

Township of Madawaska Valley Integrity Commissioner File 2016-01

INTERIM REPORT ON COMPLAINT

Interim Report

This is my interim report on whether the Respondent has contravened the Code of Conduct. It brings to Council's attention an issue related to my ability to complete the investigation under the Code.

Section 223.5 of the *Municipal Act* requires that I maintain confidentiality. Subsection 223.6(2) provides that in a report on whether a Member has contravened the Code, I may disclose such matters as in my opinion are necessary for the purposes of the report.

It is not necessary to name the parties in this interim report, but it is necessary to include all of the content below.

The Complaint

An individual (the Complainant) alleges that a Council Member (the Respondent) breached the Code of Conduct, By-law Number 2014-138, in comments made during a meeting.

At first the Complainant was self-represented. Subsequently the Complainant was, and continues to be, represented by an agent.¹

To date I have communicated directly with the Respondent.

The Templeman law firm represents the Township.

Background

By-law Number 2017-71 appointed me as Integrity Commissioner for the Township effective June 6, 2017. It repealed By-Law Number 2016-67, which had appointed the previous Integrity Commissioner. As of that date, I inherited several complaints, including this one, filed with the previous Integrity Commissioner.

This Complaint was filed in 2016. Sometime afterward, the Complainant commenced a proceeding before the Human Rights Tribunal of Ontario (HRTO).

On July 18, 2016, the previous Integrity Commissioner suspended his investigation of this Complaint pending resolution of the proceedings before the HRTO.²

¹ The Complainant began to be represented by an agent prior to my appointment.

About a year later, five weeks following my appointment, the Complainant's agent wrote to me³ and stated that the Complainant was content to have me continue the investigation.

As a result, I invited both parties to make further submissions on whether or not the investigation should continue to be suspended.

The Complainant's agent responded first, indicating that the Complainant was content that the Code proceeding be suspended pending the outcome of the HRTO proceeding. This caused me to write to the Respondent, to indicate that in light of the Complainant's position I would continue to suspend the Code proceeding unless the Respondent made submissions to the contrary. The Respondent did not make contrary submissions and the Code investigation remained suspended.

I subsequently learned that the HRTO proceeding was settled, September 19. However, the parties to the HRTO proceeding took very different positions on what this meant for the Code proceeding:

- The Complainant's agent wrote first (September 20), telling me that in light of the HRTO settlement, "you are invited to proceed as you see fit."
- The Templeman law firm wrote next (October 23) to inform me that it represented the Township (which was a respondent to the HRTO application), and to inform me that the HRTO settlement "serves to discontinue any such [Code of Conduct] complaint and to bar any future complaint based on these events."

Because the correspondence between me and Templeman is fundamental to the issues raised by this interim report, I will reproduce significant excerpts from it.

² In responding to a draft of this interim report, the Complainant's agent takes issue with the statement that the previous Integrity Commissioner suspended the investigation. The agent has provided me with a portion of an affidavit sworn by the previous Integrity Commissioner, April 24, 2018, in which the latter states that nine days before the previous Integrity Commissioner had even received this Code of Conduct complaint, a lawyer from Templeman, on behalf of the Township, wrote to the Complainant's agent to say that, "In view of the initiation of this formal [HRTO] process, to avoid multiplicity of proceedings, be advised that the Integrity Commissioner's investigation and all other internal processes related to this matter are being held in abeyance, pending the Tribunal's disposition of this matter." The portion of the affidavit suggests that suspension was not the previous Integrity Commissioner's decision. I have only been shown a portion of the affidavit. As I have not been shown the entirety of the previous Integrity Commissioner's affidavit, nor been shown any other relevant affidavits or records of examination or cross-examination, and as I have not, yet, asked Templeman to address this new point, at this time I make no finding about who in 2016 decided to suspend this Code proceeding.

³ Correspondence dated July 14, 2017.

The October 23 letter from Templeman read, in part, as follows:

We are legal counsel for the municipality and I am writing to you in that capacity to advise you of a confidential settlement reached between [Complainant] and the municipality/[Respondent] at the Human Rights Tribunal of Ontario. As part of that settlement, [Complainant] made a full and final release of all claims against the municipality and [Respondent], including any Integrity Commissioner complaint.

...

... there is some confusion as to whether [Complainant] has an active complaint before you. In any event, the release within the HRTTO settlement document serves to discontinue any such complaint and to bar any future complaint based on these events.

I attach the confidential settlement for your information. I am copying [another lawyer from another firm] on this correspondence as he represented [Respondent] in the HRTTO matter.

