
CITY OF OSHAWA INTEGRITY COMMISSIONER, GUY GIORNO

Citation: Gobin v. Nicholson, 2020 ONMIC 13

Date: November 30, 2020

REPORT ON COMPLAINT

TABLE OF CONTENTS

The Complaint..... 3

Summary..... 3

Background..... 4

Positions of the Parties..... 7

 Preliminary Issue 7

 Complainant’s Position 8

 Respondent’s Position..... 9

 Reply and Sur-reply 9

Process Followed..... 10

Findings of Fact..... 11

Issues and Analysis..... 12

 A. Preliminary Issue: Should the Complaint be dismissed because it was based on partial information in a social media post?..... 12

 B. Does section 15 of the Code of Conduct cover political interference in the independence of municipal law enforcement? 12

 C. Did Councillor Nicholson contravene section 15 of the Code of Conduct? 16

 D. Did the contravention of section 15 result from an error of judgment made in good faith?..... 20

Recommendations 21

Content..... 22

THE COMPLAINT

1. Mr. Marty Gobin (Complainant) alleges that Councillor Brian Nicholson (Respondent) contravened sections 13 and 15 of the Code of Conduct for Members of the Council of The Corporation of the City of Oshawa and the Board of Management of the Oshawa Central Business District Improvement Area, Consolidated By-law 51-2015, by attempting to interfere with the independence of the City's municipal law enforcement officers.

2. I decided to inquire only into the allegation under section 15 of the Code of Conduct. In my view, section 13 does not apply to the facts alleged in the Complaint.

3. The Complaint involves a current political and community issue within the City of Oshawa. As Integrity Commissioner, I have no business inserting myself into that issue. I am not commenting on the outreach mission of LIFE Community Project, on homelessness, on strategies to support those in need, on the use of municipal parks, or any related matter. This report must not be interpreted as commentary on these topics. It only addresses whether Councillor Nicholson interfered with the independence of municipal law enforcement, contrary to the Code of Conduct

SUMMARY

4. I find that the Respondent's communication contravened section 15 of the Code of Conduct (Conduct Respecting Staff). The basis for my finding is the well-established principle that politicians must not interfere in the independence of law enforcement.

5. I arrive at this conclusion based a fair and reasonable reading of the Respondent's own words, in the context of Canadian law upholding the independence of law enforcement from political interference.

6. Councillor Nicholson acknowledges the findings in this report, and he apologizes. He was motivated by the desire to secure the continued provision of food and necessities to the homeless and people living in extreme poverty. Despite the gravity of interference in the independence of law enforcement, I find that the contravention resulted from an error of judgment made in good faith.

7. I recommend that Council accept this report. I also recommend that Council assess the need for training or refresher training for Members on the essential separation between Council Members and municipal law enforcement officers.

BACKGROUND

8. Oshawa is home to more unsheltered homeless people than anywhere else in Durham Region. By one account, some three-quarters of the Region's unsheltered homeless live in Oshawa.¹ Large numbers of the homeless are children and youth, and individuals who identify as Indigenous or having Indigenous ancestry are significantly over-represented among the homeless.²

9. The LIFE Community Project describes its mission as, "Providing free clothing/necessities/food for those most in need!" Its communications add the explanation, "No one should have to go without these necessities of life."

10. LIFE stands for "Life Is For Everyone." The LIFE Community Project is not a registered charity nor even a legal entity. It is an unincorporated group of volunteers active in the community. In the group's own words, "we are just individuals that believe in showing love & compassion for all!"

11. Since March 17, around the time of the provincial declaration of emergency arising from the COVID-19 pandemic, LIFE volunteers have provided sandwiches and snacks to needy residents of Oshawa. I have not verified the numbers (nor is the exact count relevant to the issues in this report), but social media posts suggest that 200 sandwiches are made and distributed each day.

12. This would mean that, as of the date of this report, more than 51,000 sandwiches have been distributed during 258 days of volunteer outreach to the homeless and people living in extreme poverty. LIFE also provides clothing and necessities such as toiletries. It also currently provides free breakfasts.

13. The LIFE Community Projects relies not just on the active contribution of volunteers, but also the support of donors who provide food, toiletries, *etc.*

14. Memorial Park is a City park. It is located downtown, on Simcoe Street South, between Metcalfe Street and John Street West.

15. As its name suggests, Memorial Park is home to the Cenotaph that honours members of the community who lost their lives in service to Canada. Since it was unveiled November 11, 1924, the Cenotaph has listed the names of 138 Oshawa

¹ Community Development Council Durham and Durham Mental Health Services, Durham 2017 PiT Count Report (June 2017).

