



J. Paul Dubé, Ombudsman

## BY EMAIL

Council for the Town of Grimsby  
c/o Sarah Kim, Clerk  
60 Livingston Avenue  
Grimsby, ON L3M 0J5

March 31, 2022

Dear Members of Council for the Town of Grimsby,

I am writing in response to a complaint from Council for the Town of Grimsby regarding legal and employment-related matters arising from events in 2019.

For the reasons set out below, I have not conducted a formal investigation of the concerns raised by council. However, based on my preliminary review of this matter, I have made some best practice suggestions for council to generally address several of the issues raised. Under the circumstances, we will not be reviewing this matter further.

## The Role of the Ombudsman

The Ombudsman is an independent and impartial Officer of the Ontario legislature. As Ombudsman, I have the authority to address complaints about public sector bodies, including provincial governmental organizations, municipalities, school boards, and universities, as well as services provided by children's aid societies and residential licensees, and the provision of French language services under the *French Language Services Act*. Under the *Ombudsman Act*, I have broad discretion to decide whether or not to investigate a complaint.

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My role with respect to municipalities is to review and investigate complaints about municipal government administration. I am also the closed meeting investigator for the Town of Grimsby. When problems are identified, I may share best practices or make recommendations to a municipality to improve its processes, as well as to strengthen local governance and accountability. Elected municipal officials are generally responsible for setting broad public policy. I do not have the authority to direct municipal council decision-making or to require municipal councils to decide matters in a certain fashion.

My Office receives more than 20,000 cases (complaints and inquiries) every year. Since Ombudsman oversight of Ontario municipalities began on January 1, 2016, we have received more than 14,000 cases about general municipal issues. We strive to resolve cases at the earliest opportunity and informally whenever possible. The vast majority are resolved efficiently and effectively without the need for a formal investigation. My Office has conducted six formal investigations regarding general municipal issues since 2016. This number reflects the overwhelming co-operation that we have received from municipalities.

## **Background and request for review**

In September 2020, my Office received the Town's complaint about this matter in the form of five resolutions that council approved on July 13, and August 17, 2020. Ombudsman staff spoke with the current Clerk and Chief Administrative Officer (CAO) about council's concerns and the events that led council to contact my Office. Ombudsman staff also obtained and reviewed various materials relevant to council's concerns, including certain materials that council specifically directed staff to provide to our Office in order to review these matters.

According to the information we gathered, council terminated its Chief Administrative Officer (CAO) during a closed session of a meeting in February 2019. This matter was added to the *in camera* agenda during the meeting after a two-thirds majority vote. We were told the Town retained an external lawyer to provide advice at this meeting relating to the termination, and that the individual who was appointed Deputy Clerk for the closed session had a professional and personal connection to that lawyer.

The Town did not hire an interim CAO after the termination. It was alleged that during the period when the Town was without a CAO, the then-Clerk was offered an early retirement package without council's approval. We did not investigate the circumstances surrounding this offer. However, we were told that the package provided the Clerk with additional compensation that would allow her to retire earlier. We were also told the

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Clerk accepted the package and retired shortly thereafter. Council was concerned whether the negotiations with the Clerk were carried out under the proper authority.

We were also informed that in March 2019, the same lawyer who provided advice on the CAO's termination was again retained to provide assistance with a Request for Proposals (RFP) process to obtain municipal legal services and to provide or assist with acquiring other legal advice in the interim. Council was concerned that there may have been a pre-existing relationship that would have resulted in a conflict of interest or pecuniary interest connected with a member or members of council. We were told that council was also concerned that the lawyer who was retained had directed work to another lawyer who was a long-time colleague and who had a personal connection to a member of council. We were told that these events and relationships came to council's attention in July 2020 at a closed meeting, based on an email exchange that had been anonymously forwarded to a councillor.

We were told that sometime after this meeting, council made a complaint to the Town's Integrity Commissioner about the Mayor for improper disclosure of confidential information, relating to the emails that had been discussed in the July 2020 closed session. The Integrity Commissioner concluded that the Mayor had breached the Code of Conduct by referencing council's discussion about the emails in a communication with a third party, but found the breach trivial and without consequence and did not recommend any penalties or corrective actions. Council passed two additional resolutions to provide further information to my Office for review. These resolutions related to the billings of an external lawyer and alleged security breaches in the municipality regarding the emails that were forwarded anonymously.

