
REGIONAL MUNICIPALITY OF DURHAM INTEGRITY
COMMISSIONER, GUY GIORNO

Citation: Regional Municipality v. Neal and Schummer, 2021 ONMIC 15
Date: October 19, 2021

REPORT ON COMPLAINT

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THE COMPLAINT

1. This report concludes an inquiry into a complaint about an alleged breach of confidentiality by Councillors Joe Neal and Walter Schummer (Respondents). The breach is alleged to have occurred when they moved and seconded an amendment during the December 16, 2020, Regional Council meeting.
2. The complaint was submitted on behalf of the Regional Municipality by the Regional Clerk and Director of Legislative Services, Ralph Walton, who did so with the knowledge and support of the Regional Chair and the Chief Administrative Officer, supported by the Region's Legal Services division. In this report, I recognize the Regional Clerk, in his representative role, as the nominal Complainant.
3. According to the complaint, the alleged breach of confidentiality contravened section 12 of By-law Number 09-2019, the Code of Conduct By-law.

SUMMARY

4. This report makes no comment on the merits of the Beaverton Supportive Housing Project, and expresses no opinion on the disagreement between the Region and the Township of Brock. Nothing in this report should be interpreted as taking a position on the substantive issues.
5. This report does not comment on the Region's practices of classifying certain information as confidential. It also does not comment on whether a municipality's request for a Minister's Zoning Order (MZO) should or should not be treated as confidential. Those questions are outside an Integrity Commissioner's jurisdiction.
6. There was no closed meeting at which the information in question was considered. Consequently, there was no breach of closed meeting confidentiality.
7. There was, however, disclosure of information that the Region was treating as confidential, and Regional Council had not authorized the release. By a 26-3 vote on December 16 (albeit after disclosure had already occurred), Regional Council upheld a decision that the information was confidential. Regional Council's decision was final and is binding on me.

BACKGROUND

8. The Respondent Joe Neal represents the Municipality of Clarington, having been elected as Regional Councillor for Wards 1 and 2 of the Municipality.

9. At the relevant times, the Respondent Walter Schummer attended Regional Councillor meetings as the alternate for the Township of Brock, while the Township's Mayor, Debbie Bath-Hadden, was absent due to illness. (Mr. Schummer is Ward 3 Councillor of the Township of Brock.) Mayor Bath-Hadden passed away tragically earlier this year, and Mr. John Grant was appointed Mayor in her place. Mr. Schummer no longer represents the Township at Regional Council meetings.

10. For several months, the Township of Brock and the Regional Municipality of Durham have been disagreeing over the Region's Beaverton Supportive Housing Project, which would involve the construction of approximately 50 pre-fabricated, modular, supportive housing units at 133 Main Street, Beaverton.

11. At its October 26, 2020, meeting, the Township of Brock Council adopted two resolutions related to the Beaverton Supportive Housing Project. One resolution asked that the Region, "Not pursue the Project because the [Township] Zoning By-law does not permit the uses proposed by the Project." The other resolution directed the Township staff to prepare an interim control by-law that would temporarily prohibit prefabricated, modular construction and supportive housing anywhere in Brock.

12. The two Brock resolutions were sent to the Region and considered at the October 28, 2020, Regional Council meeting. Council referred Brock's correspondence¹ containing the resolutions to the Regional staff.²

13. Mr. Schummer, appearing in a personal capacity and not on behalf of Brock or the Township Council, made a delegation to the same meeting of Regional Council. He outlined concerns about the Beaverton Supportive Housing Project.

14. In addition to Mr. Schummer, nine other delegations spoke on the issue. Three spoke about supportive housing generally,³ and six specifically addressed the Beaverton Supportive Housing Project.⁴ Regional Council also received three more items of correspondence from Brock,⁵ and four additional items of correspondence,⁶ related to the Project.

15. On October 28, Regional Council also approved the creation of a Beaverton Supportive Housing Community Liaison Committee, "consisting of up to 10 local resident representatives selected by the Council of the Township of Brock, for the purpose of sharing information, identifying issues, concerns and mitigation strategies and to promote

¹ Council Correspondence CC 46 (October 28, 2020).

² Resolutions 300 and 301 (October 28, 2020).

³ Items 6.2, 6.7, 6.8 (October 28, 2020).

⁴ Items 6.3, 6.4, 6.5, 6.9, 6.10, 6.11 (October 28, 2020).

⁵ Council Correspondence CC 38, CC 39, CC 40 (October 28, 2020).

⁶ Council Correspondence CC 41, CC 42, CC 43, CC 47 (October 28, 2020).

the successful integration of this project and its residents within the broader Brock community.”⁷ As I discuss below, Brock subsequently declined to select any representatives.

16. On November 23, the Township of Brock enacted By-law Number 2994-2020, Being a by-law under the provisions of Section 38 of the *Planning Act*, R.S.O. 1990, c. P.13, as amended, to establish Interim Control provisions for the entirety of the Township of Brock to prohibit the establishment of Supportive Housing and Modular Construction, including Manufactured Dwelling Houses, for a period of twelve (12) months in order to allow for the appropriate completion of further research and consultation.

17. The addendum to the agenda of the November 25 Regional Council meeting discloses that Council was to consider the following correspondence:

<p>CC 57 Confidential Memorandum from Jason Hunt, Director of Legal Services, dated November 25, 2020 re: Beaverton Supportive Housing Project Potential Litigation</p>	<p>Under Separate Cover</p>
<p>Recommendation: Receive for information</p>	

18. I have reviewed Council Correspondence CC 57. The first words on the first page, in bold type, are “**Privileged and Confidential.**”

19. Council Correspondence CC 57 was distributed “Under Separate Cover” because the Regional staff considered the content to be confidential.

20. Council Correspondence CC 57 was not made public.

21. Council Correspondence CC 57 was not, however, considered in closed session. As the agenda addendum indicated, the staff recommendation was that Council Correspondence CC 57 be received for information. In open session, Regional Council resolved that Council Correspondence CC 57 “be received for information.” Questions about the document were asked and answered in open session. I consider below whether the open session activity deprived the memorandum of its confidential character.