² *Ibid.* Persons who identify as Indigenous or of Indigenous ancestry make up a percentage of the homeless population 17 times greater than their representation among the general population of the Region.

residents killed in what was then known as the Great War. Later, plaques were added to commemorate those who fell during World War II and who served in Korea.³

16. An inscription on the Cenotaph names the place, “The Garden of the Unforgotten.” It further reads:

DEDICATED TO
THE HONOURED MEMORY OF
THE MEN OF OSHAWA
WHO GAVE ALL THAT
MAN CAN GIVE, LIFE ITSELF
IN THE GREAT WARS

1914 - 1918
1939 - 1945
1950 KOREA 1953

KNOW YE WHO PASS THIS WAY
THAT THOUGH WE FELL
AND OTHER LANDS NOW CLAIM OUR DUST
WE SLEEP CONTENT

17. Memorial Park is where, starting in approximately 2015, volunteers associated with the LIFE Community Project distributed free sandwiches and snacks, weekly on Sunday, to residents in need.

18. As mentioned, since the onset of the pandemic, this outreach and support are now provided daily, in the same location.

19. The use of Memorial Park has become the subject of considerable attention, discussion, activity, law enforcement issues, City decision making, and news media coverage, none of which fall within an Integrity Commissioner’s jurisdiction. It would be inappropriate for me to comment on them. This report addresses only the Code of Conduct issue.

20. On August 31, at 7:04 p.m., a co-founder of LIFE Community Project posted the following message⁴ on Facebook:

I am an individual that was told today that I can no longer provide free food for those most in need, that I can no longer help those most in need in a public space of my choosing! There are those that feel that love & compassion should be practiced in a hidden far away place!

Tomorrow I will be at Memorial Park in Oshawa like I have been, if laws are not just or abused we must do the right thing. We must make a stand St draw the line in the sand! I will continue to practice love & compassion for all!

³ Canada, Department of Veterans Affairs, Canadian Military Memorials Database, online: <https://www.veterans.gc.ca/eng/remembrance/memorials/national-inventory-canadian-memorials/details/5571>

⁴ At the time of this report, the post remains available online: <https://www.facebook.com/TheArcherRedHeart/posts/10157991053926379>

Why not join me tomorrow between 1-3 pm, we are continuing each day to provide free food for those most in need between 1-3 pm at Memorial Park!

LIFE - Love Is For Everyone

21. Another individual saw this post, drew it to the attention of Councillor Nicholson, and then reported on Facebook: "I shared this to Oshawa Councillor Brian Nicholson!"

22. Councillor Nicholson sent a message to the City staff, and shared it with the individual, who then posted the following⁵ on Facebook:

I copied this from my note to Brian Nicholson. This is his reply!! He is trying to help!!

Brian Nicholson I have sent the following to the City >>>

I am writing to you on a matter of some concern.

I have been informed by representatives of the LIFE (Love Is For Everyone) group which has been supplying food to those in need that they were approached by a bylaw enforcement officer who instructed them that they are no longer allowed to distribute food in Memorial Park. They indicated that the Bylaw officer stated that the orders came from their supervisor and were at the direction of the City.

I am writing to you to determine if this action as described is accurate and have we as a city decided to remove LIFE from Memorial Park. If not, can I get a clear statement that LIFE may continue to provide free food to those in need as long as they meet all reasonable regulations regarding health, safety etc.

If it is true, can you provide me with the rationale and authority to remove this operation and with the names of the staff or elected official who initiated this course of action?

As a member of Council who supports this group and their efforts, and who was not consulted in any way with this decision, I would like to be informed as to why, who and how this occurred.

I would also like to officially request that any actions to remove this group from Memorial Park be put on hold until a full report is presented to members of Council and we as the elected Council have had the opportunity to debate and decide on any further course of action.

The last thing we need as a City is to act precipitously and give our community a black eye on this issue.

As I am told that the group intends to be at the park tomorrow, a prompt answer would be appreciated.

Thank you

Councillor Brian N

⁵ This comment is also available online:
https://www.facebook.com/TheArcherRedHeart/posts/10157991053926379?comment_id=10157991342201379

23. During the inquiry I received and reviewed the entire August 31 email of Councillor Nicholson. The subject line was “Memorial Park.” It was sent to Brenda Jeffs, Director, Municipal Law Enforcement and Licensing Services, and to Chief Administrative Officer Paul Ralph,⁶ with a copy sent to Mayor Dan Carter.

24. The only portions of the email that had not been posted on Facebook were an introductory paragraph (“Hello Brenda, I hope you have had a good summer.”) and the full name and title of the sender (“Councillor Brian Nicholson [new line] Ward 5 Oshawa”)

25. The City’s Director, Municipal Law Enforcement and Licensing Services, responded the next day, September 1:

Good morning Councillor Nicholson

[sentence containing irrelevant personal information of sender and recipient omitted]

Municipal Law Enforcement began working with [co-founder of LIFE], as well as other organizations operating out of the park, in early July as the City has been receiving complaints about these daily food distribution events and the corresponding impact to Memorial Park. Complaints range from debris, smoking, drug use, loitering for long periods, fights and altercations, lack of social distancing, lack of permit and the general inability of others to comfortably use the park and access the sidewalk.

