
TOWNSHIP OF MELANCTHON INTEGRITY COMMISSIONER,
GUY GIORNO

Citation: Wallace v. Mercer, 2022 ONMIC 11

Date: May 31, 2022

INQUIRY REPORT

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THE COMPLAINT

1. Ms Karren Wallace (Complainant) alleges that Councillor Margaret Mercer (Respondent) contravened the Code of Conduct for Members of Council and Members of Local Boards, By-law Number 11-2019, by contacting the Ontario Provincial Police about a communication she had received from the Respondent.

SUMMARY

2. Ms Wallace is a resident of the Township who communicates with Council Members concerning local issues. After receiving emails from Ms Wallace, January 27, Councillor Mercer complained to the OPP, and an OPP constable visited Ms Wallace at home.

3. Ms Wallace alleges that Councillor Mercer was acting in the capacity of Council Member when she contacted the OPP. She alleges that Councillor Mercer asked the OPP to visit Ms Wallace in an attempt to intimidate Ms Wallace and to discourage Ms Wallace's further political discouragement.

4. I find that Councillor Mercer's purpose in calling the police was to silence further criticism from Ms Wallace. Nonetheless, this finding does not mean that Councillor Mercer contravened the Code.

5. People who believe that they need the assistance of law enforcement have a right to contact the police. So long as they respect police independence, and do not misuse the influence of office, elected officials possess the same rights as anyone else to request police assistance.

6. Despite my finding that the Respondent was attempting to silence further criticism from a resident, the Code of Conduct and the *Municipal Act* do not prohibit a Council Member from seeking police assistance and do not authorize an Integrity Commissioner to supervise police calls made by Council Members.

7. Councillor Mercer did not disrespect the principle of police independence. She is not a police services board member and has no authority or responsibility for policing. Councillor Mercer also did not engage in political interference with policing. In contacting the OPP she did not use the influence of her office as a Council Member. Calling the police was not harassment of Ms Wallace as defined by the Code.

8. I am reporting to Council that the Code was not contravened.

BACKGROUND

9. At 8:12 p.m., January 27, Ms Wallace, from her personal email account, sent the following email to all Members of Township Council, at their Township email addresses:¹

Subject: Concerned citizen

I am emailing to express my concerns about the dysfunction and dynamics on display among members of Melancthon Council.

Recently, within days of Facebook posts made by the Mayor on his personal page expressing his concerns about possible damage to municipal infrastructure, a majority of Council called a special meeting to discuss the issue.

As expressed at that January 18, 2022, meeting, four members of Council felt the reputation of the municipality had been called into question and it was important enough to call a special meeting.

Six days later, a meeting scheduled weeks in advance, held legislatively under the *Planning Act* to discuss a by-law regarding diversified on farm uses, was called to order. Immediately, a majority of Council voted to adjourn the meeting, without hearing from any of the ratepayers who took time to attend the meeting to provide input and comments, as was their legislated right.

Margaret Mercer stated her reason for requesting adjournment was the Planner did not follow the instructions of Council in drafting the by-law. The support of three other members of Council in adjourning the meeting clearly called the Planner's integrity and professional credibility into question.

This, despite Council discussing the draft by-law and providing direction to the Planner on at least at two opportunities at Committee of the Whole meetings in the fall of 2021.

The outcome of the cancellation of that meeting was the immediate resignation of the Planner, thereby halting all development in the municipality.

And yet our Council is silent on the reputation of the municipality on this major issue and to date has not called a special meeting to discuss this troubling development.

The ratepayers in Melancthon deserve better.

They deserve a Council that works cohesively on major issues that do not sink to a level of pettiness. An example of this is when Margaret Mercer expressed on a Zoom Council meeting she was upset the Mayor did not greet her at a function in the manner in which she felt she was accorded. Another particularly offensive comment was when, with Mr. Harvey Lyon on the Zoom meeting, Mercer stated everyone would be better off if he were dead.

Melancthon residents expect their elected officials will be received at a Provincial level on matters of concern with respect, not with the knowledge of the dysfunction and dynamics at play, as reported in the print and social media.

¹ My standard practice in these reports is to edit direct quotations to correct spelling, grammar and names, and to achieve uniformity in punctuation and capitalization.

This Council, as many others, are facing unprecedented challenges regarding COVID, infrastructure deficient, funding issues, increasing taxes, aging infrastructure, crime, a potential impact to local water, and many others. And yet they focus on Facebook posts to try to score political capital.

You were put in your position to represent the best interests of your constituents. Please rise to the occasion.

Karren Wallace

10. At 9:29 p.m., Ms Wallace forwarded the above email to the personal email address of Councillor Mercer, and provided this explanation:

As you advised at the special meeting of Council on January 18, I know you aren't on social media, so I wanted to be fair and let you know this has been shared on Facebook.

Feel free to call anytime to discuss 519-925-3845.

Karren

11. That same evening, Ms Wallace posted the text of her email to Council on Facebook's Mulmur Melancthon Community Group page. Her Facebook post began as follows:

Here is the email I just sent to Council (and YES Mercer did state on a Zoom meeting everyone would be better off if Mr. Harvey Lyon were dead and YES he was on the Zoom meeting: I am emailing to express my concerns about the dysfunction and dynamics on display among members of Melancthon Council.