## Review

### *Acting beyond an individual councillor's authority*

Council's resolution asked my Office to review the circumstances leading to the former Clerk's retirement package. It was alleged that certain members of council were involved in offering the package to the Clerk. Specifically, council questioned whether this package was offered by a person with the appropriate authority, and whether the external lawyer provided legal advice on the package without being retained or directed by council. We also reviewed a complaint that the lawyer was asked to undertake other legal work that was not explicitly authorized by council.

According to our review, the Town did not appoint an Interim CAO and the role was supposed to rotate amongst senior staff. Our review found no evidence that the

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retirement package was reviewed or approved by council or someone with the CAO's authority before being offered to the Clerk. We were told that in the absence of a CAO, council would have been required to authorize this type of expenditure. We found no evidence this occurred.

It is also not clear that council specifically directed that the external lawyer undertake some work. While some of the tasks assigned to the lawyer were specifically agreed to by a majority of council, others appeared to be beyond council's authorization. However, our review found no evidence that the external lawyer provided legal advice relating to the Clerk's retirement package, and those we spoke with indicated that the package was straightforward and likely drafted by the senior human resources employee, who is no longer with the Town.

In considering council's concerns about who would have the authority to authorize the offer to the Clerk as well as further legal work, it is well established in law that unless council has otherwise authorized specific members to undertake certain activity, individual council members have no authority to act for the municipal corporation. In such circumstances, the approval authority is exercised collectively by members of council constituting a quorum.

This principle is also expressed in the Town's Code of Conduct, which in 2019 provided that "without a specific delegation from Council, no individual member of Council has executive authority over municipal staff."<sup>1</sup> The current Code of Conduct contains a similar provision, stating that "only Council as a whole and no single Member, including the Mayor, has the authority to direct staff, approve budgets, policy, and other such matters, unless specifically authorized by Council."<sup>2</sup>

Further, the Town's Council-Staff Policy provides that council members do not have an administrative/managerial role in the Town's day-to-day business.<sup>3</sup> Further, it provides that only council as a whole can direct staff through the Town Manager (CAO) or department heads, and that council members have no individual capacity to direct staff in their duties. The policy assigns the Town Manager (CAO) the job of receiving complaints about contraventions of this policy, and indicates that the Town Manager should contact the Integrity Commissioner when a council member is alleged to have

<sup>1</sup> Town of Grimsby, by-law No 16-60, *A By-law to amend By-law 14-73 being a By-law to establish a Code of Conduct for the Council of the Town of Grimsby and Local Boards of the Municipality* (19 September 2016) at 3 [Former Code of Conduct] at 4.

<sup>2</sup> Town of Grimsby, *Code of Conduct*, by-law No 20-74 at 8.2.

<sup>3</sup> Town of Grimsby, by-law No 19-18, *A By-law to establish a Council-Staff partnership and relations policy* (4 March 2019).



contravened the policy. This policy came into effect in March 2019 in response to amendments to the *Municipal Act* that required all municipalities to adopt such a policy.

No individual councillor or mayor has authority to act unilaterally, and it is not the role of council to act as the employer of individual staff members besides the CAO. These basic principles are foundational to the role of a councillor, and must be taught to new councillors and enforced when necessary to ensure accountable and transparent municipal administration. While the Town has taken an important first step by establishing a Council-Staff Policy and related complaint mechanism, the policy is only effective if it functions as intended to guide and correct the behaviour of members of council. The policy sets out clear expectations for councillor conduct and a specific complaint mechanism, but we found no evidence that council attempted to address its concerns through the Town Manager (CAO) or the Integrity Commissioner. I encourage the municipality to ensure that members of council receive initial and periodic training on the Council-Staff Policy so that they are equipped to apply it in their day-to-day council work, and this training should highlight how councillors can access complaint mechanisms if they feel another councillor has acted inappropriately.

#### *Procedure at the meeting on February 4, 2019*

Council's resolution also asked my Office to review the procedure at the February 4, 2019 meeting where the CAO was terminated. Based on our discussions with staff, council's concerns primarily related to how the closed session item was added to the agenda and whether there was a Clerk present for the purposes of the *Municipal Act*.