We understand your concerns and will be discussing today and hope to have more information by the end of the day.

Brenda Jeffs, Director, Municipal Law Enforcement and Licensing Services | City of Oshawa

POSITIONS OF THE PARTIES

PRELIMINARY ISSUE

26. Councillor Nicholson notes that the email’s opening line, “Hello Brenda, I hope you have had a good summer,” was omitted from the Complaint. Mr. Gobin states that the Complaint is based on the Facebook post and he did not have access to the entire email. Councillor Nicholson takes issue with the fact that Mr. Gobin “is relying on a partial submission of information on a social media site provided by another unidentified person. This fact alone would appear to be sufficient grounds to dismiss his application.”

⁶ I note for completeness that the email addresses of both Ms Jeffs and Mr. Ralph appeared in the “To” line of the email, even though the body of the email suggests the correspondence was directed to Ms Jeffs.

COMPLAINANT'S POSITION

27. The Complainant alleges that the Respondent's email contains a series of requests, demands and declarations that contravene the Code of Conduct.

28. The Complainant draws particular attention to the portions of Councillor Nicholson's email that:

- Requested the names of staff members who made the decision to enforce the City's by-laws against LIFE.
- Demanded that the City staff provide a rationale directly to a sitting Oshawa City Councillor explaining the reason for exercising the discretion to enforce the City's by-laws.
- "Officially" requested "that any actions to remove this group from Memorial Park be put on hold until a full report is presented to members of Council and we as the elected Council have had the opportunity to debate and decide on any further course of action."

29. According to the Complainant, the email contravenes both section 13 and section 15 of the Code of Conduct. Section 13 provides that each Member must show respect for the staff, and for staff members' professional capacities and responsibilities. (I have informed both parties that this section is not relevant to the inquiry.) Section 15 reads as follows:

No Member shall 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.

30. The Complainant cites *Greatrix v. Williams*, 2018 ONMIC 6, at paras. 132-142, as support for the proposition that the independence of law enforcement officers underpins the rule of law, and that a law enforcement officer cannot be subject to political direction in deciding whether to lay a charge or whom to charge with an offence.

31. According to the Complainant, the Respondent's request for individual staff members' names was improper. If Councillor Nicholson were only interested in a general policy debate at a Council meeting, then the names would be irrelevant. The Complaint feels that asking for names amounts to intimidation and an attempt to influence improperly.

32. Also improper, the Complainant argues, was the request for "the rationale and authority" to remove LIFE from the park. The Complainant refers to statements that enforcement action would be taken starting September 1. In his view, Councillor Nicholson was effectively asking law enforcement officials to explain the decision to lay a charge or to issue an administrative penalty notice.

33. Finally, the Complainant objects to Councillor Nicholson “officially” requesting that law enforcement activities cease until City Council was able to debate and to decide on the matter. He states that Councillor Nicholson, as one of eleven Council Members, does not possess the authority to speak for Council or to give direction to staff on behalf of Council. He adds that it would nevertheless be outside the jurisdiction of City Council to instruct law enforcement officers on whether or not to undertake enforcement action against specific individuals.

RESPONDENT’S POSITION

34. Councillor Nicholson submits that at no time did he give any direction to the staff or seek to coerce the staff into any decision. He acknowledges that an individual Council Member “has no authority to direct staff to undertake any action.”

35. Instead, he says that his communications were consistent with his role as a Council Member in that he “raised some inquiries that [he] felt were relevant and sought information as to the status of the issue raised to [him].” He submits that Council Members have a “duty and obligation” under the *Municipal Act* to exercise an “oversight responsibility” and make inquiries when they are concerned with actions taken by the staff.

36. Councillor Nicholson notes that the tone of his email to the Director, Municipal Law Enforcement and Licensing Services, was cordial, as was the tone of her reply.

REPLY AND SUR-REPLY

37. In Reply, Mr. Gobin agrees that a Council Member lacks the authority to direct the staff to undertake any action, but disagrees with Councillor Nicholson’s claim that he never gave any direction. He states that the phrasing of the email indicates a clear intent to influence using his office by using the phrase “officially request.” The Complainant then reiterates that Councillor Nicholson’s use of influence was improper because individual Councillors are not supposed to attempt to influence the actions of law enforcement officers.

38. Mr. Gobin rejects the Councillor’s assertion that he and other individual Council Members have a duty under the *Municipal Act* to make inquiries regarding issues that are raised with them, noting that no such duty exists under the *Act*.

39. The Complainant argues that the cordial tone of a communication but that is irrelevant to whether it attempted to influence the action of the City staff and whether the attempt to influence was improper.

40. The Respondent’s sur-reply sets out his position on the allegation with law enforcement. Councillor Nicholson believes there is no evidence of interference with the

actions of law enforcement officers because he was never in contact with “any of the law enforcement officers who were involved in the file.” He says the Director, Municipal Law Enforcement and Licensing Services, was not the investigative officer and had no carriage of the file.