[then followed the entire text of the email that Ms Wallace had sent to Council]

12. Immediately below her post of the email to Council, Ms Wallace then posted the following:

I fully expect to receive a cease and desist order from Margaret and when I do, I will be glad to post it here!

13. Upon receiving Ms Wallace's email to her personal email address, Councillor Mercer contacted the OPP. A constable from the Dufferin County detachment was assigned to the matter. He spoke to Councillor Mercer by telephone and then visited Ms Wallace at her home.

14. Later the same night, Ms Wallace emailed all of Council, and posted on Facebook, to inform people of the police visit and to express her displeasure at what had occurred. She stated:

In response to my email to Melancthon elected officials earlier this evening (see thread below), in the municipality where I own a residence, Margaret Mercer, contacted the OPP to complain about my email. She requested the OPP to come to my home to tell me that she did not wish to receive any of my emails.

I have copied the Officer in question so a copy of this email thread can be placed in the file so there is clarity that at no time were threats exchanged or anything but factual information provided.

Calling the OPP on a ratepayer who is exercising their democratic right to engage with their municipal representative, directed to their publicly paid email address, is an absolute waste of taxpayer money, and more importantly, police resources and time.

A component of her complaint was that she was also receiving emails to her personal email address. That is true, but those emails were concerning the Strada quarry proposal, which as a Councillor she was forwarded as a matter of courtesy so she could be informed. At one point, she emailed to demand that she wasn't kept fully informed about the issue. Her complaint has been duly noted and she will no longer receive any information about this important issue.

Additionally, everyone on that Strada email, list months ago, were requested to advise by return email if they did not wish to receive further emails. At no time did Margaret Mercer reply that she did not wish to receive emails to her personal email about the issue.

In my exchange with the investigating Officer, it was confirmed that my continuing to engage with my municipal Councillor(s) at their public municipal email address is not illegal, provided it is based on fact and not threatening.

15. On February 7, Ms Wallace submitted the Complaint that became the subject of my inquiry.

PROCESS FOLLOWED

16. In operating under the Code, I follow a process that ensures fairness to both the individual bringing a Complaint (the Complainant) and the Council Member responding to the Complaint (the Respondent). This process is based on the Complaint Protocol that was adopted by Council.

17. This fair and balanced process begins with me issuing a Notice of Inquiry that sets out the issues in the inquiry. The Complaint, including any complaint materials, is attached to the Notice. The Respondent is given the opportunity to respond, and then the Complainant receives the opportunity to reply to the Response. The Respondent is made aware of the Complainant's name. I do, however, redact personal information such as personal phone numbers and email addresses.

18. I received the Complaint on February 7 and issued a Notice of Inquiry, February 10.

19. The Complaint had cited sections 1.15 and 1.16 of the Code. I exercised my discretion to determine that the inquiry would consider section 1.15 and section 1.3 but not section 1.16.

20. Section 1.15 covers harassment as defined in the *Human Rights Code*. The *Human Rights Code* defines harassment as, “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.” This is similar to the language of section 1.15 of the Code of Conduct. In this case, the allegation of harassment is that Councillor Mercer contacted the OPP in an attempt to intimidate Ms Wallace and to discourage Ms Wallace’s political discourse.

21. While the Complaint did not expressly mention section 1.3, I determined that the last sentence of section 1.3 was applicable to the allegation that Councillor Mercer acted in her capacity as a Council Member when she contacted the OPP. That sentence reads: “No member shall use the influence of office for any purpose other than the exercise of their official duties.” I therefore exercised my discretion to reformulate the complaint to include the last sentence of section 1.3.

22. I exercised my *Municipal Act* discretion not to inquire whether Councillor Mercer contravened section 1.16 of the Code. Section 1.16 of the Code of Conduct states that bullying is “repeated” behaviour. The Complaint does not allege any behaviour that was repeated. Consequently, even if all the facts alleged in the Complaint were supported by the evidence, there would be no contravention of section 1.16.

23. Councillor Mercer provided a written response on February 18. Ms Wallace replied on February 27. Councillor Mercer submitted a supplementary response, March 9, to which Ms Wallace replied, March 20.

24. I conducted interviews of two individuals whom I believed might possess relevant information: the Mayor, and the resident who was allegedly the subject of a “better off ... dead” comment (see paragraph 11).

25. I issued a summons under subsection 33 (3) of the *Public Inquiries Act*, as well as a delegation under subsection 223.3 (3) of the *Municipal Act* to a lawyer who works with me, authorizing him to receive the evidence of an additional witness, an OPP constable. The evidence, on affirmation, was provided March 28.

26. I interviewed the Respondent in writing (at her request), between April 2 and April 27.

27. Under the process that I follow, the parties are entitled to see and address each other’s submissions, but interviews are conducted in private. During the interview, a party or witness is entitled to be accompanied by legal counsel. A party is not permitted to participate in or attend the interview of a witness or the other party.

28. On May 14, I shared with Councillor Mercer and her lawyer, Mr. Mark Donald, a draft of this report. I received comments from Mr. Donald on May 20. As I indicate at

various places below, I have taken the Respondent's feedback into account in finalizing the report.