22. The open session questions about Council Correspondence CC 57 were asked by Councillor Joe Neal and Councillor Schummer,⁸ and also Councillor Smith (who is not a party to this inquiry). The following is my transcription of the recording of that portion of the Regional Council meeting:

⁷ Resolution 293 (October 28, 2020).

⁸ The reason I refer to one Respondent only by surname (Councillor Schummer) and the other Respondent also by first name (Councillor Joe Neal) is that, as Regional Council members and those who follow Regional Council proceedings will be aware, there are two Councillors with the surname Neal.

Regional Chair: On item CC 57 the memorandum from –

Coun. Chapman: Move to receive for information.

Regional Chair: – from Jason Hunt, Director of Legal Services on the Beaverton Supportive Housing Project, to receive for information, moved by Councillor Chapman, looking for seconder.

Coun. Leahy: Leahy, second.

Regional Chair: Seconded by Councillor Leahy

Coun. Joe Neal: Point of order, Mr. Chair.

Regional Chair: Yes, Councillor Neal.

Coun. Joe Neal: So, I don't understand why this is being dealt with in –

Regional Chair: Sorry, I've lost you again. Can you start over please?

Coun. Joe Neal: I don't understand why it's being dealt with as a confidential report because it's outlining steps that will be taken which are in my mind not really giving legal advice, so I think that report should be in public record.

Regional Chair: OK. Thank you. The recommendation is receive for information. It has been moved and seconded. Councillor Smith in the chat box.

Coun. Smith: Yes, thank you. Through you Chair Henry, and I guess to Mr. Hunt, if I can.

Regional Chair: You can, but remember we are in open session.

Coun. Smith: Yes. The Township of Brock during its meeting on Monday has decided to enact an interim control by-law, but still negotiate with the Region regarding possible modifications to the Beaverton project. I'm just trying to figure out how to word this. So based on the recommendations in your report, will that negotiation still be able to take place?

Regional Chair: I'll go to Mr. Hunt first, please.

Mr. Hunt: Yes, I would anticipate that the negotiations will continue between staff at the Region and staff at Brock and it's my understanding that those negotiations so far have been fruitful and certainly have not reached the end of the line. We certainly are putting our full efforts into reaching a negotiated resolution to this, and our experience with Brock to date has been that they are reciprocating in that, so the parties I think are hopeful that we will reach a resolution, however, we may need, in the unlikely event we're not able to resolve this through that process, then this memo lays out what the next steps for the Region would be from a legal perspective, and appreciating that there are some timing constraints on this we want to keep this advice timely for Council so Council was aware what the Region was doing.

Coun. Smith: Thank you. I just want to make sure this didn't preclude any of that. I do have some questions that I'll bring forward to next week's Health and Social Services Committee. Thank you for that information.

Regional Chair: Councillor Joe Neal.

Coun. Joe Neal: My question is: At would point would the actions outlined in this actually take place?

Voice: Right away.

Coun. Joe Neal: There's an action at the end of this memo. I'm wondering, when would that be made public?

Regional Chair: I will go to Mr Hunt first.

Coun. Joe Neal: The Region of Durham has a policy to go above and beyond, for example, transparency and so on so, as I recall, there was a policy to go above and beyond –

Regional Chair: Councillor Neal, your microphone is still cutting in and out.

Coun. Joe Neal: Well, maybe it's yours, Mr. Chair, because I think mine's working fine.

Regional Chair: Well, I'm in the Council Chambers with staff and the Clerk's Office, and they're hearing the same thing I am but, anyways, I will move on to Mr Hunt.

Mr. Hunt: So I think it's important to note that we would be in [likelihood] proceeding almost immediately with those steps. As I commented earlier, I don't think the one, the negotiation, precludes the other. But, as we said, given the timing, we would be moving relatively quickly. As to the second part of the question, when there would be public disclosure, receiving advice as to the appropriate next steps in the litigation is, in my view, a privileged exercise, however, depending on the nature of the litigation, taking that next step is not something that's done in confidence. So to use an example, you may receive my confidential advice to initiate litigation by filing a statement of claim against a party. Once that statement of claim is filed of course it's a matter of public record. So when the step that's recommended here becomes a matter of public record, then obviously as [the] Councillor has pointed out, this would at least in part become a public matter. I don't have any information, unfortunately, specifically on when, at what point in the process it would be public. But the Councillor is correct to say at some point it would be a matter of public record that this particular step has been taken.

Coun. Joe Neal: OK. Thanks.

...

Regional Chair: That concludes your questions, Councillor Neal?

Coun. Joe Neal: Yes.

Regional Chair: Thank you. Councillor Schummer.

Coun. Schummer: Thank you, Mr. Chair. I'll just ask a general question here. Are there any issues with respect to timing to take the steps outlined, given where we are in the calendar, because typically half the schedule starts getting useless with holidays and what have you, any busy-ness that COVID is creating at various levels. So I'm just wondering: Is there a concern about time to take the appropriate steps?

Regional Chair: I will have our CAO respond, Councillor Schumer.

CAO: Yes, there are a number of issues impacting time. In order to have the project delivered by the end of next year, which is when the provincial and likely federal funding will expire, we require a building permit by February, so it is really urgent that we move this matter forward as quickly as possible.

Coun. Schummer: Thank you. Yes, I realize that. My question was more so about possible actions in the correspondence and how that relates to actually getting things done in a short period of time.

CAO: That would be the subject of discussion between Regional officials and the Minister's office.

Coun. Schummer: OK. Thank you.

Regional Chair: Members of Council, seeing no other comments in the chat box, on the receive for information, I will be now call that vote. All those in favour? In opposition? Hearing none, that carries.