41. Councillor Nicholson states the following:

Ms Jeffs is the Director of the Municipal Law Enforcement and Licensing Department and is the appropriate person to which a Council member shall make all enquiries regarding the department. She is so designated so as to prevent any contact with those who are actively involved in investigation. It is entirely appropriate to contact the Manager when a member of Council has questions regarding interpretations of bylaws or administrative decisions. It is also appropriate to enquire as to who initiated the course of action as it could provide an opportunity to better understand the rationale behind the investigation. As indicated in my email to Ms Jeffs I requested that she consider delaying further action until a full report could be provided to City Council as a body. The decision to do so or not is solely at her discretion.

42. His sur-reply also addresses the Complainant’s emphasis on the phrase “officially request” and argues that the entire Complaint is based on Mr. Gobin’s interpretation of that phrase. Councillor Nicholson uses dictionary definitions of the terms “officially” and “request” in order to demonstrate that he was politely requesting information, not demanding for any type of remedial action. As noted above, he believes that his email was merely a request that the Director, Municipal Law Enforcement and Licensing Services, consider delaying further action until a full report could be provided to Council.

PROCESS FOLLOWED

43. In operating under the Code, I follow a process that ensures fairness to both the individual bringing a Complaint and the Council Member responding to the Complaint. This process is based on the Code of Conduct Complaint Procedure that was adopted by Council.

44. The Complaint was submitted on September 1. I issued a Notice of Inquiry on September 14 and Councillor Nicholson submitted his Response on the same day. The Complainant replied on October 22. The Respondent provided a sur-reply on November 2.

45. The Notice of Inquiry informed the parties that the inquiry would proceed only under section 15 of the Code of Conduct. It stated that I would not investigate or inquire into the allegation under section 13, which provides that, “Each member shall show respect for staff, and for their professional capacities and responsibilities.” Based on the facts alleged in the Complaint, section 15 was and is the applicable provision. In my view, section 13 is intended to mean something different than section 15.

46. I am mindful of the fact that the financial impact of code of conduct complaints and integrity commissioner investigations falls entirely on the municipal tax base. Integrity commissioners and codes of conduct have been mandated by the Province without any corresponding provincial funding. Consequently, I conduct a full and fair process that at the same time is efficient and reasonable taking into account the circumstances of each case.

47. The Complaint is based on single email, that Councillor Nicholson has shared with me and acknowledges sending. Apart from the email, no other actions of Councillor Nicholson are alleged to have contravened the Code of Conduct.

48. I have, therefore, confined the inquiry and this report to the August 31 email, which speaks for itself. I have not expanded the inquiry to encompass the reactions and perceptions of other individuals, as these are irrelevant to the allegation. The evidence before me, and the very thorough submissions of the parties, are sufficient for me to report on the allegation.

49. Each party had the opportunity to make two written submissions to me and comment on the other party's submissions in this proceeding.

50. Before reporting to Council, I sent Councillor Nicholson a draft of this report, including preliminary findings but excluding the recommendation, and invited him to comment. I explained that the findings were preliminary pending his submissions, which I would take into account.

51. I received comments from Councillor Nicholson which I have taken into account.

FINDINGS OF FACT

52. The facts are set out in the Background section of this report.

53. Councillor Nicholson emailed the Director, Municipal Law Enforcement and Licensing Services, on August 31. The text of email (including the opening line "Hello Brenda, I hope you have had a good summer") is presented above.

ISSUES AND ANALYSIS

54. I have considered the following issues:
- A. Preliminary Issue: Should the Complaint be dismissed because it was based on partial information in a social media post?
 - B. Does section 15 of the Code of Conduct cover political interference in the independence of municipal law enforcement?
 - C. Did Councillor Nicholson contravene section 15 of the Code of Conduct?
 - D. If Councillor Nicholson contravened the Code of Conduct, did the contravention result from an error of judgment made in good faith?

A. Preliminary Issue: Should the Complaint be dismissed because it was based on partial information in a social media post?

55. No.

56. The Respondent submits that the Complaint constitutes a “partial submission of information from a social media site provided by another unidentified person.” He says this fact alone is sufficient grounds to dismiss the application.

57. I disagree.

58. First, I note that the Complaint includes copies or screen captures of the relevant Facebook posts, including the names of the individuals who posted. No one is an “unidentified person.”

59. Second, fairness requires that a Respondent have sufficient notice of the case against him to be able to respond meaningfully: *Michael Di Biase v City of Vaughan*, 2016 ONSC 5620 (CanLII), at paras. 138-139. Councillor Nicholson knows what was alleged. He has received, and he has exercised, the right of meaningful response.

B. Does section 15 of the Code of Conduct cover political interference in the independence of municipal law enforcement?

60. Yes, section 15 prohibits political interference in the independence of municipal law enforcement.

61. Also, the Director, Municipal Law Enforcement and Licensing Services is an “Officer” under the City’s Enforcement By-law and is included among the law enforcement officials protected from political interference.