29. During the inquiry, I also determined (and informed the parties on March 19) that I did not possess reasonable grounds for a referral to law enforcement under section 223.8 of the *Municipal Act*. Section 223.8 compels an Integrity Commissioner to suspend an inquiry once the Integrity Commissioner determines that there are reasonable grounds to believe that a law has been contravened. That section reads as follows:

If the Commissioner, when conducting an inquiry, determines that there are reasonable grounds to believe that there has been a contravention of any other Act, other than the *Municipal Conflict of Interest Act*, or of the *Criminal Code* (Canada), the Commissioner shall immediately refer the matter to the appropriate authorities and suspend the inquiry until any resulting police investigation and charge have been finally disposed of, and shall report the suspension to council.

30. At one point during the inquiry, the Respondent stated that the Complainant had made a death threat. The Respondent also stated that this was an ongoing police matter.

31. The fact that something is a police matter – the fact that police constables are involved – is not what triggers the application of section 223.8. Section 223.8 is triggered if the Integrity Commissioner “determines that there are reasonable grounds to believe that there has been a contravention” of either the *Criminal Code* or an Ontario statute other than the *Municipal Act* and the MCIA.

32. I carefully considered all the social media points provided to me by both parties, as well as their submissions. I also considered potentially relevant legislation, including the *Criminal Code* which, in section 264, deals with criminal harassment.² My March 19 determination, based on the information in front of me *at the time*, was that I did not have reasonable grounds to believe that there had been a contravention of any other Ontario Act³ or the *Criminal Code*. Consequently, I informed the parties that the inquiry would continue.

33. The obligation to consider section 223.8 is a continuing obligation. If at any point in the inquiry I had determined that there were reasonable grounds to believe that there had been a contravention of any other Ontario Act or the *Criminal Code*, then I would have been required to suspend the inquiry. At no time during the inquiry did I determine that reasonable grounds existed.

34. This report identifies all witnesses who were interviewed in the course of the inquiry. I accept a portion of the Respondent's submission about fairness and identifying witnesses. In my view, identifying the witnesses *contributes* to fairness and to the

² The first two subsections of s. 264 are reproduced at paragraph 98 of this report.

³ That is, other than the *Municipal Act* and the *Municipal Conflict of Interest Act*.

transparency of the process, but it is neither mandatory nor always *essential* to fairness: *Di Biase v. Vaughan (City)*, 2016 ONSC 5620 (CanLII), at paras. 148-149. Indeed, the *Municipal Act*, subsection 223.5 (1), requires that an Integrity Commissioner “preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties.” Subsection 223.6 (2) makes an exception for disclosure in an inquiry report of such matters as in the Integrity Commissioner’s opinion are necessary for the purposes of the report. In this case, I am of the opinion that identifying the witnesses is necessary for the report’s purposes.

POSITIONS OF THE PARTIES

Complainant’s Position

35. Ms Wallace notes that she was exercising her democratic right to engage with her municipal representative. She states that her communications were factual and non-threatening.

36. She alleges that Councillor Mercer asked the police to visit her at home and to tell her that Councillor Mercer did not want to receive her emails.

37. Ms Wallace alleges that the Councillor’s conduct was “a blatant attempt to intimidate, harass and bully me” and that the Councillor contacted the OPP in her capacity as an elected official.

38. On the specific question of why Ms Wallace used the Councillor’s personal email address (in addition to several emails that she sent to the Councillor’s Township address, Ms Wallace explains as follows:

A component of [Councillor Mercer’s] complaint was that she was also receiving emails to her personal email address. That is true, but those emails were concerning the Strada quarry proposal, which as a Councillor she was forwarded as a matter of courtesy so she could be informed. At one point, she emailed to demand that she wasn’t kept fully informed about the issue. Her complaint has been duly noted and she will no longer receive any information about this important issue.

Additionally, everyone on that Strada email, list months ago, were requested to advise by return email if they did not wish to receive further emails. At no time did Margaret Mercer reply that she did not wish to receive emails to her personal email about the issue.

39. On the issue of what the OPP constable told her, Ms Wallace states that she was informed that it is legal to email elected officials and to post on social media content that is factual and not threatening.

40. Ms Wallace denies that the OPP told her not to contact Councillor Mercer again.

Respondent's Position

41. Councillor Mercer's initial response to me was that, "I contacted the OPP as a resident of Melancthon after the Complainant made a death threat which she sent to me by email and then posted on Facebook."

42. According to the initial response, Councillor Mercer contacted the OPP for personal safety reasons, and did so after consultation with family.

43. The Councillor states that she contacted the OPP in a personal capacity and not as a Council Member. She notes that if she had intended to act in an official capacity then she would have communicated through the Township's CAO.

44. Councillor Mercer's supplementary response maintained the position that she had received a death threat from the Complainant. Excerpts from her supplementary response appear below:

Let me reiterate that I take this death threat very seriously, as does my family. This is my home and this is a personal policing matter.

...

Her persistent actions show disrespect for the police, and for my rights to personal safety.

It must be stated: she instigated all contact with me from the outset; contact was initiated by her. It is not welcome nor is it reciprocated.

When someone does not wish to respond, or engage, or has called the police, surely that would be a signal to a reasonable person to back off, cease, desist, and just stop.

...

She has a right to communicate with Council and the Township. She does not have the right to harass individual council members and demand that they answer her in a fashion that would suit her – particularly when uttering a death threat.

