

City of Oshawa
Integrity Commissioner's
Recommendation Report
Regarding Councillor Derek Giberson

August 28, 2024

- [1] This report results from a complaint against Councillor Derek Giberson, the Respondent, for comments he posted on social media in regard to a police media release about the arrest of an individual in the community.

Executive Summary

- [2] It was alleged that by commenting publicly regarding a criminal matter, in a manner that might potentially influence the proceedings, the Respondent contravened the obligation of elected officials to refrain from commenting on matters before the courts.
- [3] Known as the rule against *sub judice*, the prohibition is a recognition that elected officials, whose influence may carry weight, should avoid publicly commenting on matters before the courts.
- [4] We have determined that the Respondent's public comments in regard to the matter breached the rule against *sub judice* and, as such, his conduct was contrary to the Code of Conduct.

The Complaint

- [5] On May 6, 2024 we received a complaint against Councillor Giberson, the Respondent, that he made comments on social media, regarding a criminal matter, which contravened the obligation of elected officials to refrain from commenting on matters before the courts.
- [6] It was alleged that the Respondent's comments on social media imply that an individual identified in a police media release, who had been recently arrested and charged, had engaged in previous dishonest or criminal activity.
- [7] The complaint asserted:
- That no Member of Council should be making comments, suggestive or otherwise, that directly or indirectly concern a matter that is or soon will be before the courts.

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- That no Member of Council should be making public statements that may be seen as repugnant to the right of due process of an individual charged with an offence.

[8] The complaint alleged that the Respondent's conduct breached the Council Code of Conduct.

Process Followed for this Investigation

[9] In conducting this investigation, Principles *Integrity* applied the principles of procedural fairness and was guided by the complaint process set out under the Code of Conduct.

[10] This fair and balanced process includes the following elements:

- Reviewing the complaint to determine whether it is within scope and jurisdiction and in the public interest to pursue, including giving consideration to whether the complaints should be restated or narrowed, where this better reflects the public interest
- Notifying the Respondent of the complaint against him, and obtaining his response;
- Providing the Complainant with an opportunity to review and reply to the Respondent's response
- Reviewing the relevant documentation and conducting interviews, where relevant, of persons with information relevant to the complaint
- Providing the Respondent with the opportunity to review and provide comments to the Integrity Commissioner's Preliminary Findings Report, and taking those comments into consideration prior to finalizing and submitting our Recommendation Report

[11] In this regard, we have assessed the information fairly, in an independent and neutral manner, and have come to our findings only after providing an opportunity to the respondent to respond to the allegations, and to review and provide comment on the preliminary findings.

Background and Context

[12] On May 3, 2024 the Durham Regional Police Service issued a news release which announced the arrest and charges against an individual for possession and trafficking of a controlled substance.

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- [13] The individual who was arrested and charged was known to the Respondent through his previous involvement leading an initiative that distributed food and personal goods, from a trailer (known as the C.A.M.P. trailer) parked on a municipal roadway, to homeless and low income individuals in downtown Oshawa.
- [14] The Council decision to not renew a permit allowing the trailer to be parked on a municipal roadway was characterized as uncompassionate.
- [15] The news release issued by the police did not draw any connection between the arrest of the individual and the previous initiative in support of the homeless.
- [16] The Respondent took the opportunity to post on Facebook, as follows:
- Today is a day of vindication to all of us who knew, who were close enough to the community to know the real happenings, but weren't listened to when we warned others. Now you know.
- Remember in the last Council term, when I. moved a motion at committee to remove this guy's request for a "memorial for people who have died of overdoses? No? Of course you wouldn't because I didn't announce it on Facebook for lots of reasons, but there was NO WAY, on my watch, that his name would be attached to such a thing. Now you know.
- Remember when this guy would openly advocate against the life-saving work at the Back Door Mission, openly state that he told people struggling with addictions not to go there, openly advocate against harm reduction approaches, openly talk about how his methods were better? Now you know.
- Remember when he led a food distribution operation for the vulnerable on a side street beside Midtown Mall, and a majority on Council decided not to extend the exemption to be set up there, and we had to take the punches right on the chin in public for that decision? Now you know.
- [17] Four days later, the Respondent's comments were repeated in the online publication InDurham, under the heading **Drug trafficking suspect ran Oshawa's CAMP meal provider, city councillor claims.**
- [18] Although repeating most of the Respondent's Facebook comments verbatim, the article concluded with a statement that *"the allegations against Bond have not been proven in court"*.
- [19] The very fact that the posted comment was picked up by the media and featured in the headline of the article demonstrates the core of the problem.

