municipal codes of conduct, is intended to prevent a Member from attempting to affect the staff's recommendation, the staff's advice, or a staff member's exercise of job duties or of delegated decision-making on a matter. Section 15 applies to Members who use their individual influence or authority, real or perceived, to obtain or to attempt to obtain improper outcomes. Simply making the staff aware of the time sensitivity of a matter and, as in this case, ensuring that an item is brought forward so that Council can make a decision, does not constitute a misuse of influence or authority and does not constitute improper influence. In fact, ensuring that a matter is taken before Council so that Council has the opportunity to decide is the antithesis of the individual freelancing that section 15 is meant to address.

78. I also find that the Respondent's communications with the Complainant about retirement did not contravene section 15 of the Code.

79. Section 15 does not apply to Council decision-making. As both parties recognize, Council decision-making is a collective not an individual function. Here, the Respondent maintains that she was reflecting a collective perspective and not her individual opinion. The Complainant does not agree that the Respondent was acting within the scope of Council's authority. However, that is not a section 15 issue. Section 15 is about individual Council Members who improperly use their influence and authority, or attempt to do so. Section 15 is not about an individual Member who says she is acting pursuant to a closed-meeting Council mandate but happens to be wrong. If there is a disagreement about whether an individual Member has misinterpreted, misapplied, or failed to follow the closed-meeting instructions of Council, then it is for Council to clarify and confirm its instructions; the Integrity Commissioner should not be the arbiter of closed-meeting mandates.

80. As I have said, section 15 does not apply to decisions of Council. In fact, the entire Code does not apply to Council's collective decisions. The Code applies to the conduct of Members, not the exercise of Council's lawful authority. In this case, for example, the decision-making of Council, acting as the employer, is not subject to the Code of Conduct.

81. The Code also does not apply to positions that individual Members may espouse during the decision-making process. It is true that the decision of the majority constitutes the decision of Council, but being in the minority does not mean being in contravention of the Code. Council Members may take positions on how the employer (Council) should manage the employment relationship, without the Integrity Commissioner second-guessing their leadership of the municipal corporation.

82. If constructive dismissal were to occur (and I make no finding that this was the case), then it would be an employment law matter subject to employment law remedies. Constructive dismissal is not covered by the Code.

**B. DID THE RESPONDENT CONTRAVENE SECTION 13 OF THE CODE BY FAILING TO SHOW RESPECT FOR THE STAFF, INCLUDING THE COMPLAINANT?**

83. I have found as a fact that there were legitimate reasons why the affordable housing report took as long as it did. However, this fact alone does not give rise to a Code of Conduct violation.

84. As Council Members repeatedly stated during the February 16 meeting, affordable housing is a complex issue. The issues addressed by the KPMG report and the accompanying staff report were particularly complex. The Respondent never denied the complexity of the problem (in fact, she said twice, "this is a huge issue"), but her repeated comments make absolutely clear what she was attempting to accomplish. She wanted



everyone – fellow Council Members, the staff, and the Peterborough community – to focus on the urgency despite the complexity. She repeatedly said, “the most important thing is building housing units as quickly as possible and getting people into safe, affordable housing.”

85. The Respondent understands that governing is complicated and that government solutions take time. She explicitly said this on February 16. However, she wanted to make the point that the situation is urgent and there is no time to wait. As she said at one point, “housing and the housing crisis is not unique to Peterborough, but it is something that is felt every day, especially today, when it is minus 25, and we have people who have nowhere to live. So, for me, another 18 months to establish a bureaucracy is very frustrating when we have Peterborough Housing that has been doing this for years.”

86. The basis of the section 13 allegation is that, by expressing her frustration in this manner, the Respondent was disrespectful of the staff (in particular the Complainant) and was blaming the staff for affordable housing delays. In my view, that is not what the Respondent was saying, and it is not how section 13 was intended to apply. Expressing frustration because the temperature is minus 25, people have nowhere to live, and municipal government moves slowly, is not reasonably interpreted as a criticism of the municipal staff. It is a call to action, not a personal attack. I do not interpret section 13 of the Code, which requires respectful treatment of the staff, to prevent a Member from emphasizing the urgency of a crisis.

87. In summary: The Respondent was critical of perceived delay in reporting to Council. It happens that there were legitimate reasons why the report took so long. Nonetheless, the Respondent emphasized the urgency of the housing issue. She clearly seemed less concerned about the reasons for delay than the fact there was delay, and she was entitled to take that position. Section 13 was not intended to silence a Council Member from drawing attention to the housing crisis.

88. I should add that all of the Respondent’s remarks on February 16 were calm, measured, thoughtful, respectful, and professional. I have reviewed the recording (<https://tinyurl.com/3yf7fe69>) numerous times and can come to no other conclusion. Even when the Respondent said that her frustration was palpable, she spoke politely and with restraint. There is simply no basis to find that she was disrespectful on February 16, whether of the staff generally, of the Complainant, or of the presenter from KPMG.