...

The death threat was a final straw indicating she had crossed the line and police needed to be notified.

Clearly, I have reason to be concerned because even after police intervention she continued to contact me. Police intervention had little to no effect on her.

She has not respected my personal boundaries. This is an attack.

...

At no time does the complainant's right to online political discourse trump my right for safety in my personal home. I have a right to feel safe here as a resident and to call the police anytime I do not.

It is her responsibility to conduct herself accordingly and respect police authority, amongst other civic responsibilities.

I am concerned, as is my family, for my personal safety because in addition to this death threat, online posts were also calling for residents to show up at my door. This kind of rhetoric is alarming.

It is tantamount to civic unrest.

I have good reason to believe that she is a risk to my personal safety based on her actions to date which indicate she wishes me harm. Death threats are a serious matter particularly coming from someone who has a repeated pattern of using intimidation to control others.

45. During the written interview, I probed Councillor Mercer's assertion that she had been threatened with death. The only mention of death in Ms Wallace's communications was the following (and statements like it):

Here is the email I just sent to Council and YES Mercer did state on a Zoom meeting everyone would be better off if Mr. Harvey Lyon were dead and YES he was on the Zoom meeting.

46. It seems clear that Ms Wallace was alleging that Councillor Mercer had wished someone dead, not threatened Councillor Mercer with death. In the interview, Councillor Mercer addressed the death threat issue as follows:

I called the police because Ms. Wallace sent a threatening email which I perceived as a death threat against a member of our community. As the Integrity Councillor is aware, Ms. Wallace stated in her email to me:

"... and YES Mercer did state on a Zoom meeting everyone would be better off if Mr. Harvey Lyon were dead and YES he was on the Zoom meeting ..."

I had made no such comment, and I was concerned that Ms. Wallace would use this falsehood to do harm to Mr. Harvey Lyon under the guise that I was responsible. I felt it was inappropriate to simply ignore the statement under these circumstances.

...

It was not a threat against me personally, but rather, a threat against another individual (Mr. Harvey Lyon) that I believed she may act upon.

47. During the interview, Councillor Mercer clarified that in order to explain the nature of the email that she perceived as threatening, it was necessary to inform the OPP constable that she was a municipal councillor. She explained, however, that she first called the OPP she did not identify herself as a councillor.

48. In her initial⁴ and supplementary responses, Councillor Mercer asserted that the OPP asked Ms Wallace to cease communication with Councillor Mercer.

⁴ According to the initial response (February 18): "After the OPP went to her home and asked her to cease communication with me, she emailed me again."

49. Councillor Mercer emphasized that, by continuing to send emails, Ms Wallace had “defied” a police instruction:

The one constable phoned me after he attended her home. He said he specifically told her not to contact me again.

She did contact me again by email and then posted it on Facebook which defies the police request.

Clearly, I have reason to be concerned when an individual does not respect me, my need for safety, and the request of a police officer to comply.

50. Councillor Mercer’s supplementary response suggests that getting Ms Wallace to stop emailing was a purpose of contacting the OPP:

Clearly, I have reason to be concerned because even after police intervention she continued to contact me. Police intervention had little to no effect on her.

...

It is her responsibility to conduct herself accordingly and respect police authority, amongst other civic responsibilities.

51. During the interview, however, Councillor Mercer maintained that she had not asked the OPP to stop Ms Wallace from communicating:

Q. The police constable who responded to the call has stated that the purpose of your call to the police was to have Ms Wallace stop contacting you. Did you ask the police to stop Ms Wallace from contacting you?

A. The constable’s recollection as to the purpose of my call is incorrect. I called the OPP on the evening of January 27 to report a frightening email that I’d received when I was in my home later in the evening (around 9 PM). I was frightened by the content of the email as it threatened the death of a community member. I discussed the email with friends and family members who directed me to immediately call the police. I called the OPP so they would be aware of the content of the email to create a police report of what had happened and to investigate. The threat was not “council business.”

I do not recall asking the police to stop Ms. Wallace from contacting me. The purpose of the call was to deal with the threat described above ... I asked the officer how to deal with Ms. Wallace and what my legal rights were in light of this threatening email.

52. According to Councillor Mercer, she did not ask the police constable to visit Ms Wallace. The constable did so in his own discretion.

53. Councillor Mercer agrees that Ms Wallace is entitled to contact a Council Member about “relevant issues.” She states that Ms Wallace “is not entitled to threaten and harass Council Members under the guise of public discourse.”

54. Through counsel, the Respondent argues that – except as required by the *Municipal Act*, section 223.8 (see paragraphs 31 to 33, above) – an Integrity

Commissioner lacks jurisdiction to consider whether the *Criminal Code* was contravened and should not comment in a report on *Criminal Code* contraventions. The Respondent also argues that I have no jurisdiction to comment on the Respondent's purpose in contacting the police. I address these submissions under the Issue C heading, at paragraphs 96 to 101.

55. Through counsel, the Respondent submits that, as a matter of fairness, the inquiry report must name all witnesses. I address this submission in paragraph 34, above.

FINDINGS OF FACT

56. Findings of fact appear in the Background section of this report, and below. Findings are based on the evidence, according to the standard of the balance of probabilities. Where accounts differ, I have made findings that are in harmony with the preponderance of the probabilities based on all of the evidence.