23. At the December 16 meeting of Regional Council, Councillor Chapman and Councillor Pickles moved and seconded the following motion, of which they had previously given notice:

Whereas at the meeting of October 28, 2020, Regional Council passed a motion that in part said:

"That in order to improve communication with area residents, a Beaverton Supportive Housing Community Liaison Committee be created, consisting of up to 10 local resident representatives selected by the Council of the Township of Brock, for the purpose of sharing information, identifying issues, concerns and mitigation strategies and to promote the successful integration of this project and its residents within the broader Brock community";

And Whereas the Council of the Township of Brock has chosen not to support this project including not wishing to select representatives of the community to participate in a Beaverton Supportive Housing Community Liaison Committee;

And Whereas Regional Council believes a Beaverton Supportive Housing Community Liaison Committee created for the purpose of sharing information, identifying issues, concerns and mitigation strategies would greatly assist to promote the successful integration of this project and its residents within the broader Brock community;

Now therefore be it resolved that staff reach out to local Beaverton community groups such as, but not limited to the Legion, Lions Club, Board of Trade, Lakeview Manor Family Committee, Gillespie Gardens, the Library Board, Brock Community Health Centre and Local church groups to invite these groups to nominate a representative for a Beaverton Supportive Housing Community Liaison Committee; and

That the Beaverton Supportive Housing Community Liaison Committee have up to 10 members from the Brock community as noted above; it be co-chaired by the Director of Housing Services and a community member selected by the committee; and, meet at least monthly.

24. Councillor Joe Neal moved, seconded by Councillor Schummer, "That the main motion of Councillors Chapman and Pickles be amended by adding the following clause: 'That the Region not seek a Minister's Zoning Order (MZO) and instead work with Brock Township to satisfy local concerns.'"

25. The following is my transcription of debate at Regional Council, beginning immediately after Councillor Chapman read his main motion into the record:

Regional Chair: Councillor Chapman, did you wish to speak to it?

Coun. Chapman: Yes. As we heard when we originally passed the motion on October 28th, about having this committee, Councillor Smith from Brock, Councillor Pickles (the Vice Chair of Health and Social Services), and our Director of Housing, met with a number of the residents in the Brock community about this Project, and what came out of that was the request for a two-way passage of information with the residents on this matter. So the motion was to have a committee appointed by the Brock Township Council, seeing that they would know their community more than that. The Brock Township, I'm told, Council is not interested in doing that. So in this case it's another way to reach out. We don't want staff or Regional Council selecting these people. We're asking these various groups, the staff can reach out to them by way of letter or however staff sees best of how to do that, to get ten people, at least up to ten people, to have this important committee, so that we can have that two-way dialogue with the residents up there, and they can understand the Project,

they can help our staff understand some of their concerns, and working together maybe we can move forward to make sure that the Project is successful. So I hope that all of Council would support this, to have this liaison committee. Thank you, Mr. Chair.

Regional Chair: Thank you. Councillor Pickles, do you wish to speak to this?

Coun. Pickles: Thank you, Mr. Chair. Just to clarify that when I and Councillor Smith agreed to meet residents, one resident representative came out, but as Councillor Chapman indicated, that one resident purported to, if not necessarily represent, but had been talking with a number of other residents and really felt that there could be a better two-way communication, and that's why we drafted up the motion that we did, to seek this committee. You know, it's not incumbent to be supportive of the Project to be on the committee. We may have people who are supportive, some people who aren't, or some people who just have a lot of questions, and that's fine. But I think we do want to open it up to the communities to have people who are interested in participating coming forward. If people aren't interested in participating they don't need to come forward. We want to make this available for those that are interested in receiving the information, asking questions, and having a dialogue. I'm pleased we brought it forward. I do think there are people in the community that will want to put their names forward and participate. Thank you.

Regional Chair: Thank you. Councillor Joe Neal, you have an amendment?

Coun. Joe Neal: Yes, sir. I gave it to the Clerk. It could be displayed, or do you want me to just read it?

Regional Chair: Please read it, and I will ask the Clerk to display it.

Coun. Joe Neal: So the amendment is moved by myself, seconded by Councillor Schummer: "That the Region not seek a Minister's Zoning Order (MZO) and instead work with Brock Township to satisfy local concerns."

Regional Chair: Councillor Neal, that was an in camera item.

Coun. Joe Neal: Well, I sent to the Clerk so, I'm just –

Regional Chair: One second.

[pause]

Regional Chair: Members of Council, just bear with me for one minute please.

[pause]

Regional Chair: So, Members of Council, I will come back to this. I'm going to ask for a ten-minute recess, please

Coun. Joe Neal: I'll give you that motion.

Coun. Marimpietri: So moved, Mr. Chair.

Regional Chair: Moved by Councillor Joe Neal, seconded by Councillor Marimpietri. On a ten-minute recess, all those in favour? In opposition? None. We are in recess for ten minutes.

[recess]

Regional Chair: Mr. Clerk, if you could do a roll call please.

[roll call omitted]

Regional Chair: Thank you, Mr. Clerk. Councillor Neal, I'm going to rule your amendment out of order. The subject matter is confidential. It deals with a matter that Council has already previously considered.

Coun. Joe Neal: Mr. Chair, I don't think it's dealing with confidential advice of any sort. It's dealing with –

Regional Chair: It's not for debate. I've given my ruling on your amendment. You always have the option of challenging the chair.

Coun. Joe Neal: I'll challenge the ruling.

Regional Chair: OK. Mr. Clerk, will you explain the rules for challenging the chair, please?

Regional Clerk: Through you, the question is: Shall the ruling of the chair be upheld? If you wish to uphold or support the ruling of the chair, you vote yes; if you are opposed to the ruling, you'll vote no.

[roll call vote omitted]

Regional Chair: The ruling is upheld. Councillor Neal.

Coun. Joe Neal: Well, so much for accountability and transparency.

Regional Chair: Councillor, really?

Coun. Joe Neal: Section 224 of the *Municipal Act* talks to that, as the role of council, Mr. Chair, to ensure the accountability and transparency of the operations of the municipality.

Regional Chair: Councillor Neal, we've gotten through a very long meeting today, with a decorum that has been pretty amazing, and we will continue with that decorum, thank you. Each Member of Council acts on their own accord. Please continue.

Coun. Joe Neal: So I don't agree with the notion of bypassing Brock Council on this, so I can't imagine this happening in a different locale, or maybe it will happen, I don't know, for example, if something was happening regarding the EFW or something and Clarington was not particularly happy about it, would you –

[open microphone interruption omitted]

Coun. Joe Neal: I'll stop there, Mr. Chair. Thanks.

Regional Chair: Thank you.