I have omitted passages of the letter that refer to events in the HRTTO proceeding prior to the settlement. It suffices to say that the Integrity Commissioner proceeding was discussed at several points during the HRTTO proceeding, and there is disagreement about what was said or agreed on those prior occasions. In my view, only the references to the Integrity Commissioner at the time of the HRTTO settlement are relevant to this interim report.

Enclosed with the October 23 letter were the minutes of settlement of the HRTTO proceeding. Significantly, the settlement identified two “respondents”: the Township was the first named respondent and the Council Member who is the Respondent to the Code complaint was the second named respondent. Both respondents signed the minutes of settlement. (The then-CAO/Clerk signed on behalf of the Township.) The Complainant in this Code proceeding was listed on the settlement as the “applicant.”

All three of them – the Township, the Council Member and the individual who is the Complainant in this proceeding – were identified as “parties” to the settlement. The operative provisions of the settlement begin with these words: “THEREFORE THE PARTIES AGREE AS FOLLOWS.”

The settlement included the following sentence:

The Applicant hereby releases the Respondent [*sic*], its subsidiaries, affiliates and successors, and each of their respective past and present officers, directors, employees, agents, contractors and elected representatives from any and all applications, claims, demands, complaints, or actions of any kind arising out of or related to the events that gave rise to this application or subsequent filings, including but not limited to claims under the common law and the Ontario Human Rights Code, the Employment Standards Act, Occupational Health and Safety Act and the Labour Relations Act and the Integrity Commissioner. [underlining added]

While both respondents signed the settlement, the above sentence refers to “the Respondent,” singular. Whether this means one respondent, or both, is unclear. Nonetheless, the following facts are clear:

- The settlement purports to be a release from current and future Integrity Commissioner proceedings.
- All three parties, *including the Township*, agreed to the terms, and those terms include reference to Integrity Commissioner proceedings.
- The Township executed the settlement.

For reasons that I will explain below, I was troubled by the correspondence and the settlement’s reference to the Integrity Commissioner. As the same time, I was (and still am) reluctant to make the correspondence the subject of protracted communication. Templeman is paid by the Township. The Integrity Commissioner is paid by the Township. In my view, if two lawyers paid by the Township must correspond with each other then it is in the Township’s interest that their communication be economical and efficient.

I wrote to Templeman, November 24, and copied the then-CAO/Clerk. My email read as follows:

Please accept my apologies for the delay in responding to your October 23 letter.

I will confess that the reason for the delay is attributable to my uncertainty about how to respond. Each of us is paid by the municipality, and its interests would not be served by a lengthy exchange of correspondence between two individuals who are both paid by the Township.

That said, I am confused by the suggestion that the municipality purported to settle an integrity commissioner proceeding. It cannot do so. Under the *Municipal Act*, the integrity commissioner is to operate independently and reports to council. Further, the municipality itself is not party to integrity commissioner proceedings; the municipality, in the person of the council, receives the integrity commissioner’s reports, but the municipality itself is not a party. Indeed, fundamental to the statutory regime is the understanding that the municipality takes no position as between complainant and respondent until the integrity commissioner has reported to council.

I also do not understand the suggestion that future integrity commissioner complaints are barred. It is impossible for a contract to override Part V.1 of the *Municipal Act* or By-law Number 2014-138.

There is no need for you to reply to this communication. It is being sent to you as a courtesy. Under the Act I report to council. I will be reporting to council shortly.

Templeman replied the same day, and clarified the position of the Township:

Thank you for your e-mail of today's date. I regret that I did not provide some important context to the settlement document which I hope will assist your understanding of it and alleviate the legitimate concerns you have raised.

The Minutes of Settlement forwarded to you were created by a Vice-Chair of the HRTO pursuant to their mediation/adjudication process. The Vice-Chair was concerned that the Minutes' reference the IC process solely because the municipality had brought a motion to defer the HRTO process until [Complainant's] Integrity Commissioner complaint could proceed. Accordingly, please note that the municipality specifically advocated in favour of the IC process going ahead. In a Case Management hearing held in April 2017, the Tribunal opted not to defer to the Integrity Commissioner proceeding, based upon [Complainant's] representation, on the record and contained within the Case Management Decision, that [Complainant] had decided to withdraw the IC complaint and wished to have the matter solely dealt with by the HRTO.

Please note that it was entirely the Complainant's decision to withdraw the IC complaint and [Complainant] made this decision both independently and long prior to any settlement discussions. At no time did the municipality or [Respondent] ask that [Complainant] do so, and there was never a requirement that [Complainant] forego the IC proceeding in order to obtain an HRTO settlement. The legal release perhaps gives this impression, but was merely confirmatory of the Applicant's representation made months before to the HRTO that because [Complainant] had decided to withdraw the IC complaint, the Tribunal did not have to defer to the IC proceeding (as urged by the municipality). Presumably, the HRTO is concerned about a settled matter being revived after the Complainant made representations on the record regarding the status of another proceeding to which the Tribunal would have otherwise deferred. The individual Respondent was also concerned that [Respondent] was foregoing the opportunity to defend [Respondent] before the HRTO if what the Complainant represented to be a withdrawn IC complaint on the same subject matter could be revived in future.