62. Section 15 broadly covers the attempt to influence improperly any staff member or to interfere with that staff member's duties. Since municipal law enforcement officers are staff members, and law enforcement is their duty, it is obvious that section 15 protects municipal law enforcement officers, just as it protects the rest of the staff, from attempted influence and attempted interference.

63. This interpretation of section 15 is bolstered by the fundamental legal principle that the independence of law enforcement must be free from political inference, and by the City's Enforcement By-law, By-law 92-2014,⁷ which expressly protects municipal law enforcement officers from such interference.

64. The legal principles are summarized in *Greatrix v Williams*, 2018 ONMIC 6, and *Re Partner*, 2018 ONMIC 16.

65. Section 15 of the *Police Services Act* provides that a municipal council may appoint persons to enforce the by-laws of the municipality, and that municipal law enforcement officers are peace officers for the purpose of enforcing municipal by-laws.⁸ While in the discharge of their duties, they are provincial offences officers.⁹

66. The jobs of law enforcement officers involve discretion. While law enforcement officers have a duty to enforce the law, they also have a duty to exercise their discretion, including the discretion to write or not to write a ticket, or to pursue or not to continue an investigation.¹⁰ Police discretion (or, in this case, the discretion of municipal by-law officers) is not absolute,¹¹ but nonetheless is an essential element of the justice system.¹²

67. The independence of law enforcement officers underpins the rule of law.¹³ Independence means that a law enforcement officer cannot be subject to political direction in deciding whether to lay a charge or whom to charge with an offence.¹⁴

68. The connection between municipal law enforcement officers' discretion and their independence from Council Members was explained in this manner in a staff report to Toronto City Council:

⁷ City of Oshawa, By-law 92-2014, Being a by-law to establish a transparent, consistent, fair, unbiased, and effective process for the enforcement and prosecution of alleged contraventions of municipal standards.

⁸ *Police Services Act*, R.S.O. 1990, c. P.15, s.15.

⁹ *Provincial Offences Act*, R.S.O. 1990, c. P.33, subs. 1(1), definition "provincial offences officers," clause (d).

¹⁰ *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190 at para. 37.

¹¹ *Ibid.*, at para. 38.

¹² *Ibid.*, at paras. 51, 86.

¹³ *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 29.

¹⁴ *Ibid.*, at para. 33

Once officers determine the permitted tools, they use their discretion to determine the tool that will achieve compliance most effectively. Officers consider the seriousness of the violation, the impact of the violation on public safety, the likelihood of the person to repeat the violation, and the impact of the enforcement activity on business and community in Toronto. The decision to take enforcement action must be free from bias and political interference.¹⁵ [emphasis added]

69. This specific issue was considered at great length by the British Columbia Ombudsperson, whose observations (in a 2016 special report) represent the most detailed review of the independence of municipal law enforcement officers in a Canadian context:

... council establishes overall priorities for enforcement, enacts bylaws, and adopts bylaw enforcement policies and standards of conduct for bylaw enforcement staff. Council may also provide direction on types of bylaw enforcement issues. For example, council may direct its enforcement staff to prioritize enforcement of certain bylaws, or to issue warnings rather than tickets for specific categories of violations.

Within this framework, everyday enforcement decisions are delegated to staff. Defining and maintaining separation between council and front-line enforcement staff is essential to an administratively fair bylaw enforcement system. It is important for council members to be aware of how their own actions can affect the fairness of an enforcement process. This means that while council sets policy and provides general direction on enforcement priorities, its individual members should not become directly involved in enforcement action by directing enforcement against specific residents, groups or businesses, or by directing that enforcement action not occur in a particular circumstance. Rather, individual enforcement decisions should be made by delegated bylaw enforcement staff or contractors.

It can be difficult for council members to remain a step removed from the day-to-day enforcement process when they are a main point of contact for members of the public who have complaints or who have been the subject of enforcement. It is understandable that council members want to be responsive to the concerns of those who elected them. In such situations, it is certainly appropriate for a member of council to seek assurance that bylaw enforcement staff have fairly responded to a person's concerns.

However, even if motivated by good intentions, council members should not advocate either publicly or privately for a particular result in a specific case. Doing so can create the appearance of bias, particularly if council later hears an appeal on the same matter after bylaw enforcement action is taken. Moreover, any action by a council member that is motivated by favouritism or personal animosity toward an individual may be perceived as an improper use of discretion. Each member of council should strive to remain uninvolved in a specific bylaw enforcement decision unless and until the matter is put on the agenda for the entire council to consider.¹⁶ [emphasis added]

¹⁵ City of Toronto, Executive Director, Municipal Licensing and Standards, "Tools Available to Municipal Licensing and Standards for Enforcement" (September 7, 2016), at 3.

¹⁶ British Columbia, Office of the Ombudsperson, "Bylaw Enforcement: Best Practices for Local Governments" (March 2016), Special Report No. 36, at 15-16.