57. I find that Councillor Mercer telephoned the OPP on January 27 and spoke to an operator based in Orillia. The operator recorded the subject of the complaint as "harassment."

58. Police Constable Andrew Fines of the Dufferin County detachment was dispatched. P.C. Fines spoke to Councillor Mercer by telephone, then visited Ms Wallace at home, and then (according to usual procedure) phoned Councillor Mercer again to follow up.

59. Councillor Mercer is not a member of the Township of Melancthon Police Services Board and has no responsibility for, or authority related to, policing. Before speaking to her on January 27, P.C. Fines did not know who Councillor Mercer was and he had never heard her name. I find as a fact that Councillor Mercer had no influence over the police constable, and that nobody would reasonably perceive that she has influence over the OPP generally.

60. Councillor Mercer did tell P.C. Fines that she was a Township of Melancthon Council Member, but I find that she did not seek preferential treatment. I accept the evidence of P.C. Fines that Councillor Mercer's complaint was handled no differently than anyone's similar complaint would have been addressed.

61. I also find that, in asking the OPP for a remedy (that is, asking that the communications be stopped: see paragraph 66), Councillor Mercer was acting in the capacity of someone who alleged she was being harassed and not relying on her position as a Council Member.

62. I find that Councillor Mercer did not tell P.C. Fines that Ms Wallace had made a death threat. I note the constable's evidence that if a death threat had been mentioned then he would have remembered it and would have recorded it in his notes.

63. The parties disagree on whether the police constable told Ms Wallace not to contact Councillor Mercer again. (I note that Councillor Mercer did not witness what P.C. Fines said to Ms Wallace; she only heard from the constable after the fact.) Where the recollections of the parties differ, I rely primarily on the evidence of P.C. Fines and the police occurrence report. I find that P.C. Fines began the conversation by conveying Councillor Mercer's desire that Ms Wallace not email the Councillor again, but readily accepted Ms Wallace's explanation that residents have the right to email their elected officials. He did, however, ask Ms Wallace no longer to use the Councillor's personal email address.

64. The discussion between Ms Wallace and the constable ended with Ms Wallace agreeing not to use the Councillor's personal email address again, but confirming that she would continue to email the Councillor at her Township email account. This finding is consistent with the evidence of P.C. Fines, the statement of Ms Wallace, and the OPP occurrence report.

65. P.C. Fines cautioned Ms Wallace not to spread false information. (Ms Wallace told the constable, and maintains, that she did not communicate false information.)

66. On the question of whether Councillor Mercer asked the OPP to stop Ms Wallace from communicating with her, I find, on balance of probabilities, that Councillor Mercer did ask P.C. Fines to visit Ms Wallace to ask her to stop sending emails. I accept the evidence of P.C. Fines, a disinterested witness, who testified that he went "to Ms Wallace's house as per the request of Ms Mercer."

67. According to the police constable, once at the home:

The conversation was pretty straightforward. I advised her the reason I was there, and that "Ms Mercer would not like to receive communication from you anymore."

68. As context for Councillor Mercer's request to him, P.C. Fines explained that it is standard procedure to ask someone who has called for police assistance why the call was made and what resolution was sought:

So, I always ask people I deal with: "What's going to satisfy you tonight? What is the purpose of you calling me tonight?"

Her purpose was to have Ms Wallace stop contacting her. So, I went over to her house and asked her to stop contacting.

69. Additional factors support the finding that Councillor Mercer had asked the OPP to stop Ms Wallace from communicating with her. First, the OPP had logged Councillor Mercer's call as a harassment complaint, and it is likely that someone who alleged

harassment would have asked for the harassment to stop. Second, during the first month of this inquiry, Councillor Mercer expressed concern that Ms Wallace had failed to comply with an (alleged) police request to stop contacting the Councillor. Her comments about a police request to cease contact are consistent with my finding that she had asked the police to convey that message.

70. In fairness to Councillor Mercer,⁵ I gave her an opportunity to address the constable's evidence that the purpose of her call to the police was to have Ms Wallace stop contacting her. (My question and the Councillor's answer are reproduced at paragraph 51, above.) Councillor Mercer maintained that the recollection of P.C. Fines is incorrect. Yet she also stated, "I do not recall asking the police to stop Ms. Wallace from contacting me." [emphasis added]

71. My finding that Councillor Mercer did ask P.C. Fines to visit Ms Wallace to tell her to stop sending emails takes into account the Councillor's evidence as well as the evidence of the constable, the police report, and other relevant evidence.

72. I find as a fact that Councillor Mercer did not tell the OPP that Ms Wallace had made a death threat. Councillor Mercer's interview evidence supports this finding.

73. While I find that Councillor Mercer's purpose in calling the police was to silence further criticism from Ms Wallace, for the reasons explained in the next section, this finding does not mean that Councillor Mercer contravened the Code.

74. Finally, I find as a fact that the OPP, in the person of P.C. Fines, took Councillor Mercer's call seriously, acted on it, and attempted to achieve a resolution. I find that the police did not treat Councillor Mercer's concern as frivolous, vexatious, or groundless.