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The Council Code of Conduct and the Applicable Law

[20] The City of Oshawa Council Code of Conduct contains the following provisions relevant to this complaint:

5. Key statements of principles that underlie this Code of Conduct are as follows:

- (a) Members must serve and be seen to serve their constituents in a conscientious and diligent manner;
- (b) Members must be committed to performing their functions with integrity, avoiding the improper use of the influence of their office, and conflicts of interest;
- (c) Members are expected to perform their duties in office and arrange their private affairs in a manner that promotes public confidence and that will bear close public scrutiny;
- (d) Members must recognize and act upon the principle that democracy is best achieved when the operation of government is made as transparent and accountable to members of the public as possible; and
- (e) Members shall seek to serve the public interest by upholding both the letter and the spirit of the laws of Parliament and the Ontario Legislature, as well as the laws and policies adopted by the Council.

Analysis and Findings

[21] This complaint arises at a time when communication via social media – Facebook and X/Twitter particularly – is commonplace.

[22] Elected officials, often motivated by the desire to keep their constituents informed, may post about issues and events in real time as they are unfolding.

[23] Elected officials, however, occupy a privileged position within our democratic system which imposes accountability for their words publicly pronounced or published.

[24] Elected officials have a responsibility to avoid commenting on matters under investigation or which are before the courts. This is known as the rule against *sub judice*.

[25] For the reasons set out in detail below, we find that the Respondent's post on social media -- the clear implication which was to suggest there was other criminal activity not previously disclosed or widely known about the accused -- relating to the charges laid by

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the police, constitutes inappropriate conduct contrary to the standards expected of members of Council as reflected under the Code of Conduct.

Commenting on matters before the Court and the rule against *sub judice*

- [26] It is recognized that elected officials have a certain status by virtue of the office they hold. Elected office is a privileged position which wields some influence.
- [27] Commenting on a court proceeding is recognized as inappropriate. While elected officials may hold their own views regarding legal proceedings, they are constrained from publicly commenting on proceedings before the courts, and this extends to matters under criminal investigation by the police.
- [28] This is particularly the case where an arrest has been made and charges are proceeding. A post that suggests there is much more to the story than evident on the face of the charges seems to imply that the accused need not be accorded a presumption of innocence.
- [29] Under a democratic system of government, where the courts are independent of a legislative branch of the government, elected officials are constrained from opining on matters before the courts in a manner which may be perceived as attempting to influence the outcome.
- [30] *Sub judice* is a principle recognized in the jurisprudence and parliamentary convention and requires that elected officials should not comment, in matters before the court, where to do so may be seen as an attempt to interfere with the due course of justice or lawful process of the courts.
- [31] At the Provincial level, it has been found to contravene the Ontario Provincial Members' Integrity Act.
- [32] In a report dated October 25, 2006, the Provincial Integrity Commissioner stated the following regarding an MPP's comments about a court proceeding:

[23] ... **all members know, or should know, that they should not comment on a matter that is the subject matter, or part of the subject matter, of a proceeding pending before a court.** Indeed, there is a standing order of the Legislature which addressed that very issue as related to comments in the Legislative Assembly. [emphasis added]

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- [33] The proper practice, observed regularly when elected officials are asked to take a position on legal proceedings, is to state that they have no comment because the matter is before the courts.
- [34] This is more than just a way to avoid answering difficult questions. It is the appropriate response for elected officials to avoid improper influence in legal proceedings.
- [35] The concept is readily recognized by elected officials at the Provincial and Federal levels.
- [36] It ought to be better understood at the Municipal level, as well.
- [37] It is simply inappropriate for Members of Council to comment on such matters.
- [38] The Respondent's comments clearly implied that there was other criminal activity not previously disclosed about the accused, and that the charges laid were warranted if not overdue.
- [39] The risk of such public comments by an elected official is that they may influence the legal proceedings.
- [40] Moreover, such comments publicly made may become a source of misinformation in the public realm, if it turns out that they were made without any factual foundation.
- [41] In this regard, the Respondent's comments posted on social media must be regarded as inappropriate in publicly disseminating innuendo, unproven statements about earlier criminal activity of the accused.
- [42] The Respondent's post breaches the rule against *sub judice* by commenting on a matter where there are legal proceedings – in this case, criminal charges to be prosecuted.
- [43] The Respondent has acknowledged the posts.
- [44] He advises that he did not post comments with an intent to influence or interfere with the due course of justice, and his comments did not constitute a 'real and substantial risk of prejudice to the integrity of the administration of justice'.
- [45] It appears to us that his comments were certainly posted with the intention of publicly sharing 'new' information, undisclosed to the community at large to that point, that the accused was essentially *guilty* of other misdeeds, of which the Respondent had previous knowledge.