70. In the City of Oshawa, these legal principles have been codified in the Enforcement By-law. The Preamble to the Enforcement By-law recognizes that:

Council considers it appropriate to ensure the proper administration of justice, to respect the roles of Council members, complainants, staff investigators and prosecutors in the administration, enforcement and prosecution of alleged contraventions of municipal bylaws and other applicable provincial legislation, and to ensure that such investigations and prosecutions occur in a fair and unbiased way, free from any improper influence or interference.¹⁷
[emphasis added]

71. The Director, Municipal Law Enforcement and Licensing Services, is defined as an “Officer” under the Enforcement By-law.¹⁸

72. Under section 2 of the Enforcement By-law, an individual Council Member may only make a complaint to the City regarding alleged contraventions of by-laws. An individual Council Member may also be summoned to testify in the prosecution of an alleged contravention.

73. According to the Enforcement By-law, the only roles of Council as a whole are: to make, amend and repeal by-laws; to set the budget and policies for municipal law enforcement; and “at meetings of Council or of one its Standing Committees, [to] ask questions of, and [to] receive information from, the Director on general questions relating to the enforcement of Municipal Standards.”¹⁹ [emphasis added]

74. Section 4 of the Enforcement By-law confirms the broad discretion possessed by municipal law enforcement officers. Without limiting the full range of options available to officers, I note that they may receive complaints, screen complaints, and undertake investigations. They may conclude an investigation on the basis that there is insufficient evidence to proceed with enforcement, that the matter has been brought into compliance, that the complaint is trivial, frivolous, vexatious or made in bad faith, or that the matter should be enforced. Enforcement tools include requests, administrative orders, municipal remedial work, administrative penalty, *Provincial Offences Act* Part I or Part II proceedings, *Provincial Offences Act* Part III prosecutions, and seeking relief by way of action or application in the Superior Court of Justice.

75. Officers are subject to the directions of the Director, Municipal Law Enforcement and Licensing Services.²⁰ On a case-by-case basis, all investigations and enforcement are subject to any directions of the Director.²¹ This is significant. Not only is the Director herself defined as an Officer, she has the authority to give direction in any investigation

¹⁷ By-law 92-2014, Preamble, para. 5.

¹⁸ *Ibid.*, para. 1.4(c) and para. 1.6(a).

¹⁹ *Ibid.*, section 3.

²⁰ *Ibid.*, section 4.

²¹ *Ibid.*, section 6.

or enforcement matter. Contrary to Councillor Nicholson's argument, channeling the attempt to influence through the Director does not insulate a Council Member from a finding of interference in the law enforcement process. On the contrary, attempting to influence the Director is interference with the senior municipal law enforcement officer who possesses authority in every individual case.

76. Section 6 of the Enforcement By-law confirms that all investigations and enforcement must be undertaken "independently of political or other external influences."

77. The Enforcement By-law further provides that:

11. Each Officer who is contacted by a member of Council with respect to an outstanding complaint or investigation matter, other than a complaint made by or against the Council member or in which the Council member is a witness, shall immediately disclose such contact to the Officer's Director.
12. Each Director shall disclose to the City Solicitor the particulars of each report provided to the Director pursuant to sections 10 and 11. The City Solicitor may report the particulars to Council.

78. I repeat that the By-law defines the Director, Municipal Law Enforcement and Licensing Services, as an Officer. Contact by an individual Council Member with any Officer, about an individual case, is considered so significant that it must be reported up to the City Solicitor and possibly to Council.

79. Any steps under sections 11 and 12 of the Enforcement By-law that might have been triggered by Councillor Nicholson's email have no bearing on this Code of Conduct inquiry.²² It is not my place to administer the Enforcement By-law. I have considered the Enforcement By-law only in the course of interpreting and applying section 15 of the Code of Conduct. In my view, section 15 clearly covers the attempt to influence or to interfere in a particular law enforcement case.

C. Did Councillor Nicholson contravene section 15 of the Code of Conduct?

80. Yes. I find that August 31 email constituted the use of authority and influence as a Council Member, in an attempt to influence improperly, and in an attempt to interfere with the duties of, the municipal law enforcement officers.

81. Councillor Nicholson was writing as a Council Member, and he used the word "officially." It is clear that the email represented the use of the authority and influence that he possessed as a Council Member.

²² I note that the Chief Administrative Officer received Councillor Nicholson's original email.

82. Councillor Nicholson seems to disagree that he was acting in an official capacity. He cites dictionary definitions to support the explanation that one can use the word “officially” without using the influence of one’s official capacity.

83. Having considered everything Councillor Nicholson says on this point, I find that he was clearly emailing as a Council Member and not in a personal capacity. (This not the case where a Council Member is the subject of an investigation, for example in relation to a property standard affecting a Council Member’s property, or where a Council Member is being interviewed or testifying as a witness to an incident.) Including the Mayor and CAO on the email, use of the City’s email account, use of his title, the familiar tone with which he addressed the Director: all are indicia of a communication sent in his capacity as a Council Member.