89. The other relevant meetings, including the January 27 ASC meeting, were not recorded, though I have taken in account the evidence of witnesses who were present. I have also taken into account the Complainant’s and Respondent’s perspectives of the February 16 meeting, including whose perspective aligns more closely with the recording.

90. I find no contravention of section 13.

**C. DID THE RESPONDENT CONTRAVENE PARAGRAPH 10 C) OF THE CODE BY ENGAGING IN HARASSMENT?**

91. I will separately consider each aspect of the harassment allegation: Did the comments related to the housing report contravene paragraph 10 c)? Did the handling of the retirement issue contravene paragraph 10 c)?

92. Before doing so, I wish to clarify the meaning of “harassment.” Though the definition in the Code begins with the words, “any comment, conduct, action or gesture *that is unwelcome*” (emphasis added), it also refers to reasonable knowledge that the conduct was unwelcome. Despite the use of the word “or” between these two portions of the definition, I believe that City Council intended “harassment” to be interpreted and applied according to the meaning of that word under Ontario law. Specifically, “harassment” has both a subjective element and an objective element. The conduct must be unwelcome to the complainant (subjective) and the respondent must know or ought reasonably to know the conduct was unwelcome (objective).<sup>17</sup> In my view, this is what the Code of Conduct definition means.<sup>18</sup>

93. The Respondent’s comments in relation to the affordable housing report (see paragraphs 73 and 88, above) did not constitute harassment of anyone. The comments also did not constitute any of the other acts prohibited by section 10 of the Code, namely abuse, bullying and intimidation.

94. I now turn to the handling of the retirement issue. As previously mentioned, the positions advocated by individual Council Members when Council, as employer, collectively makes decisions, should not be reviewed by the Integrity Commissioner. The fact that the majority makes a particular employment decision does not mean that those in the minority (who might have favoured a different employment decision) contravened the Code of Conduct. The significance of that principle, in this particular case, is that the Respondent’s employment-related deliberations with other Council Members are not subject to the Code.

95. Further, Council’s exercise of functions as an employer is not within an Integrity Commissioner’s jurisdiction. If the Respondent, when she spoke to the Complainant, had been representing the position of Council or acting on behalf of Council, then what transpired would have been an employment matter for which remedies, if any, would be available under employment law.

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<sup>17</sup> *Wozniak v. Oxford Mini Mart & Tip Top Cleaners*, 2021 HRTO 216 (CanLII), at para. 44.

<sup>18</sup> The definition in the Code only makes sense if the first portion is understood to imply respondent knowledge. The definition reads: “any comment, conduct, action or gesture that is unwelcome or that ought reasonably known to be unwelcome that could affect a person’s dignity or a person’s psychological or physical health.” The reference in the second portion to conduct that *ought reasonably to be known* to be unwelcome only makes sense if the first portion refers to conduct that is [known to be] unwelcome. The words in square brackets are necessarily implied.

96. The Respondent did have a mandate to ascertain the Complainant's retirement plans. Her execution of that Council mandate was an employment matter not subject to the Code or to Integrity Commissioner review.

97. The articulation of a position on retirement timing (earlier versus later) was the aspect of the Respondent's comments to the Complainant that did not reflect a Council decision. In my view, however, the communication is closely connected to Council's role as employer. If there was a misunderstanding, uncertainty or disagreement about the closed-meeting mandate that Council, as employer, gave to the Respondent, then it lies within Council's proper authority to resolve the matter. In fact, this is precisely what Council did on February 22. The issue of Council's position on the employment matter was resolved by Council.

98. In any event, all that I can do, as Integrity Commissioner, is to draw matters to Council's attention and to make recommendations for action. Anything that I might draw to Council's attention was already noted by Council, and addressed, on February 22.

## RECOMMENDATIONS

99. My role under the *Municipal Act* is to report findings on whether the Code of Conduct has been contravened. I find no contravention.

100. I recommend that Council receive this report.

101. I recognize that Integrity Commissioners in some other municipalities include in their inquiry reports advice and coaching on how Councils should handle interpersonal issues and manage their relations with the senior staff. Despite how others might interpret the *Municipal Act*, I do not believe that this is the role of an Integrity Commissioner in an inquiry. Obviously, in the course of this inquiry I have become aware, as Council is already aware, that the Mayor and CAO have not communicated one-on-one since February. Out of respect for the boundaries of my role, I make no findings or recommendations on that matter, not because it is unimportant, but because it would be inappropriate for me to overstep my jurisdiction.

## CONTENT

102. Subsection 223.6 (2) of the *Municipal Act* states that I may disclose in this report such matters as in my opinion are necessary for the purposes of the report. All the content of this report is, in my opinion, necessary.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Guy Giorno". The signature is fluid and cursive, with a prominent initial "G" and a long, sweeping tail.

Guy Giorno  
Integrity Commissioner  
City of Peterborough

July 6, 2021