While what you say is, of course, technically accurate about contracting out of the provisions of the Act and By-law, there were significant procedural decisions made by the HRTO based on [Complainant's] unsolicited decision to withdraw [Complainant's] IC complaint, which led to the parties having a mediation/adjudication and settling the matter. The settlement reflects the good faith understanding of the parties and the Tribunal as to the Complainant's prior and unrelated decision not to pursue the IC complaint. It was not consideration for the settlement and release. In hindsight, the Minutes should have made this explicit and I thank you for providing that insight.

I would add that the former IC decided to hold [Complainant's] IC complaint in abeyance once [Complainant] filed the HRTO application. I am not clear about his reasons for doing so, as I was simply informed that was his decision and asked to communicate it on behalf of the CAO. As emphasized above, the municipality took the contrary position before the HRTO that [Complainant's] IC proceeding should not only proceed, but do so on a priority basis.

I trust that this helpful to you. Please do not hesitate to contact me if you have any questions.

I found that the law firm's reply was helpful in clarifying matters.

The second-last paragraph of the Templeman reply requires elaboration. Apparently, during the term of the previous Integrity Commissioner, the Complainant and Complainant's agent were unable to communicate directly with the Integrity Commissioner. Instead, communications to and from the Integrity Commissioner were routed through the then-CAO/Clerk and/or the Township's law firm.⁴ I make no suggestion about whether this practice was established by the previous Integrity Commissioner or by the Township. It was, however, the previous practice.

Since my appointment as Integrity Commissioner, I have communicated directly with the parties to complaints. I have not communicated with complainants and respondents through the Township. In my view, filtering through the municipal administration an Integrity Commissioner's investigative communications is incompatible with the *Municipal Act* requirement that the Integrity Commissioner be

responsible for performing in an independent manner the functions assigned by the municipality with respect to ... the application of the code of conduct for members of council and the code of conduct for members of local boards or of either of them ... [emphasis added]⁵

I shared the Templeman October 23 letter with the Complainant's agent, who replied orally and then in writing that

we do not accept that the HRTO settlement document (which was disclosed to you without [Complainant's] permission) "serves to discontinue any such complaint ..."

The Complainant's agent also argued that Templeman had previously been "intermeddling" in the Integrity Commissioner process and, according to the agent, continued to do so. The agent referred to a July 19, 2016, letter from Templeman that said, in part, "the Town has deferred the Integrity Commissioner process ..." The agent provided examples of correspondence complaining that the Township had allegedly been interfering with the previous Commissioner's independence.

I shared a draft of this interim report with the parties and with Templeman and invited their comments. The Complainant (through the Complainant's agent) and Templeman

⁴ In response to a draft of this interim report, Templeman states, "Please be advised that this was indeed the previous practice established by the former Integrity Commissioner, for reasons not disclosed to us." In response to the same draft, the Complainant's agent states, "I at the very beginning objected to the Township's policy on insisting that all such communications should be through the Township without even the requirement that those communications be placed in a sealed envelope."

⁵ *Municipal Act*, subsection 223.3(1)

have provided comments on the draft. The Respondent has not. This interim report being presented to Council takes into account the feedback I received.

Issue

The Templeman letter and the HRTO settlement were discussed during a meeting with the Complainant and Complainant's agent.

Recently, both the Complainant and Templeman have written to me about what occurred during that meeting. The Complainant invited me to confirm the Complainant's position on what transpired. Templeman shared with me the Complainant's position on what transpired and stated:

I write as a professional courtesy to advise you that this characterization of your activities is being made initially, to me, and, I assume, in no short order, to the Tribunal. If you wish to rectify this error, I would be grateful if you could either contact me or provide me with a copy of any correspondence doing so.

It seems that one or more parties in another legal proceeding might view my position as relevant to that proceeding.

I report to Council. It is therefore appropriate that any response I make be made directly to Council.

The *Municipal Act* requires that Integrity Commissioner investigations be conducted in confidence. Subsection 223.5(1) states that:

The Commissioner and every person acting under the instructions of the Commissioner shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

Of course this does not prevent an Integrity Commissioner from sharing parties' submissions with other parties, so that each party has the opportunity to respond fully to allegations and issues affecting the party's interests. Nor does it prevent an Integrity Commissioner from giving a party the opportunity to confront and to address relevant evidence.