Coun. Joe Neal: Recorded vote, please.

Regional Chair: This isn't bypassing Brock Council. Brock Council has made a decision. Councillor Schummer.

Coun. Schummer: Thank you, Mr. Chair. I will be supporting the motion, because I never like to not support getting the public involved. If I could get some clarification, this committee, is the idea that this committee would be formed and active both before and after the Project completion?

Regional Chair: So, Councillor Schummer, your question is to the mover of the motion, which would be Councillor Chapman. Councillor Chapman.

Coun. Chapman: Yes, the idea is to get the Project moving, as it moves forward, up and running, and then it would see whether it would be needed at that stage, or whether some other local or committee within the housing organization would take up those responsibilities.

Regional Chair: Councillor Schummer, did that help?

Coun. Schummer: Kind of. I guess I'll go to where it states the purpose of it being to share information, identify issues, concerns, and mitigation strategies. So is the purpose of this committee, then, not only to kind of act as a human suggestion box, and receive, maybe,

complaints and issues with the Project, but is the point to also solicit possible solutions from the public?

Regional Chair: Councillor Chapman.

Coun. Chapman: Yes. Through this committee, the idea is to share the information on it, to identify concerns, from both sides of those working on the Project and later on when we're into the actual running of the operation, and of course the residents, and to try to address those concerns as best possible. This is why we also want to have a joint chairmanship of it, somebody from the community as well as our Director of Housing.

Coun. Schummer: Thank you. My concern – there is an awful lot of, I'm going to call it suspicion, in the Beaverton community especially, and I can only imagine there's going to be some from this as well. At the last Health and Social Services Committee, the Orgcode⁹ consultant was both at the committee and his report was there, as well as a critique of that report which was from a Guelph, I believe, professor, which was brought in at the request of the Beaverton Vision group of citizens,¹⁰ and unfortunately the consultant really just brushed off all of the points that were in that critique. He labelled it as nothing but NIMBYism, which certainly is a slap in the face, because a lot of the concerned people in Beaverton, it's not that they just don't want the Project in their backyard, but they want a proper project. What happened there was quite a slap in the face, and there were recommendations made in that report, in fact, one of them being about the 20 per cent of the units that will share a washroom, and the consultant was very much against that but, yet, the Region is going to move ahead, full steam ahead, regardless of that safety concern, especially during COVID, and so, if the Region is not going to pay attention to such a significant concern and recommendation from its own consultant, I don't know what the citizens of Beaverton that are going to be solicited to sit on this committee are going to feel if they're going to really have an impact. My concern is that this will be seen as a feel-good project. I know that you do not, Councillor Chapman and Pickles, I know you do not want it to be that, but my fear is that that is how it's going to be seen, as everything has been full steam ahead as far as many of the citizens in Beaverton are concerned. Like I said, I am going to support this motion, but I can only offer some serious advice that this committee, if you're going to use the words about mitigation strategies, if it seems that it's just collecting words and putting words out, it is going to lose the faith, even more so, of those residents of Beaverton and the ones that sit on the committee. Like I said, I'll support this, but this has got to be done right or there's going to be an even further erosion of faith and trust. Thank you.

Regional Chair: Thank you. Councillor Pickles, I know you want to comment on this, but you've already spoken to this matter as the seconder.

Coun. Pickles: That's fine, Mr. Chair. I just wanted to point out to Council, that this motion isn't so much about setting up the committee but how appointing to it. We've already dealt with the matter of the committee previously.

Regional Chair: Thank you. Is there anyone else wishing to speak to this motion? I believe, Councillor Joe Neal, you asked for a recorded vote.

Coun. Joe Neal: That's fine.

Regional Chair: OK. Thank you. OK. Mr. Clerk, I'll call for that recorded vote now, please.

[roll call vote omitted] [motion carried]

⁹ Iain De Jong, President and CEO, Orgcode Consulting Inc., presented to the Health and Social Services Committee, December 3, 2020, on the suitability study of 133 Main Street, Beaverton.

¹⁰ At the same meeting, David J. Douglas presented to the committee and provided comments on the Orgcode suitability study. The committee minutes do not identify Dr. Douglas as such, but he is Professor Emeritus in the University of Guelph School of Environmental Design and Rural Development.

26. Both the minutes and the recording indicate that the Regional Chair ruled the amendment of Councillors Joe Neal and Schummer out of order on the ground that the subject matter was confidential and had previously been considered by Council. The Chair's ruling was sustained on a 26-3 vote.

27. The amendment was moved at approximately 3:20 p.m.

28. At 1:03 p.m., Councillor Joe Neal had sent the following email to the email address of Mr. Walton, the Regional Clerk:

From: Joe Neal

Sent: December 16, 2020 1:03 PM

To: Ralph Walton

Subject: Chapman Pickles Motion

Ralph: On the above motion, the following amendment would be moved by myself and seconded by Councillor Schummer:

"That the Region not seek an MZO and instead work with Brock Twp. to satisfy local concerns."

Thanks

Joe

29. The email was sent during the lunch recess, which lasted from 12:41 p.m. to 1:45 p.m.

30. The Regional Chair and the Regional Clerk were present in the Council Chamber during the December 16 meeting. The recording shows that the Regional Clerk was active during the meeting, conducted five roll calls and 15 recorded votes, gave advice to the Chair, and communicated with the staff.

31. The Respondents were not present in the Chamber. They attended the meeting virtually.

PROCESS FOLLOWED

32. In operating under the Code, I follow a process that ensures fairness to both the individual bringing a Complaint and the Council Members responding to the Complaint. This process is based on the Complaint/Application for Inquiry Procedure that is Schedule A to the Code of Conduct.

33. I received the Complaint January 5.

34. On January 9, I issued a Notice of Inquiry, informing the parties that I was conducting an inquiry under section 223.4 of the *Municipal Act* into whether the

Respondents contravened section 12 of the Council Code of Conduct by making confidential information public without the authorization of Regional Council when they moved and seconded the amendment at the December 16 meeting.