ISSUES AND ANALYSIS

75. I have considered the following issues:

- A. Did Councillor Mercer attempt to interfere with police independence?
- B. Does an Integrity Commissioner otherwise have jurisdiction over a Council Member's complaint to the police?
- C. Given the disposition of Issue B, what are the limits of the opinions and findings in this report?
- D. Did Councillor Mercer misuse the influence of office contrary to section 1.3 of the Code?
- E. Did Councillor Mercer harass the Complainant contrary to section 1.15 of the Code?

⁵ See *Browne v. Dunn*, 1893 CanLII 65 (FOREP), 6 R. 67 (H.L.), at 71, and *R. v. Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 S.C.R. 193, at para. 65.

Issue A: Did Councillor Mercer attempt to interfere with police independence?

76. No.

77. Police independence underpins the rule of law.⁷ A fundamental, Canadian legal principle is that the independence of law enforcement must be free from political interference. The police must not be subject to political direction.⁸

78. Interference or attempted interference with police independence would be contrary to the Code of Conduct, in particular, section 1.3, which prohibits the use of the influence of office for a purpose unrelated to official duties. See: *Gobin v. Nicholson*, 2020 ONMIC 13 (CanLII), at paras. 67-69; *Re Partner*, 2018 ONMIC 16 (CanLII), at paras. 136-141; *Greatrix v. Williams*, 2018 ONMIC 6 (CanLII), at paras. 46, 50.

79. In this case, there is no evidence that Councillor Mercer attempted to interfere in the independence of the OPP. I have found (paragraphs 59 to 6160) that she did not possess any influence over the OPP, including P.C. Fines, that no one would reasonably perceive that she had such influence, that she did not seek preferential treatment, and that in asking to stop future communications she acted in the capacity of someone who alleged she was being harassed and did not rely on her position as a Council Member.

80. Merely seeking police assistance does not mean that a politician is attempting to give political direction or to interfere with police independence. Elected officials have the same rights as other individuals to request help from the police. There is a difference between the improper act of attempting to give political direction and the perfectly legitimate act of complaining to the police when one feels victimized.

81. Support for this analysis is found in *Re Grimes*, 2022 ONMIC 9 (CanLII), at paras. 52-53. In that case, City of Toronto Integrity Commissioner Jonathan Batty found that the Council Member complied with the Code of Conduct when he followed proper channels to inform law enforcement officials of alleged unlawful activity, without attempting to tell them about what they needed to do. I agree with Integrity Commissioner Batty that reporting a concern to the police through proper channels, without giving direction, does not constitute political interference with police independence.

⁷ *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 S.C.R. 565, at para. 29.

⁸ *R. v. Campbell*, at para. 33; *Smith v. Ontario (Attorney General)*, 2019 ONCA 651 (CanLII), at paras. 62-63.

Issue B: Does an Integrity Commissioner otherwise have jurisdiction over a Council Member's complaint to the police?

82. No. While the attempt to give political direction to the police or to interfere with the independence of law enforcement would be subject to the applicable code of conduct, an Integrity Commissioner does not otherwise have jurisdiction to oversee and second-guess a Council Member's request for police assistance.

83. As explained above (paragraphs 29 to 33), under section 223.8 of the *Municipal Act*, an Integrity Commissioner must consider whether the facts in an inquiry give reasonable grounds to believe that there has been a contravention of an Ontario Act (other than the *Municipal Act* and the *Municipal Conflict of Interest Act*) or of the *Criminal Code*. Where such reasonable grounds exist, the Integrity Commissioner must immediately refer the matter to the police and suspend the inquiry.

84. In my view, there were not, and there still are not, reasonable grounds to believe that legislation, including the *Criminal Code*, has been contravened. That is why I continued the inquiry and did not make a referral to the police.

85. My determination relates only to my obligations, as Integrity Commissioner, under section 223.8. Because I am aware of no reasonable grounds for belief that the Complainant's emails and posts breached the law (including the criminal harassment provision of the *Criminal Code*), I did not notify the police. My determination is not, however, a finding that *Councillor Mercer* was wrong to contact the police. Section 223.8 confers on me no jurisdiction to determine whether a Council Member properly or improperly sought police assistance. Indeed, section 223.8 reflects a clear legislative intent that Integrity Commissioners have no business interpreting and applying the criminal law.

86. My opinion, that there exist no reasonable grounds to believe that Ms Wallace's emails and posts breached the *Criminal Code*, is relevant only to my own obligation under section 223.8. My opinion is irrelevant to whether Councillor Mercer contravened the Code by contacting the OPP. A Council Member does not need Integrity Commissioner approval to request police assistance.

87. It cannot be the case that a Council Member may contact the police only if an Integrity Commissioner believes on reasonable grounds that the law was broken. Neither the *Municipal Act* nor the Code of Conduct provide this.

88. At paragraph 73, I have found that Councillor Mercer's purpose in calling the police was to silence further criticism from Ms Wallace. In my view, however, this finding does not establish a Code of Conduct contravention.

89. It is beyond the scope of Codes of Conduct and Integrity Commissioners to decide when and whether municipal councillors may request police assistance. Integrity Commissioners possess no special expertise in interpreting the *Criminal Code*. It is not in the public interest to discourage people, including elected officials, from seeking the assistance of law enforcement. This is particularly the case when an elected official or family member feels threatened. In that circumstance, whether an Integrity Commissioner believes that the threat is real is of secondary importance. To discourage people who feel threatened from requesting police assistance can obviously have potentially dangerous repercussions.