Our review of the meeting minutes indicates that after council passed its confirming by-law at the end of the scheduled meeting, council resolved to consider a new item concerning an identifiable individual in closed session. The Town's procedure by-law allows agenda additions after a two-thirds majority vote, which occurred. The resolution retained the external lawyer to provide legal advice and appointed a specific individual to serve as Deputy Clerk for the closed session. When council returned from the closed session, it did not pass any further resolutions or confirming by-laws.

Regarding the concern about how the item was added to the agenda, the Town's procedure by-law allows for agenda additions on a two-thirds majority vote. However, in the interest of accountability and transparency, I would encourage the Town to ensure that all agenda items are identified in advance whenever possible.

Regarding the concern about appointing a deputy clerk for the meeting, section 228(2) of the *Municipal Act* provides municipalities the ability to appoint deputy clerks, who

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have all the powers and duties of the Clerk and are not required to be an employee of the municipality. Our review indicated that the Town appointed a deputy clerk by resolution prior to proceeding *in camera*.

However, section 5(3) of the *Municipal Act* states municipal power must be exercised by by-law unless the municipality is specifically authorized to do otherwise. While confirming by-laws are passed out of an abundance of caution, the courts have looked approvingly on this process, as in most cases, the absence of a by-law means a council has not properly exercised its legislative authority and has not made a corporate act.<sup>4</sup> Grimsby did not pass a confirming by-law after the Deputy Clerk's appointment or the *in camera* termination of the CAO in February 2019. In future, the Town should review its practices to ensure that it has properly exercised its authority through by-law unless specifically authorized to do otherwise.<sup>5</sup>

In addition, the Town should ensure that any votes taken *in camera* are consistent with the voting restriction in the *Municipal Act*. Section 239(6) of the Act limits votes in closed session to procedural matters or directions to staff. It is not clear that council's vote to terminate and unappoint the CAO in closed session on February 4, 2019, fell within either of these exceptions.

### *Conflicts of interest*

We were told that council was concerned about possible conflicts of interest between a member of council and two lawyers who were retained by the Town. In addition, council referenced a potential connection between a councillor and one of the lawyers. We were told these alleged conflicts have not been brought to the Town's Integrity Commissioner, who is responsible for investigating allegations that a member of council has breached the Code of Conduct as well as the *Municipal Conflict of Interest Act*.

Regarding conflicts of interest, the Town's 2019 Code of Conduct provided that:

Members of Council shall not use their position within the Town to gain any particular interest, personal or family advantage or benefit in utilizing any service provided by the Town or in conducting any business on behalf of the Town. Members of Council shall not be involved as an official of the Town in judging, inspecting or making a decision on any matter in which they have a personal or

<sup>4</sup> *Law of Canadian Municipal Corporations*, *supra* note 11 at s 9.15.

<sup>5</sup> Town of Grimsby, 19 February 2019, Meeting Agenda at 92. The agenda shows a different deputy clerk being appointed though a by-law.



family interest. Any Member of Council involved shall immediately declare a conflict of interest as soon as such conflict is identified.<sup>6</sup>

The current Code of Conduct similarly requires that councillors avoid pecuniary and non-pecuniary conflicts of interest. While the previous and current Codes of Conduct establish a limitation period for bringing complaints to the Integrity Commissioner, this limitation is set by council and can be altered by a majority. If council wishes to further review these matters, I encourage it to consider amending the Integrity Commissioner's limitation period and refer the matter for review.

### *Concerns about the conduct of an external lawyer*

Some of the concerns council forwarded to my Office related to the conduct of a lawyer retained by the Town, and we were provided with detailed information about their billings during the relevant period.

Under section 14(4) of the *Ombudsman Act*, my Office is precluded from reviewing the acts or omissions of legal advisors for organizations within my authority. The Law Society of Ontario is responsible for regulating and taking complaints about lawyers. If council has concerns about the legal services it received, it may wish to review information on the Law Society's website about how to initiate a complaint: <https://lso.ca/protecting-the-public/complaints/how-to-make-a-complaint>.

### *Security breach concerns*

Council's complaint to my Office also referenced a "security breach" of the Town's email server and asked Town staff to provide my staff with related documents. In reviewing these documents and in response to our inquiries, we were told that Town staff had looked into the alleged security breach and determined that further review was not required because the emails that were alleged to have been leaked were not sent from or received by a Town email address. Accordingly, the potential leak of the emails could not be related to any security breach of the Town's server. Given my Office's focus on administrative conduct, I encourage council to contact an information technology specialist if it continues to have concerns about the security of its email servers.

