

**DATE:** Tuesday, October 22, 2024

**TO:** Mayor and Members of Council

**FROM:** Suzanne Craig – Integrity Commissioner and Lobbyist Registrar

**RE: COMMUNICATION – Committee of the Whole(2)**

**Item 15, Report 35**

**Formal Code of Conduct Complaint Investigation**  
**Report #071624(1), 071624(2)**

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### **Recommendation**

The Integrity Commissioner recommends that:

1. The Communication to the Code of Conduct Complaint #071624 (a) and (b) Investigation Report in Respect of Regional Councillor Mario G. Racco be received.

### **Background**

The Office of the Integrity Commissioner and Lobbyist Registrar received two Code of Conduct Complaints on July 16, 2024. The Complainant wrote that she had reasonable grounds to believe that with respect to Complaint #1, the Respondent did not conduct himself with appropriate decorum in contravention of Rule 15 of the Code, when he responded by email on June 26 and July 5 to resident emails about a development project that was the subject of litigation before the Ontario Land Tribunal (“OLT”). In my Notice to the Respondent, I indicated that the Complaint raised the following issues:

1. the Respondent made derogatory comments about a matter that was subject of litigation before the OLT knowing that [Councillor Martow] would be unable to respond;
2. the Respondent commented himself on the matter before the OLT, denigrating Council’s decision-making; and
3. the Respondent made disparaging comments about a majority of Members of Council.

The Complainant alleged that the Respondent’s actions left her “with two unpalatable options regarding the email thread”:

- a. “Option 1: Follow the advice<sup>1</sup> by staying silent and not defend [her]position”;

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<sup>1</sup> The Complainant received advice from staff that she should not comment on matters before the OLT.

or

- b. "Option 2: Go against the advice and request of our esteemed leadership team by responding to both the email chain and the insulting accusations in [the Respondent's] public response."

As addressed below, while the initial Complaint form referenced only Rule 15, I found that the conduct raised in Complaint #1 constituted a violation of Rules 10, 13 and 15.

The Complainant made a second complaint which I addressed as Complaint #2 in my report. She alleged that the Respondent did not conduct himself with appropriate decorum in contravention of Rule 15 of the Code, when he removed the Complainant Member of Council from an email thread initiated by a resident's association, which was, in her view, an attempt to post disparaging comments about the Complainant (and Council) without her knowledge and to ascribe a negative motive to the Complainant's lack of action.

I found that the conduct raised in Complaint 2 constituted a violation of Rule 15.

The Complaint Form/Affidavits were accompanied by 13 pages and 15 pages respectively of detailed particulars of the allegations in copies of email threads.

To some extent, the Complaints overlapped. They addressed email threads involving the Respondent during the same two-week period. The conduct complained of included the content of what was said and the removal of the Complainant from an email thread.

On July 19, I provided the Respondent with my Notices of the Complaints. As I address below, I provided the supporting documentation but did not provide the Complaint Form/Affidavit itself. I requested the Respondent's written response. The Respondent provided a written response to the complaints.

On September 10<sup>th</sup> 2024, I provided a copy of my draft findings to the Respondent and provided him with an opportunity to provide comments on errors or omissions of fact and confirmed that I would take these into consideration in drafting a final report.

On September 13, 2024, the Respondent wrote to me to seek clarification on the timing of the submission of any comments on the draft findings. In my response, I reminded the Respondent that I would take into consideration his comments regarding errors or omissions of fact, in the drafting of my final report but that I would not accept supplementary submissions or new evidence.

On September 19<sup>th</sup>, I received the Respondent's comments to my draft findings. At the conclusion of his comments, the Respondent wrote that he had not elected to obtain legal advice earlier in the process and had not had time to do so after receiving the draft

findings.

Later that day, I advised that while I would typically determine that a Member under investigation is bound by their earlier decision not to seek advice, I would exercise my discretion to grant the Respondent additional time to obtain legal advice with respect to the draft findings. While this is outside my normal process, and I do not intend to provide opportunities to belatedly seek legal advice to members in the future, the timing of the complaint had overlapped with the summer break and I would complete my investigation within my prescribed timeline, I decided to afford the Respondent the opportunity to seek legal advice. I provided a deadline of September 29.

On September 25<sup>th</sup>, I received correspondence from the Respondent's lawyer with his additional comments in response to my draft findings. There appeared to be some confusion as the Respondent's lawyer stated that "only one complaint has been listed".

On October 3<sup>rd</sup>, I provided the Complainant and Respondent with my final report. I subsequently followed the City's process and submitted a copy of the final report to the City Clerk's Office to be included in the agenda of the next Council meeting.

My report was made public with the agenda for the October 22 meeting.

Shortly before the Thanksgiving long weekend, I received correspondence from the Respondent's lawyer indicating that the Respondent had never received one of the complaints. She followed up on Tuesday, October 15<sup>th</sup> requesting that my report be pulled from the Council meeting. I reviewed my files to determine what had been sent to the Respondent. That day, I responded:

I provided Regional Councillor Racco with Notice of the Complaints on July 19, 2024. In my Notice of Complaint Cover Letters, I noted that I was including a copy of the Complaint Form and supporting documentation to the Complaint. Due to an administrative error, I provided the supporting documentation but not the Complaint Form; however, for each Complaint, the content of the Complaint Form was included in the Cover Letter. For your reference, I have attached the Complaint Forms here. In addition, I also attach the Cover Letters that were previously forwarded to your client. While I regret this technical error, I note that Regional Councillor Racco had notice of the Complaints and an opportunity to respond to the Complaints (which he did). Accordingly, I intend to proceed with this matter.