90. In the event that a complaint to the police is made without justification, then the criminal law and the police, not codes of conduct and Integrity Commissioners, are appropriately suited to address the situation.⁹

91. In this case, the police treated Councillor Mercer's concern seriously and attempted to resolve the matter. The OPP did not treat the Councillor's complaint as frivolous. There is no evidence that the OPP viewed Councillor Mercer's call as improper or an abuse of the law enforcement process. Indeed, the constable who responded attempted to resolve the issue, and advised Ms Wallace about appropriate communication. In this context, my opinion (in relation to section 223.8) – that nothing written by the Ms Wallace gave reasonable grounds to believe that she had broken a law – is irrelevant to the Code of Conduct issue. The OPP clearly viewed Councillor Mercer's call as worthy of a response and settlement efforts; it would be inappropriate for me to conclude that Councillor Mercer should not have contacted the OPP in the first place.

92. I am mindful of the fact that, in a democracy, people possess every right to communicate with their elected representatives. This includes the right to criticize.¹⁰ Indeed, politicians must expect that they will be subject to searching criticism, even castigation by members of the public.¹¹ As the Chief Justice of Canada observed in 1938, criticism makes our democratic institutions strong:

There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals.¹²

⁹ See, for example, *Criminal Code*, s. 140 (public mischief).

¹⁰ *McLaughlin v. Maynard*, 2017 ONSC 6820 (CanLII), at para. 69; *Savard c. Émond*, 2002 CanLII 32769 (QC CA), at para. 31.

¹¹ *Martin v. The Manitoba Free Press Co.*, 1892 CanLII 196 (MB CA), 8 Man. R. 50 at 72; *Vander Zalm v. Times Publishers*, 1980 CanLII 389 (BC CA), at para. 5; *Vellacott v Saskatoon StarPhoenix Group Inc.*, 2012 SKQB 359 (CanLII), at para. 48; *Kent v Martin*, 2016 ABQB 314 (CanLII).

¹² *Reference re Alberta Statutes*, [1938] S.C.R. 100, at 133, cited with approval in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*; *Reference re Independence*

93. Nobody who expresses an opinion to a government official should be subject to reprisal, including a visit from the police. On the other hand, everyone's conduct must be lawful. All Canadians – government officials included – are entitled to contact the police when they feel threatened or subjected to unlawful behaviour.

94. The issue is whether an Integrity Commissioner may sit in judgement of an elected official's request for police assistance – whether an Integrity Commissioner can assess that a threat is real and a call to the police is reasonable. Subject to the obligation created by section 223.8 of the *Municipal Act*, making threat assessments is not the Integrity Commissioner's role, nor should it be. Integrity Commissioners possess neither the expertise nor the statutory authority to assess threats or to make findings about the reasonableness of contacting the police.

95. In summary, it is not my place to determine whether Councillor Mercer was justified in contacting the police. She had the right to do so. As I have noted, regardless of my determination under section 223.8, the OPP took Councillor Mercer's concern seriously, communicated with both parties, and attempted to resolve the matter.

Issue C: Given the disposition of Issue B, what are the limits of the comments and findings in this report?

96. In response to the draft, Mr. Donald, counsel for the Respondent, argues that, having found an Integrity Commissioner lacks jurisdiction to decide when and whether a Council Member may request police assistance, I must not state an opinion on whether the Respondent was actually threatened and I must not make any finding about the Respondent's purpose in contacting the OPP. For the reasons that follow, I accept the first part of the argument, and not the second part.

97. Except as required by section 223.8 of the *Municipal Act*, an Integrity Commissioner lacks jurisdiction to consider whether the *Criminal Code* was contravened. As explained above, section 223.8 provides for a referral to the police, not for making findings in an inquiry report. No section of the *Municipal Act* confers authority to include criminal findings in a report such as this one.

98. The criminal harassment provision of the *Criminal Code*, section 264, reads, in part, as follows:

(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

and *Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at 74.
See also: G. Giorno, Judicial Activism and the Constitution, *Canada Watch* 8:1 (October 2000) 13, 15.

- (2) The conduct mentioned in subsection (1) consists of
- (a) repeatedly following from place to place the other person or anyone known to them;
 - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
 - (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
 - (d) engaging in threatening conduct directed at the other person or any member of their family.

99. I accept the Respondent's submission that this report must not state any opinion about whether conduct described in section 264 of the *Criminal Code* occurred. It must not state an opinion on whether the Respondent was actually threatened.

100. An Integrity Commissioner may only make findings related to whether the Code of Conduct was breached: see *Baker v. Ryan*, 2019 ONMIC 4 (CanLII), at para. 47. An Integrity Commissioner must not make findings about criminality, and should not opine about criminality. Consequently, I refrain from stating an opinion on whether Councillor Mercer was actually threatened.

101. Counsel also argues that I may not make any finding about Councillor Mercer's purpose in contacting the OPP. In my view, the purpose of her call to the police is relevant to compliance with the Code of Conduct, including section 1.3, which incorporates the requirement of non-interference with police independence. Consequently, the finding about the purpose of the call to the police (which was included in the draft on which the Respondent commented) remains in this report.