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- [46] Certainly, that is a fair reading of the words: “*Today is a day of vindication to all of us who knew, who were close enough to the community to know the real happenings, but weren’t listened to when we warned others. Now you know.*”
- [47] During our investigation, the Respondent explained that his purpose was to bring to the attention of the public other presumably criminal activities “*stretching back*” which were “*in basic alignment with the charges*”.
- [48] The Respondent’s purpose is the very reason for the rule against *sub judice*.
- [49] Elected officials should not be publicly commenting on additional allegations of past activities whilst other charges are being processed by law enforcement, and proceeding before the court.
- [50] There is an implicit unfairness as an elected official’s words tend to carry weight. Greater knowledge may be assumed by the public.
- [51] The Respondent explained that he was motivated, in part, to post his comments in order to counter what he perceived as an unfair characterization of Council and individual members as uncaring to the plight of the vulnerable when Council did not renew the temporary road occupancy permit for the C.A.M.P. trailer.
- [52] Seeing that the police news release made no mention of the accused’s alleged previous activities, the Respondent decided it was “a matter of public interest”.
- [53] It was nevertheless inappropriate for the Respondent, as an elected official and a member of City Council, to be publicly commenting on the matter while proceedings are ongoing.
- [54] It must be generally acknowledged that politicians **can**, unfortunately, have a significant influence on where local police forces focus their attention, and so, the comments posted by the Respondent, and then repeated in the media, potentially risk influencing the police investigation and consequently the proceedings before the courts.
- [55] The Respondent’s submission to us is that an integrity commissioner lacks jurisdiction to make any determination in regard to the rule against *sub judice*.
- [56] The Respondent referred us to a report by another integrity commissioner who determined that the rule against *sub judice* did not apply to members of municipal councils. Respectfully, we do not agree with, nor are we bound by, the conclusion of that integrity commissioner. In our view, it is a legally incorrect and contrary to the public interest.

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- [57] That integrity commissioner's reluctance to hold municipal politicians to the standard as is applicable to Provincial and Federal politicians - to respect *sub judice* and refrain from publicly commenting on proceedings before the courts – fails to meet the standards expected by the public and fails to respect the principles of due process in the administration of justice..
- [58] While the *sub judice* convention applicable to Provincial and Federal politicians may be enforceable at the discretion of the Speaker – a mechanism which does not exist for municipal councils - a breach may also attract the censure of an integrity commissioner.
- [59] To hold otherwise raises the spectre of municipal politicians wading into and commenting on all variety of proceedings before the court which may catch their interest, inviting a free-for-all of political comment in the public realm.
- [60] We also do not agree with the Respondent's contention that *sub judice* is a subset of *contempt of court*, and therefore falls within the exclusive jurisdiction of the court to make a determination.
- [61] Such an interpretation would undermine the purpose of a council code of conduct, removing from the public reach an efficient, right-sized and cost-effective mechanism to resolve complaints outside the litigation process.

Findings:

- [62] Municipal Codes of Conduct are policy documents adopted by municipal councils to guide the conduct and behaviour of their members.
- [63] Codes of Conduct are not statutes like the Criminal Code or Highway Traffic Act, which require the application of strict and narrow legal interpretation before the commission of an offence can be found. Rather, a Code of Conduct is a policy document, and is to be given broad, liberal interpretation in much the same manner as an official plan or other municipal policy.
- [64] The Oshawa Council Code of Conduct does not contain a specific provision regarding commenting on law enforcement matters on Facebook or other social media.
- [65] It is worthy of noting that neither do Codes of Conduct typically list specific prohibitions against lying, swearing, shouting, or other abusive behaviour toward constituents, or proscriptions against attending virtual meetings shirtless, drunk and disheveled. Yet, it would be unreasonable to argue that these behaviours would not be open to examination as breaches of the behavioural standards found in a Code of Conduct.

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- [66] A Code of Conduct provides general and specific guidance to aid members in understanding and achieving the high standard of behaviour expected by the public.
- [67] Codes should be perceived as guides to proper ethical behaviour, and not simply as traps for elected officials.
- [68] While a toenail over an ethical line would not draw the attention of an integrity commissioner, neither should significant non-compliant behaviour be excused merely because of the absence of codified text in the nature of a statutory offence provision such as those found in the Criminal Code or the Highway Traffic Act.
- [69] The lack of specificity in the Code may influence the nature of any sanctions that might be recommended. That is a separate matter from whether the context of a situation can result in a finding that a Member of Council has fallen short of the ethical standards applicable to them.
- [70] We find that the Respondent's conduct posting in regard to a matter which is the subject of criminal proceedings was contrary to the Key Principles of the Code.
- [71] As such, we find that the complaint is sustained.