I received a series of emails from the Respondent's lawyers. On October 17<sup>th</sup>, the Respondent's lawyer wrote to this Office stating that:

We note, contrary to your Decision, Complaint 071624a does **not** contain any allegation that Councillor Racco:

1. made derogatory comments about a matter that was the subject of litigation before the OLT knowing that [Councillor Martow] would be unable to respond;

2. commented himself on the matter before the OLT, denigrating Council's decision-making; and
3. made disparaging comments about a majority of Members of Council.

Our client is very disturbed by this mis-statement in your Decision.

The mischaracterization of the allegations in the Complaint ripples through your Decision.

Further your Notice to Councillor Racco provided on July 19, 2024 did **not** indicate that any of these allegations had been made in Complaint 071624a.

We also note that your Decision takes the position that our client may have "confused" the two Complaints. Given that the IC, by its failure to meet the obligation to provide Complaint 071624a to our client itself caused the confusion (and as the IC mis-stated the allegations in 071624a), we require the opportunity to meet with our client to discuss this with him.

Please confirm that you will indicate to the Council that this matter should be withdrawn from the agenda next week.

Thank you,

On October 21<sup>st</sup>, I forwarded a copy of this Communication to the Respondent.

#### *Complaint Forms/Affidavits*

As noted above, in my July 19 Notices of Complaints, while I referenced attaching the Complaint Form/Affidavit, through an administrative error, I did not enclose those documents. However, in the body of the Notice, I summarized the key issues, and I provided all the supporting documentation. As a result, the Respondent had an opportunity to provide a response to each of the related complaints. While the Complainant stated that the Respondent made "insulting accusations", I set out the issues as including the Respondent's use of disparaging comments (the language of Rule 10).

It was only after I finalized my report (i.e., not during the additional 10 days provided after the Respondent indicated that he had not received legal advice) that I learned that the Complaint Form/Affidavit had been inadvertently excluded. While my office does not always provide the Complaint Form/Affidavit (which is not required under the protocol), I provided them upon request as it had been my intent to provide them.

I am satisfied that there was nothing in those documents which was withheld from the Respondent. There was, however, one error in the language of the Notice under Complaint 2. One of the complaints included in Complaint 1 was duplicated in the Notice for Complaint 2. This explains why the Respondent included a response to that allegation in both his responses (i.e. his response to Complaint 1 and to Complaint 2). I

accept responsibility for any confusion between the two complaints. I am satisfied that the Respondent had a fair opportunity to respond to the complaints. I did not make any findings in respect of conduct that had not been raised with the Respondent.

The Respondent has been provided with the allegations made against him. Notwithstanding there having been an administrative mistake on the part of this Office in not including the Complaint Forms/ Affidavit, the content of the Complaints were included in my Cover Letters and the supporting documentation to both Complaints (email threads) were included in their entirety.

The Respondent has not suffered any prejudice arising from the lack of inclusion of the Complaint Forms. Granting the Respondent's requested relief regarding the administrative error in not providing the Complaint Forms, would privilege form over substance, at the expense of ensuring accountability and transparency of elected officials, and I decline to do so.

#### *Additional Rules Cited in the Report*

The initial Complaints referenced only Rule 15. It is not uncommon for complainants to cite some, but not all, relevant provisions of the Code of Conduct. Here, it was clear that the Respondent was aware that Rule 10 and 13 could have been triggered by his conduct. Indeed, he raised Rule 10 in his initial written response to Complaint 1 (perhaps because my summary of the issues in the Notice used the phrase "disparaging comments"). The Respondent indicated that it was his view that he was "within [his] rights to disagree with a decision, so long as [he does] it in a respectful way, which [he] did." Rule 10 relates to accurate communication of decisions of Council and Rule 13 relates to members encouraging public respect for its bylaws, which are often the documents which evidence a decision of council. The Respondent knew that council's decision was set out in a bylaw.

In certain circumstances, upon determining that there were additional rules triggered by the Respondent's conduct, I might provide an additional Notice to the respondent. Here, that notice was not necessary as the Respondent commented on rule 10 in his initial response. Additionally, the Respondent had a further opportunity to address these issues in response to the draft findings.

The conduct which I found to have violated Rules 10 and 13 also violated Rule 15. In recommending the sanction included in my report, I did not consider the number of rules violated as an independent factor on sanctioning. I made my recommendation based on the misconduct found considered holistically. Even if I had only determined that the conduct violated Rule 15, I would have made the same recommendation on sanction.

As the Divisional Court stated in *Dhillon v. the Corporation of the City of Brampton*, 2021 ONSC 4165,

Procedural fairness governs participatory rights, to ensure that administrative decisions are made using a fair procedure, appropriate to the decision being made and its statutory, institutional, and social context: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999 CanLII 699 \(SCC\)](#), [1999] 2 SCR 817 at para. [22](#). The procedural protections and participatory rights required to meet the duty of fairness are assessed contextually.

In *Di Biase v. City of Vaughan*, [2016 ONSC 5620](#) (Div. Ct), the Court considered the duty of procedural fairness in the context of an Integrity Commissioner's investigation and report under the *Municipal Act*. The court determined that the integrity commissioners have a relatively low obligations of procedural fairness. The statutory scheme prioritizes confidentiality; the integrity commissioner's process is investigatory and she may only make recommendations on sanction; the maximum penalty if Council accepts recommendations is 90 days suspension of pay; and no councillor may lose his elected position or suffer civil or criminal liability on the basis of an integrity commissioner's report.

I am satisfied that I have met those obligations of procedural fairness – and importantly, that the Respondent was on notice of the allegations against him and received multiple opportunities to participate in the investigation process.

For more information, contact Suzanne Craig – Integrity Commissioner and Lobbyist Registrar, 905-832-2281 ext. 8314

Respectfully submitted by



Suzanne Craig – Integrity Commissioner and Lobbyist Registrar