35. I also informed the parties that, even though there are two Respondents, I would conduct a single inquiry because there is only one Complaint based on one allegation. I modified my usual process by offering each Respondent an opportunity to address the submissions of the other Respondent, in addition to the submissions of the Complainant. This turned out to be unnecessary because the Respondents made joint submissions.

36. On January 9, Councillor Joe Neal requested clarification. He also requested an extension of time for the Respondents to file a joint Response. I granted an extension.

37. I also dealt with the Respondents' suggestion that, in order to respond to the Complaint, they needed to see any MZO request submitted by the Region to the Minister of Municipal Affairs and Housing. I address this position later in the report.

38. I received the Respondents' joint Response on March 9.

39. I received the Complainant's Reply on March 25.

40. On April 27, I emailed the parties to inform them that the material provided to me was sufficient for me to understand the nature of the Complaint and the position of the parties. As a result, I did not think it was necessary for me to request interviews of the parties. I nevertheless offered each party the opportunity of an interview, at the party's election.

41. Councillor Joe Neal accepted the opportunity of an interview. The Complainant declined.

42. I issued a delegation under subsection 223.3(3) of the *Municipal Act* to another lawyer in my office, authorizing him to conduct the interview of Councillor Joe Neal. The interview took place on May 21.

43. I subsequently reviewed the law, read all the documentation provided, carefully examined the recordings of the November and December meetings of Regional Council, and considered the submissions of the parties. In writing this report I have taken into account all the evidence and all the submissions.

POSITION OF THE PARTIES

Position set out in Complaint

44. According to the Complaint, by moving the amendment on December 16, the Respondents released confidential information during an open, public portion of a Regional Council meeting and in the process contravened section 12 of the Code. The Complaint mentions Regional Council meetings are broadcast and streamed online with recordings available to the public.

45. The Complaint states that the Regional Chair, as presiding officer of the meeting, ruled the motion out of order because it dealt with a confidential subject, and the Regional Chair's ruling was sustained on appeal.

46. The Complaint states that at no time did Council authorize the release of the confidential information.

Respondents' Position

47. The Respondents' written submissions refer specifically to section 12.1 C) of the Code. This provision relates to a meeting closed to the public. The written submissions do not specifically mention section 12.1 A), which applies to confidential information acquired by virtue one's office, but the submissions do, in detail, address whether the request for an MZO was confidential. Whether the MZO request was confidential is the issue under section 12.1 A), and the Respondents have addressed that issue.

48. The Respondents emphasize that there was no closed meeting on November 25 at which the content of Council Correspondence CC 57 was considered. As a result, they did not disclose the substance of "a matter, that has been debated or discussed at a meeting closed to the public," in contravention of section 12.1 C) of the Code.

49. The Respondents further submit that by introducing the amendment on the floor of Council they did not reveal any legal advice or any confidential information. They rely on the November 25 explanation of the Director of Legal Services as authority for the "distinction between legal advice which is confidential, versus a step that is taken as a result of that advice, which is not confidential."

50. The Respondents argue that the wording of the amendment ("That the Region not seek a Minister's Zoning Order (MZO)") did not disclose confidential information, properly construed. They note that no discussion took place about the Region actually requesting an MZO.

51. Further, the Respondents believe that the CAO's comments ("That would be the subject of discussion between Regional officials and the Minister's office") at the November 25 meeting were sufficient to allow an individual listening to the meeting to conclude that the Region was contemplating applying for an MZO from the Minister of Municipal Affairs and Housing. To support their position, they provided a contemporaneous email that suggests at least one individual in the community did infer, from the CAO's statement, that an MZO would be sought. That individual had written, "Right at the end the CAO mentioned the Minister. I can only assume they will be asking for an MZO."

52. According to their submissions, "The CAO of the Region had let the cat out of the bag, not Councillors Neal and Schummer."

53. The Respondents submit that, in any event, once an MZO had been formally requested – a fact of which they were unaware on December 16 – the step of requesting the MZO was no longer confidential. In their words, "Once the request for the MZO was made by the Region on November 25, 2020, the fact of the request ceased to be confidential."

54. Further, they observe that, "There was no disclosure of any legal advice in putting the amendment on the floor of Council, nor was there disclosure that the Region had in fact applied for an MZO."

55. I note that, while section 12.1 A) is not expressly mentioned in the written submissions, the arguments set out at paragraphs 49 through 54, above, if correct, would be a response to the allegation that the Respondents contravened section 12.1 A).

56. The Respondents further submit that requesting an MZO from the Minister is not grounds for a closed meeting under section 239 of the *Municipal Act*. They note that the Region cannot exempt itself from section 239.

57. During his interview, Councillor Joe Neal explained that Regional Council routinely receives memoranda from municipal lawyers that were marked confidential but that are not properly considered confidential. As a Regional Councillor, he believes it is his duty to prevent the overuse of the term "confidential" by the municipal staff, as overuse has the effect of depriving the public of knowledge about important matters about which the public otherwise has a right to know. He pointed out that this is precisely why s. 239 of the *Municipal Act* exists: to ensure that meetings are open to the public unless they are closed to the public for a legitimate purpose.

58. The Respondents also point out that they emailed the text of their amendment to the Regional Clerk, at 1:03 p.m., during the lunch recess, on the day of the December 16 meeting. They explain that, during virtual meetings necessitated by the COVID pandemic, emailing the Regional Clerk with the wording of motions and amendments has become

standard practice. Previously, during in-person meetings, an amendment needed to be written out, signed by the mover and seconder, and physically handed to the Regional Clerk at the meeting.

59. As evidence, Councillor Joe Neal provided numerous examples –both before and after the December 16 meeting – of motions and amendments that had been emailed to the Regional Clerk in the same manner as his email of December 16.

60. The Respondents take the position that Councillors should be able to assume that an amendment that has been emailed to the Regional Clerk has been reviewed.

61. They also note that the Regional Clerk had more than two hours to raise any concerns about the amendment – two hours during which the information in the amendment had not been shared with anyone other than the Regional Clerk and, consequently, was not public. The Respondents believe that the Regional Clerk had ample opportunity to review the amendment and address any concerns before Councillor Joe Neal was invited to read the wording of the amendment in open session.