84. The content of the email is unambiguously written in the capacity of a Council Member. Councillor Nicholson writes, “we as a city ... As a member of Council ... we as the elected Council ... The last thing we need as a City ...” The email makes a specific request to defer action pending Council consideration.

85. In summary, I find that the email unquestionably employs the authority and influence of the author’s position as a Council Member.

86. The next consideration is whether the Respondent’s authority and influence were used in an attempt to influence improperly, and to interfere with the duties of, the municipal law enforcement officers.

87. Councillor Nicholson submits that he was merely asking questions, and not attempting to influence action. As I explain below, I find that Councillor Nicholson was, in part, seeking to influence action. I also find that many of his questions, by themselves, constituted interference in law enforcement.

88. The email asked for “any actions to remove this group from Memorial Park be put on hold until a full report is presented to members of Council ...” Asking a municipal law enforcement officer to put enforcement action “on hold” was an attempt to influence enforcement in an individual case. The attempt to influence enforcement action in an individual case is always improper, and contrary to section 15.

89. The email stated, “The last thing we need as a City is to act precipitously and give our community a black eye on this issue.” This was clearly an attempt to influence enforcement action (that is, not to have action occur “precipitously”) in an individual case. This was improper, and contrary to section 15.

90. Further, the email asked questions that were improper and interfered in law enforcement.

91. I consider first the sentence, “If not, can I get a clear statement that LIFE may continue to provide free food to those in need as long as they meet all reasonable regulations regarding health, safety etc.” I find that this was not really a question in the sense of a request for information. Instead, I find that this sentence advocated a particular enforcement outcome in a particular case: namely, that the LIFE Community Project be allowed to continue to provide food to those in need. I expressly refrain from commenting on the importance of LIFE’s work or on the use of Memorial Park. I simply observe that this sentence sought to influence the outcome of a particular law enforcement matter and was, therefore, contrary to section 15.

92. The email then asked for, “the rationale and authority to remove this operation and .. the names of the staff or elected official who initiated this course of action.” It continued, “I would like to be informed as to why, who and how this occurred.” These two sentences were requests for information, and not requests for action. However, I find that the requests for information were improper and constituted interference with law enforcement.

93. The absence of political interference in municipal enforcement means that Council members must not interfere. Asking the justification for the exercise of discretion in a particular case constitutes interference. Asking who exercised discretion in a particular case constitutes interference.

94. Municipal law enforcement officers are never answerable to an individual Council Member. Municipal law enforcement officers are certainly not answerable to an individual Council Member for how they exercise discretion in a particular case. The request, “I would like to be informed as to why, who and how this occurred” was improper, constituted political interference, and was contrary to section 15.

95. I draw attention to the full sentence in those words appear.

As a member of Council who supports this group and their efforts, and who was not consulted in any way with this decision, I would like to be informed as to why, who and how this occurred.

96. The reference to support for LIFE, in an individual law enforcement case, is problematic. Municipal law enforcement must be independent of political interference. It should be irrelevant whether a politician supports or does not support the person or entity that is the subject of the law enforcement action.

97. The words, “who was not consulted in any way with this decision,” are also concerning. It would be improper to involve a politician in deciding on law enforcement action in an individual case, and a Council Member should not expect to be consulted.

98. This report is based on the email of Councillor Nicholson. In reviewing such a communication, it is important to be reasonable and fair in considering the gist of the

Council Member's message, without placing undue emphasis on a particular word. As was noted in *Greatrix v. Williams*, at paragraph 164:

It is important to remember that Council Members, when they send emails, use the language of ordinary people and not of legal drafters or judges. It would be inappropriate, therefore, to pick apart the wording of a Council Member's email as if it were a legal contract or a judicial decision.

99. I have considered the Respondent's email based on this fair and reasonable standard, considering the gist of his message and not placing undue emphasis on any particular word. I cannot arrive at any conclusion other than that the email was written in the capacity of a Council Member and attempted to influence improperly, and interfere in the duties of, the municipal law enforcement staff.

100. I have considered the Respondent's explanation for contacting the Director, Municipal Law Enforcement and Licensing Services. The explanation does not alter my finding that section 15 was contravened.

101. He states that the Director "is the appropriate person to which a Council member shall make all enquiries regarding the department." This may be true as a general matter, but inquiries that interfere with individual law enforcement cases are simply impermissible, regardless of which law enforcement officer (I repeat, again, that the Director is one of the officers) is contacted.

102. He refers to "questions regarding interpretations of bylaws or administrative decisions." Law enforcement actions in individual cases are not merely "administrative decisions." They are independent exercises of discretion that must be protected from political interference. Intervening in an individual case cannot be explained away as asking questions about an administrative decision.

103. He states, "It is also appropriate to enquire as to who initiated the course of action as it could provide an opportunity to better understand the rationale behind the investigation." [emphasis added] With great respect, I disagree strongly with the underlined words. An individual Council Member has no need to understand the rationale for a particular law enforcement investigation, or a particular step in an investigation, and no right to ask for an explanation.