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<sup>6</sup> 2019 Code of Conduct, at 3.

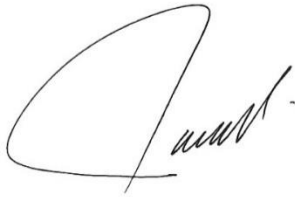


## Conclusion

Thank you for contacting the Ontario Ombudsman. As explained above, I am exercising my discretion to not conduct a further review of council's concerns.

However, I encourage Council for the Town of Grimsby to carefully consider the best practices I have identified to improve the accountability and transparency of its municipal practices.

Sincerely,



J. Paul Dubé  
Ombudsman of Ontario  
President; North American Region of the International Ombudsman Institute

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## BY EMAIL

Council for the Town of Grimsby  
c/o Sarah Kim, Clerk  
60 Livingston Avenue  
Grimsby ON, L3M 0J5

April 6, 2022

Dear Members of Council for the Town of Grimsby,

I am writing in response to complaints that the Ontario Ombudsman received about the Town of Grimsby related to the dismissal of the then-Treasurer in March 2021. Specifically, complainants alleged that the dismissal did not comply with the *Municipal Act* and occurred without council's approval. Residents also complained about related changes in bank signing authority, and that the Town's policies do not include a mechanism for complaining about the Chief Administrative Officer (CAO).

Based on our review, and for the reasons set out below, the Ombudsman is exercising his discretion to not review this matter further.

## The Role of the Ombudsman

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closed meeting investigator for the Town of Grimsby. When problems are identified, the Ombudsman may share best practices or make recommendations to a municipality to improve its processes, as well as to strengthen local governance and accountability. Elected municipal officials are generally responsible for setting broad public policy. Our Office does not have the authority to direct municipal council decision-making or to require municipal councils to decide matters in a certain fashion.

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## Review

In response to complaints we received in April and May 2021, Ombudsman staff spoke with the Clerk and reviewed various materials relevant to these concerns.

According to the information we gathered, during a closed session meeting on March 22, 2021, the CAO presented a report to council regarding employment matters in the Finance department. Council received this report for information but did not pass a motion to take action on any of its recommendations. Approximately one week later, the CAO wrote to council advising that certain employees, including the Treasurer, were no longer with the municipality.

As a result of these staffing changes, the CAO directed two municipal staff members to visit the Town's bank to add themselves as signing authorities so that the Town could continue to transact its affairs. While this change would normally require that council pass a by-law granting them signing authority, this had not occurred. We have been advised by the CAO (but not confirmed with the bank in question due to privacy restrictions) that as a workaround in exceptional circumstances, and in order to be able to sign off on cheques as the next day was staff pay day, the bank allowed the Town Clerk and the most-senior Manager in the Finance department to have signing authority until a resolution could be passed at the next council meeting.

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Council addressed each of these matters at its meeting on April 6, 2021. Regarding the termination of the Treasurer, council passed by-law 21-22 to appoint a new Town Treasurer, retroactive to April 5, 2021. Regarding the change in signing authority, council resolved to seek legal advice to determine whether signing authority could be granted retroactively. In response to that advice, on April 26, 2021, council amended by-law 16-37, which is the Town's by-law to appoint bank signing authorities. The amendment added the new signing officers, retroactive to March 30, 2021.

With respect to concerns that that Town's policies do not have a mechanism to review complaints about the CAO, on February 7, 2022, council adopted a new, stand-alone Whistleblower Policy. This policy allows employees to report concerns of serious wrongdoing directly to an independent third-party service, which will keep their identity confidential from the Town. Concerns about serious wrongdoing by the CAO must be reviewed by Council, and the Clerk is responsible for managing this process.

## Conclusion

Given that the Town has appointed a new Treasurer, approved the banking authorities retroactively, and adopted a new Whistleblower Policy, our Office is exercising our discretion to not conduct a further review.

We would like to thank the Town of Grimsby for its co-operation during this review. The Clerk confirmed that this letter would be included as correspondence at an upcoming council meeting.

Sincerely,



Robin Bates  
Senior Counsel  
Office of the Ontario Ombudsman

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