62. The Respondents note that the Regional Clerk was physically present in Council chambers with the Regional Chair the day of the meeting. They believe that it is unreasonable to the Regional Clerk subsequently to file a Code of Conduct complaint under the circumstances.

Region's Reply

63. The Regional Clerk, on behalf of the Region, noted that the amendment text was emailed to the Regional Clerk's individual email address, contrary to the following direct instruction included with meeting invitations: "We will use the "Message/Chat" function in Teams to indicate requests to speak. If you wish to send wording for a motion, please send it to clerks@durham.ca." [emphasis added]

64. The difference, of course, is that the clerks@durham.ca email address is accessible to a larger number of staff members, and not just the Regional Clerk who has active duties during the meeting. The Region's Reply also notes that "Meetings are very dynamic and fluid and time does not always permit in depth review of information and motions forwarded to Clerks' staff. Complexity of issues adds to the challenge."

65. According to the Reply, only after the amendment in question had been moved and seconded was it actually reviewed (in consultation with the Chief Administrative Officer and Regional Solicitor).

66. The Reply also makes the point that the CAO's November 25 comment about discussions with the Minister's office did not imply that an MZO was being considered.

67. Finally, the Reply notes that section 12.1 A) of the Code refers to confidential information without tying that information to a closed meeting. (In contrast, section 12.1 C applies to matters considered at closed meetings.)

FINDINGS OF FACT

68. The following findings are based on the standard of a balance of probabilities, taking into account all the evidence.

69. I find as a fact that Council Correspondence CC 57 (November 25) was not considered in a closed meeting. I find further that the Respondents did not disclose a matter, the substance of a matter, or information pertaining to a matter that had been discussed at a meeting closed to the public.

70. However, I also find as a fact that CC 57 was a confidential document and that the Respondents acquired access to it by virtue of their office.

71. I find the Respondents knew that the information in CC 57 was being treated as confidential. On November 25, in reference to CC 57, the Regional Chair had reminded the Council that it was meeting in open session. I find that the Regional Chair's reminder was intended as, and understood to be, a caution not to disclose the memorandum's content. It is clear from the recording of the meeting that Council Members chose their words carefully, to avoid disclosing what was in CC 57.

72. For example, Councillor Schummer confirmed that he would not discuss specifics of the legal memorandum when he said, "I'll just ask a general question here." He did not disclose the document's content, and carefully referred only to "possible actions in the correspondence."

73. Councillor Joe Neal argued, on a point of order, that the memorandum should be public. His point was that the document was not public but should be. In making this point, Councillor Joe Neal acknowledged the confidential status of CC 57. He did not agree, but he understood the document was confidential. In his words, "I don't understand why this is being dealt with as a confidential report ..."

74. I find as a fact that, at the time of the December 16 meeting, Regional Council had not consented to the release of the content of CC 57. In particular, I find that Regional Counsel had not consented to the release of information about requesting an MZO.

75. I find as a fact that the CAO's comments on November 25 did not imply a request for an MZO. The fact that one or more members of the community inferred that this was the case does not mean that this is what the CAO implied or intended to imply. The drawing of an inference does not require an implication.

76. I find as a fact that on December 16 a request for an MZO was not public.

ISSUES AND ANALYSIS

77. I have considered the following issues:

- A. Did the Respondents need access to the Region's communication with the Minister about an MZO?
- B. Did the Respondents contravene section 12.1 C) by disclosing closed meeting information?
- C. Did the Respondents contravene section 12.1 A) by disclosing confidential information?

A. DID THE RESPONDENTS NEED ACCESS TO THE REGION'S COMMUNICATION WITH THE PROVINCE ABOUT AN MZO?

78. Part of the delay was occasioned by the Respondents' request for access to a communication by the Region to the Province about an MZO.

79. As Integrity Commissioner, I have *Municipal Act* authority, in the course of an inquiry, to obtain relevant information and records from a municipality, but I do not have authority to order a municipality to disclose records to anyone else, including a respondent in an inquiry. I do have the ability to determine whether it is fair to proceed with an inquiry based on the information available to a respondent.

80. As I understand the Respondents' position, once an MZO has been requested, the fact of the request is not confidential and, consequently, is not subject to the restriction in section 12 of the Code.

81. I understand the Respondents' position to be based, at least in part, on the following statement of the Director of Legal Services, made November 25:

As to the second part of the question, when there would be public disclosure, receiving advice as to the appropriate next steps in the litigation is, in my view, a privileged exercise, however, depending on the nature of the litigation, taking that next step is not something that's done in confidence. So to use an example, you may receive my confidential advice to initiate litigation by filing a statement of claim against a party. Once that statement of claim is filed of course it's a matter of public record. So when the step that's recommended here becomes a matter of public record, then obviously as [the] Councillor has pointed out, this would at least in part become a public matter. I don't have any information, unfortunately, specifically on when, at what point in the process it would be public. But the Councillor is correct to say at some point it would be a matter of public record that this particular step has been taken.

82. I interpret the Director of Legal Services to have been making a general observation that confidential advice about taking action is distinct from the taking of action, and that while the advice remains confidential, the taking of action will become a matter of public record. The Director did not specifically state when the taking of action becomes public, and he certainly did not state that the request for an MZO is public immediately upon being made.

83. On the contrary, the Director stated, "So when the step that's recommended here becomes a matter of public record, then obviously as [the] Councillor has pointed out, this would at least in part become a public matter." This sentence is a tautology, and sheds no light on the point in time when the becoming public occurs.

84. The next two sentences confirm that the Director was making no statement about the timing of becoming public: "I don't have any information, unfortunately, specifically on when, at what point in the process it would be public. But the Councillor is correct to say at some point it would be a matter of public record that this particular step has been taken."

85. I agree that the central issues in this inquiry are whether information became public and, if so, when it became public. In my view, actual communication between the Region and the Province is not essential to either issue. The Respondents not only had a fair opportunity to address these issues, they did in fact address the issues fully.

B. DID THE RESPONDENTS CONTRAVENE SECTION 12.1 C) BY DISCLOSING CLOSED MEETING INFORMATION?

86. No. It is established that Council Correspondence CC 57 was not considered at a closed meeting and that the Respondents' amendment did not relate to a matter considered at a closed meeting.