Disciplinary Role of Council

- [72] This Report is the culmination of an independent and confidential investigation conducted in accordance with the *Municipal Act*, and in accordance with the tenets of procedural fairness (see the insertion at the end of this report to read more about the process itself).
- [73] The role of Council is not to reinvestigate the complaint or the findings in this report. The role of the Integrity Commissioner is to undertake a thorough and impartial investigation, which has now been completed. The tenets of procedural fairness require us to provide reasons for our conclusions and recommendations, and we have done that. Procedural fairness also requires us to conduct a process where parties can participate in the review and resolution of a complaint.
- [74] We have a statutory obligation to conduct investigations in a confidential manner. That means that Council is not **able** to conduct its own 'investigation' because it does not, by operation of the statute, have access to all of the information that contributed to our findings in this matter.
- [75] The obligation to conduct a fair and independent investigation has been discharged.
- [76] The role of Council is to review this report and decide which recommendations to adopt, if any. An Integrity Commissioner can recommend training, remedial steps, and/or

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sanctions as they deem appropriate based on the circumstances of complaint(s), but it is Council which has the final voice in determining what should be done.

Recommendations and Concluding Remarks

- [77] While an Integrity Commissioner may recommend sanctions, the overarching goal is to achieve course correction and better ethical behaviour among members of Council. This, we believe, assists in preserving, or improving, the overall good will of the community toward Council.
- [78] In the course of this investigation, the Councillor has approached the matter with an open, if inquisitive and tenacious, mind.
- [79] The Respondent has acknowledged that, in hindsight, he would be more circumspect in his actions, and would likely refrain from making any similar such comment. We are prepared to accept this declaration as affirmation that the message has been understood.
- [80] We are satisfied that the educational aspect of our work should be front and centre, rather than any punitive outcome. As such, no specific recommendation is warranted.
- [81] Rather, it is hoped that members of municipal council would have due regard for the rule against *sub judice* and refrain from publicly commenting on criminal charges proceeding before the court, regardless of what they may believe about the matter.
- [82] We conclude by expressing our thanks to the respondent who was at all time courteous and cooperative with our investigation. We will be pleased to be in attendance when this report is considered to answer any questions Council may have relating to its contents.

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About Principles *Integrity* and the Complaint Process

Principles *Integrity* was appointed the Integrity Commissioner for the City of Oshawa on November 15, 2023. We are also privileged to serve as Integrity Commissioner for a number of other Ontario municipalities. The operating philosophy which guides us in our work with all of our client municipalities is this:

The perception that a community's elected representatives are operating with integrity is the glue which sustains local democracy. We live in a time when citizens are skeptical of their elected representatives at all levels. The overarching objective in appointing an integrity commissioner is to ensure the existence of robust and effective policies, procedures, and mechanisms that enhance the citizen's perception that their Council (and local boards) meet established ethical standards and where they do not, there exists a review mechanism that serves the public interest.

Oshawa City Council has as part of its ethical framework a Code of Conduct which is the policy touchstone underlying the assessments conducted in this report. It represents the standard of conduct against which all members of Council are to be measured when there is an allegation of breach of the ethical responsibilities established under the Code of Conduct. The review mechanism contemplated by the Code, one which is required in all Ontario municipalities, is an inquiry/complaints process administered by an integrity commissioner.

Integrity commissioners carry out a range of functions for municipalities (and their local boards). They assist in the development of the ethical framework, for example by suggesting content or commentary for codes of conduct. They conduct education and training for members of council and outreach for members of the community. One of the most important functions is the provision of advice and guidance to members to help sort out ethical grey areas or to confirm activities that support compliance. And finally, but not principally, they investigate allegations that a person has fallen short of compliance with the municipality's ethical framework and where appropriate they submit public reports on their findings, and make recommendations, including recommending sanctions, that council for the municipality may consider imposing in giving consideration to that report.

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It is important that this broad range of functions be mentioned in this investigation report. Our goal, as stated in our operating philosophy, is to help members of the West Grey community, indeed the broader municipal sector and the public, to appreciate that elected and appointed representatives generally carry out their functions with integrity. In cases where they do not, there is a proper process in place to fairly assess the facts and, if necessary, recommend appropriate sanctions. In every case, including this one, the highest objective is to make recommendations that serve the public interest, if there are recommendations to be made.

Our role differs from other 'adjudicators' whose responsibilities generally focus, to state it colloquially, on making findings of fact and fault. While that is a necessary component when allegations are made, it is not the only component.

Our operating philosophy dictates the format of this report. The tenets of procedural fairness require us to provide reasons for our conclusions and recommendations. Procedural fairness also requires us to conduct a process where parties can participate in the review and resolution of a complaint. We met these obligations as we carried out an independent and confidential investigation, which has culminated in this report to Council.