104. He notes that he does not possess the authority to direct the Director. Lack of actual authority does not negate an attempt to influence and to interfere.

D. Did the contravention of section 15 result from an error of judgment made in good faith?

105. According to the Complaint Procedure:

If upon completion of the investigation, the Integrity Commissioner finds that ... the contravention committed was trivial or committed through inadvertence or an error of judgment made in good faith, the Integrity Commissioner shall set this out in its report to Council.

106. I am therefore required to include in my report whether the contravention of section 15 resulted from an error of judgement made in good faith.

107. Similar passages appear in the codes of conduct of many different municipalities. Some of the similar provisions state that a finding of inadvertence or good-faith error must lead to a recommendation that no penalty be imposed. The Oshawa provision, quoted above, simply states that inadvertence or good-faith error is to be reported to Council.

108. Passages such as this appear to be borrowed from subsection 31(6) of the *Members' Integrity Act*, which provides as follows:

If the Commissioner determines that ... a contravention occurred that was trivial or committed through inadvertence or an error of judgment made in good faith, the Commissioner shall so state in the report and shall recommend that no penalty be imposed.

109. Previous provincial Integrity Commissioners²³ set a relatively low bar for what constitutes an error of judgment made in good faith. Former Ontario Integrity Commissioner Osborne found good-faith errors by an MPP who passed off a news reporter as a legislative staff member, in order to facilitate her unauthorized entry into the Don Jail during the SARS lockdown,²⁴ and by an MPP who used the Government of Ontario courier service to ship eight large boxes overseas for a friend.²⁵ In each case, a key factor seemed to be the presence of an altruistic motive.

110. A similarly low bar was set in the City of Toronto, where good-faith errors were attributed to a councillor who used a ward newsletter to announce her candidacy in a provincial by-election,²⁶ and a councillor who accepted a benefit of below-market rent for his constituency office.²⁷ An altruistic motive (to save taxpayers' money) was cited

²³ I refer to *previous* Ontario Integrity Commissioners, because the current Integrity Commissioner, the Honourable J. David Wake, appears never to have relied on a finding of inadvertence or good-faith error.

²⁴ *Re David Levac* (July 23, 2003), Integrity Commissioner Osborne, at 10-11, paras. 32-35.

²⁵ *Re Sandra Papatello* (December 12, 2002), Integrity Commissioner Osborne, at 11, paras. 33-34.

²⁶ *O'Reggio v. Watson*, 2007 ONMIC 1, Integrity Commissioner Mullan.

²⁷ *Sweeney v. Palacio*, 2008 ONMIC 1, Integrity Commissioner Mullan.

in the second instance. In the first case, no reason was given for the finding of good faith.

111. The application of the old “error in judgment” language of the *Municipal Conflict of Interest Act*²⁸ (different than the language at issue here) involved stricter criteria.²⁹ Even then, good intentions were considered mitigating factors.³⁰

112. Upon review of a draft of this report, Councillor Nicholson stated that he never intended to influence decisions in the investigation, but only to secure information for follow up, but now recognizes how the wording of his email could have been more clear.

113. He explains that he acted pursuant to his understanding of the role as a councillor based on the training and instructions that he had received. He indicates that the findings in this report are more in-depth, and provide more clarity on the separation of roles of Council Members and the municipal law enforcement staff, than training previously received. He suggests that Council may benefit from an education and training session on this topic.

114. He now understands that his email was contrary to section 15 of the Code of Conduct and says the breach was certainly inadvertent and an error in judgement made in good faith, as it was never his intent to insert himself in the decisions of a law municipal enforcement officer. He offers an apology.

115. I accept that Councillor Nicholson was motivated by a desire to secure the continued provision of food and necessities to the homeless and people living in extreme poverty. Despite the gravity of interference in the independence of law enforcement, I accept that his contravention of section 15 was an error of judgment made in good faith.

RECOMMENDATIONS

116. Having found that Councillor Nicholson contravened the Code, I must recommend an appropriate consequence.

117. Councillor Nicholson acknowledges the findings in this report, and he apologizes. He made an error of judgment in good faith. I recommend that Council accept this report.

²⁸ Subsection 10(2), as it read prior to March 1, 2018.

²⁹ *Magder v. Ford* (2012), 112 O.R. (3d) 401, at para. 52; rev'd on other grounds, but aff'd on this point, (2013), 113 O.R. (3d) 241 (Div. Ct.).

³⁰ *Jaffary v. Greaves*, 2008 CanLII 28055 (Ont. S.C.), at para. 42; *Davidson v Christopher*, 2017 ONSC 4047 (CanLII), at para. 31.

118. I also recommend that Council assess the need for training or refresher training on the essential separation between Council Members and municipal law enforcement officers.

CONTENT

119. 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,



Guy Giorno
Integrity Commissioner
November 30, 2020