87. Consequently, there was no contravention of section 12.1 A) of the Code.

C. DID THE RESPONDENTS CONTRAVENE SECTION 12.1 A) BY DISCLOSING CONFIDENTIAL INFORMATION?

88. Section 12.1 A) of the Code of Conduct By-law reads as follows:

12.1 No member shall:

- A) disclose, release or publish by any means to any person or to the public any confidential information acquired by virtue of his or her office, in any form, except when required or authorized by Council or the board or otherwise by law to do so

89. Before continuing, I will address two preliminary issues related to this section.

90. First, I need to address whether section 12.1 A) is properly in issue in this inquiry.

91. The Complaint does not mention section 12.1 A) or 12.1 C. It simply refers to section 12.

92. Similarly, the Notice of Inquiry that I issued does not specify section 12.1 A) or section 12.1 C). It simply refers to section 12.

93. However, the Respondents have focused on the following statement in the Notice of Inquiry:

The following is the allegation and the section of the Code I am considering:

- Allegation that Councillors Neal and Schummer contravened section 12 of the Code by moving and seconding motion 396 at the December 16 Council Meeting, thereby making public confidential information considered at and arising from the November 25 closed session of Regional Council, without the authorization of Regional Council to release the information.

94. As will be noted, the above passage does not refer to either 12.1 A) or 12.1 C). It simply mentions section 12. Further, the passage combines in a single sentence the concept of information considered at a closed meeting (which pertains to section 12.1 C)) and confidential information disclosed without the authorization of Regional Council (which pertains to section 12.1 A)).

95. In hindsight, it would have been better for the Notice to separate the two concepts more clearly. Nonetheless, what is relevant is whether the Respondents understood and had a fair opportunity to address the allegations. It was clear from the materials provided to the Respondents that the alleged disclosure of confidential information was one of the central issues. Second, the Respondents addressed in some detail the allegation that they disclosed confidential information. See paragraphs 49 through 54, above, which summarize their position that confidential information was not disclosed.

96. In my view, there is no reason to discontinue the inquiry into the allegation under section 12.1 A) – disclosure of confidential information without the authorization of Council.

97. Second, I must explain the limits of my role as Integrity Commissioner in a section 12.1 A) case. I do not have authority to review the Region's decisions about openness and transparency. In other words, it is not for me to determine whether the Region was right or wrong to classify certain information as confidential.

98. The Code defines confidential information as follows:

"confidential information" means any information in the possession of, or received in confidence by, the Region that the Region is prohibited from disclosing, or has decided to refuse to disclose, under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, or any other law, which includes, but is not limited to:

- (1) information of a corporate, commercial, scientific or technical nature received in confidence from third parties;
- (2) personal information as defined in subsection 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act*;
- (3) information that is subject to solicitor-client privilege;
- (4) information that concerns any confidential matters pertaining to matters related to an identifiable individual, personal, labour relations, litigation, property acquisition, the security of the property of the municipality or a local board;
- (5) any other information lawfully determined by the Council to be confidential, or required to remain or be kept confidential by legislation or order; and
- (6) any information considered by or made available to Council during a closed meeting pursuant to subsection 239(2) of the *Municipal Act, 2001*.

99. As will be seen from the definition, in particular, its introductory words and items (4) and (5), the Region has scope to determine whether information is to be disclosed or kept confidential. Once the Region has done so, the *Municipal Act* gives me no authority to overrule its determination.

100. If a municipality transmits to the Minister a request for an MZO, it is not for me to state whether the municipality should or should not treat this action as confidential. The Respondents, and, in particular, Councillor Joe Neal, advanced reasoned arguments why a municipality's taking of such action should not be confidential. That is not, however, a question I need to consider. The relevant questions are whether the Region decided to make the information about the taking of action confidential, and whether Regional Council authorized the information's release.

101. I appreciate that item (5) of the "confidential information" definition refers to "information lawfully determined by the Council to be confidential." The application of section 239 of the *Municipal Act* (closed meetings) is under the jurisdiction of the closed meeting investigator and the application of MFIPPA is under the Information and Privacy Commissioner's jurisdiction; in neither instance may an Integrity Commissioner rule on what is lawful. Should other instances exist, I am not certain that the inclusion of the word "lawfully" permits the Integrity Commissioner to decide that a particular determination of confidentiality was unlawful and therefore not subject to the definition in the Code, but in this case, that question does not arise.¹¹

102. Councillor Joe Neal has set out his reasons for believing that the "confidential" designation is overused to shield from public view information that ought to be accessible. The issue he raises is significant, but this report neither accepts nor rejects the Councillor's position. That issue falls outside an Integrity Commissioner's purview.

¹¹ Section 239 of the *Municipal Act* was raised, but it applies to meetings and not the status of a particular document (in this case, CC 57).

103. I now turn to substance of the allegation under section 12.1 A). In my view, the reference to an MZO was confidential when the amendment was moved: see the findings of fact at paragraphs 70 through 76, above.

104. The Regional Council had not consented to the release of that information.

105. As I have explained, the issue of whether CC 57 was confidential is distinct from the question of whether a request for an MZO ought to be confidential. That question is not for an Integrity Commissioner to decide.

106. The Respondents knew or should have known that CC 57 was considered confidential. As I have noted, Councillor Joe Neal's November 25 point of order was premised on the confidential classification of CC 57. He disagreed with the confidential classification, but he was aware of it. In fact, that was the entire subject of his point of order.

107. Even if the making of a request for a MZO had the effect of converting the request into public information (and there is no evidence that this was the Region's intention), the Respondents were unaware, on December 16, of a request having been transmitted to the Minister. In other words, as of December 16, they knew nothing to suggest that the confidential classification of CC 57 had changed since November 25.

108. Finally, and significantly, the Regional Chair ruled, and a 26-3 majority sustained the ruling, that the Respondent's December 16 amendment contained confidential information. I am required to accept that determination for purposes of this inquiry.

109. In previous cases I have expressed the view that, once the presiding officer of a meeting has ruled on an issue of order (or decorum), the Integrity Commissioner should not duplicate that work by making parallel findings under the Code of Conduct: see, for example, *Sinnott et al. v. McConkey*, 2021 ONMIC 4 (CanLII), at para. 180.