Another exception is when an Integrity Commissioner reports to Council on a complaint.

Absent these special considerations, I will not divulge what occurred during a meeting with a party during a proceeding that is still ongoing.

What I will do, without commenting on a particular conversation, is to set out my position on relevant matters.

1. An Integrity Commissioner reports directly to the Council as a whole. The Integrity Commissioner does not report to any individual Council Member or any officer or agent of the Township.

2. The *Municipal Act* requires that the Integrity Commissioner perform the functions independently.
3. The Township is not a party to Code of Conduct complaints. The parties are the complainant and the respondent(s).
4. After an investigation, the Council will decide what to do about the Integrity Commissioner's report and recommendations. Until then, the Township should be neutral on any ongoing Code of Conduct proceeding.
5. Consequently, the Township should take no position on ongoing Code of Conduct proceedings. This includes taking no position on whether a Code proceeding should settle, whether a Code proceeding should be suspended or stayed, or whether a Code proceeding should be expedited.
6. I was concerned that the law firm's October 23 letter *appeared* to indicate that the Township had participated in settling an Integrity Commissioner proceeding when the Township is not a party to an Integrity Commissioner proceeding.
7. It was, and is, important to maintain the independence – including independence from the Township – of Integrity Commissioner investigations.
8. For the above reasons, in my view it would be untenable for a lawyer of the Township to represent a Code of Conduct respondent or complainant. Apart from conflict of interest, this would be inconsistent with the independence that the *Municipal Act* requires of an Integrity Commissioner.
9. Templeman explains that it has not represented and does not represent the Council Member in the Code of Conduct proceeding. Templeman does currently represent the Council Member in the HRTO proceeding.⁶
10. I appreciate the further clarification provided by the law firm – including the explanation that the settlement merely codifies an earlier withdrawal of a Code complaint (which the Complainant does not agree took place) – but I remain concerned that the Township's former CAO/Clerk signed a document that purports to settle an Integrity Commissioner proceeding.⁷ This is, on its face, inconsistent with the statutory imperative that an Integrity Commissioner conduct

⁶ The information in this paragraph has been provided by Templeman in response to a draft of this interim report. I have amended this paragraph to reflect Templeman's feedback. The Complainant's agent has also commented on this paragraph of the draft, pointing out that Templeman originally had represented both the Council Member and the Township in the HRTO proceeding.

⁷ In response to a draft of this interim report, Templeman explains as follows: "As has been indicated, the HRTO proceeding had a single file number, albeit with two Respondents. The settlement reached was prepared as a single document, although some terms would be more relevant to one Respondent than another, and certain public interest remedies were of relevance to the Tribunal. The Township had and has no interest in this or any IC proceeding. ... The Township takes no position on the issue of whether or in what fashion the current Code of Conduct investigation should continue."

investigations independently, including independently of municipal administration.

11. On a go-forward basis, I will not consider communications from another source (whether a Respondent, the Township or a third party) that purport to reflect a Complainant's decision to withdraw.
12. If a Complainant decides to withdraw a Code of Conduct complaint then the Complainant should inform the Integrity Commissioner directly.
13. Among other valid reasons, this is consistent with direct communication between the Integrity Commissioner and the parties. As I have explained, direct communication is an essential aspect of the Integrity Commissioner's independence.
14. In the meantime, in the case of this specific settlement document, I do not consider myself bound by the portions that purport to apply to the Integrity Commissioner proceeding.
15. In addition to the above grounds, the fact that the Complainant does not agree that the Integrity Commissioner proceeding was withdrawn or settled is reason enough not to apply the settlement agreement to the Code proceeding.
16. I have decided to resume the Code of Conduct investigation unless both the Respondent and the Complainant agree that the process should be suspended further pending the outcome of any ongoing proceeding before another tribunal.
17. Finally, I believe that the *Municipal Act* requirements of Integrity Commissioner independence and Integrity Commissioner confidentiality prevent other bodies, conducting other proceedings, from interfering in the Integrity Commissioner process including by attempting to breach the confidentiality of the investigation process.

Conclusion

I have decided to resume the investigation unless both parties agree that it should continue to be suspended pending the outcome of another legal proceeding.

The Complainant's agent confirms that the Complainant does not agree with continued suspension.^{8,9} Absent the agreement of *both* parties to suspend, the investigation is, therefore, resuming.

⁸ This position is contained in the Complainant's response to the draft of this interim report.

⁹ The Township, quite rightly, takes no position on suspension. The statement of no position is contained in Templeman's response to the draft of this interim report.

Recommendation

None.

Respectfully submitted,



Guy Giorno
Integrity Commissioner
Township of Madawaska Valley

August 9, 2018