110. I am not the only Integrity Commissioner to defer to the procedural decisions of presiding officers. In the City of Toronto, Integrity Commissioners have consistently taken the position that they do not have jurisdiction over the behaviour of Council Members during Council and committee meetings. Professor David Mullan, the first municipal Integrity Commissioner ever appointed in Canada, noted that the *Municipal Act* requires that each municipality pass a procedure by-law¹² and that the procedure by-law provides a clear mechanism for enforcing decorum and orderly conduct during meetings. Integrity Commissioner Mullan concluded:

In general, the Integrity Commissioner does not have authority under the Code of Conduct to review complaints about the behaviour of Councillors at Council and Committee meetings. The behaviour of Councillors at Council, while regulated by the Code of Conduct, is the responsibility of Council (acting primarily through the Mayor or his deputy). Absent a resolution of Council

¹² *Municipal Act, 2001*, subsection 238(2).

requesting the Integrity Commissioner to become involved, this self-policing is part of the statutory rights and privileges of Council.¹³

111. Subsequently, Toronto's Interim Integrity Commissioner Lorne Sossin¹⁴ (now Mr. Justice Sossin), Integrity Commissioner Janet Leiper¹⁵ (now Madam Justice Leiper), and Integrity Commissioner Valerie Jepson,¹⁶ all declined to exercise jurisdiction over comments made during meetings. As Integrity Commissioner Jepson explained:

The strong policy principle behind this approach is that the Integrity Commissioner ought not to interfere with the conduct and management of any particular meeting. This makes good sense. The Speaker, or any Chair of a meeting, requires a certain degree of autonomy to ensure that a meeting is conducted in accordance with the procedural bylaw and as specifically stated therein, to oversee order and behaviour of members (s. 27-43(C)). So, if a councillor uses an insulting term against another councillor, in an effort to ensure decorum, the speaker might rule the question out of order and seek some remedial measure such as an apology or – in a serious case – an ejection from the meeting. In most cases, these issues are resolved and the meeting proceeds. There would be little gained by a subsequent referral to the Integrity Commissioner to review the actions.¹⁷

112. The Region's Procedural By-law, By-law 44-2018, as amended, sets clear rules of procedure and gives the Regional Chair all the tools necessary to enforce order.

113. Clause 5.3(d) provides that it is the duty of the Regional Chair, "to decline to put to vote, motions which infringe upon the Rules of Procedure or which are beyond the jurisdiction of Council."

114. Pursuant to this authority, the Regional Chair ruled the amendment out of order on the ground that its subject matter was confidential.

115. The Procedural By-law provides for an appeal of the Chair's ruling. In this case, the Regional Chair's ruling was appealed and upheld. According to clause 17.2(e), "The decision of Council [on the appeal] is final." "Final" means, among other consequences, that an Integrity Commissioner is bound by the decision.

116. Based on the Regional Chair's and Council's determination, it is settled that the Respondents' amendment contained confidential information.

117. I have considered the other submissions of the Respondents, including the advance emailing to the Regional Clerk of the amendment wording. Those submissions

¹³ City of Toronto, Report on Complaint (April 6, 2005), Integrity Commissioner David Mullan, at 4.

¹⁴ City of Toronto, Integrity Commissioner Annual Report-2009 (July 29, 2009), Interim Integrity Commissioner Lorne Sossin, at 12.

¹⁵ City of Toronto, Integrity Commissioner Annual Report-2010 (June 28, 2010), Integrity Commissioner Janet Leiper, at 4.

¹⁶ City of Toronto, Report from the Integrity Commissioner on Violation of Code of Conduct: then-Mayor Rob Ford (September 22, 2015), Integrity Commissioner Valerie Jepson, at 10.

¹⁷ *Ibid.* Note that in Toronto a Speaker, and not the Mayor, chairs meetings of Council.

are relevant to my recommendation, but not to whether the amendment contained confidential information.

RECOMMENDATION

118. As I have noted, Regional Council determined on December 16 that the Respondents moved and seconded an amendment containing confidential information. I make no recommendation about whether Council ought to reaffirm that decision (as it is not my place to advise Council on procedure). For my purposes, I accept that the issue of confidentiality was decided and settled by that vote, which is final and, therefore, binding on me.

119. I do not recommend sanctions, for the following reasons.

120. Councillor Schummer was new to the Regional Council and served in an alternate capacity. He was acting in place of the late Mayor Debbie Bath-Hadden during her illness and, after her untimely passing, he continued to act until a new Mayor was appointed. December 16 was only his second Regional Council meeting as a member.

121. I also note that Councillor Schummer's temporary participation in meetings of Regional Council and committees was precipitated by tragic circumstances. Brock's need of an alternate has now passed.

122. It is clear to me that a factor contributing to the incident was the difficulty associated with conducting and participating in virtual meetings. Had the December 16 meeting been conducted in person, and had the amendment been physically handed to the Regional Clerk, it is extremely likely that concern about the amendment would have been flagged before the content was made public.

123. Further, the circumstances of this case were complicated. The status of a confidential report that was not actually considered in camera, but instead was considered in an open meeting, was understandably confusing. Council's December 16 vote to uphold the Regional Chair's ruling was conclusive and final, and sufficient to clear up any uncertainty, but it came after the information had already been made public.

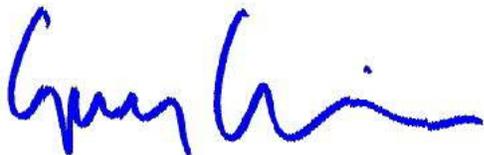
124. Finally, I return to my comments about deference to the decisions of presiding officers during meetings (in this case, deference to a decision of the Regional Chair that was upheld 26-3 on appeal). The Procedural By-law was applied and the Regional Chair and Council have spoken. I am not sure that there is anything I usefully can add.

125. I do, however, offer the suggestion that refresher training in confidentiality and the handling of confidential information – not limited to closed meetings, since this case did not involve a closed meeting – would be beneficial.

CONTENT

126. 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
Regional Municipality of Durham

October 19, 2021