Issue D: Did Councillor Mercer misuse the influence of her office, contrary to section 1.3 of the Code?

102. No. Given the disposition of Issues A and B, I conclude that Councillor Mercer did not misuse the influence of her office. She did not interfere with police independence. She was exercising her right to report a perceived threat to the police. Regardless of my opinion of the threat level, it is not my place to second-guess her exercise of that right.

103. Further, in the circumstances of this case, I have found that, when she communicated with the OPP on January 27, Councillor Mercer was not making use of the influence of her office as a Township Council Member. Since she was not using the influence of her office, she cannot be said to have used the influence in a manner contrary to section 1.3 of the Code.

Issue E: Did Councillor Mercer harass the Complainant, contrary to section 1.15 of the Code?

104. No.

105. The Code of Conduct adopts the *Human Rights Code* definition:

“harassment” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome [emphasis added]

106. Neither the Township’s Code of Conduct nor the *Human Rights Code* defines “course” or “vexatious,” but the meanings of these words have been considered numerous times by the Supreme Court of Canada, Ontario courts, boards of inquiry, and the Human Rights Tribunal. An Integrity Commissioner cannot invent new definitions for legal terminology, but instead should apply the accepted meanings found in the Ontario jurisprudence.

107. A course of conduct or course of comment is an essential ingredient of harassment. The word “course” generally refers to a pattern of activity.¹³ As the Supreme Court of Canada observed, “It is certainly difficult to see a course of conduct in a single incident.”¹⁴ Unless the conduct is egregious or a comment is particularly virulent,¹⁵ a single incident does not amount to a course of conduct and therefore is not harassment.¹⁶ The allegation in this inquiry relates to a single incident (Councillor Mercer’s January 27 call to the police) and, on that basis alone, the conduct is not harassment.

108. Section 1.15 of the Code of Conduct and section 10 of the *Human Rights Code* (to which the Code of Conduct refers) also use the term “vexatious.” For the reasons that follow, it is impossible to conclude that Councillor Mercer’s call to the OPP was vexatious.

109. According to the case law, “vexatious” has two different meanings, depending on the context in which it is used.

110. In the human rights context, when applied to comments and conduct:

The term “vexatious” clearly imports a subjective element into the definition of harassment. The comment or conduct must be annoying, distressing or agitating to the person complaining: see *Wall v. University of Waterloo* (1995), 1995 CanLII 18161 (ON HRT), 27 C.H.R.R. D/44 (Ont. Bd. Inq.). It has also been said that conduct is vexatious where the complainant finds the comments and conduct

¹³ *Rodgers v. Hydro One Networks*, 2011 HRTO 877 (CanLII), at para. 65.

¹⁴ *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 SCR 362, at para. 73.

¹⁵ *Grigorakis v. Essex County Soccer Association*, 2012 HRTO 906 (CanLII) at para. 22; *B.C. v. London Police Services Board*, 2011 HRTO 1644 (CanLII), at paras. 46-48.

¹⁶ *Alli v. Region of Waterloo Public Health Department*, 2019 HRTO 1564 (CanLII), at para. 16; *Morrison v. King (Township)*, 2016 HRTO 667 (CanLII), at para. 12; *Szabo v. Niagara (Regional Municipality)*, 2010 HRTO 1083 (CanLII), at para. 54.

worrisome, discomfiting and demeaning; see *Saunders v. Morsal Developments Ltd.* (August 23, 1995), No. 718 (Ont. Bd. Inq.).¹⁷

111. On the other hand, when used to describe lawsuits, legal proceedings, and formal complaints (including human rights complaints), “vexatious” has a different meaning. Often it is interpreted to refer to a proceeding that cannot succeed,¹⁸ that is commenced maliciously without good cause,¹⁹ or initiated without sufficient²⁰ or reasonable grounds.²¹ According to *Black’s Law Dictionary*, an action is vexatious “when the party bringing it is not acting *bona fide*, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result”²² Other judicial applications of the word “vexatious” have been summarized as follows:²³

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

¹⁷ *Streeter v. HR Technologies*, 2009 HRT0 841 at para. 33.

¹⁸ *Mascan Corp. v. French*, 1988 CanLII 5747 (Ont. C.A.), at para. 17.

¹⁹ *John v. Samuel*, 2018 ONSC 5651 (CanLII), at para. 24.

²⁰ *Law Society of Upper Canada v. Chavali*, 1998 CarswellOnt 1581 at para. 20; aff'd 1998 CanLII 5043 (Ont. C.A.).

²¹ *Vatamanu v. Baird*, 2009 CarswellOnt 8045 (S.C.), at para. 36; *Elguindy v. Koren* (2008), [2009] O.J. No. 764 (S.C.), at para. 46.

²² *Carby-Samuels v. Carby-Samuels II*, 2017 ONSC 6834 (CanLII), at para. 2, citing *Black’s Law Dictionary*, in *The Law Dictionary* (online).

²³ *Re Lang Michener and Fabian*, 1987 CanLII 172, 59 O.R. (2d) 353 (H.C.J.), at para. 20.

112. The most significant difference between the two meanings of “vexatious” is found in their subjective and objective elements. In the harassment context, “vexatious” is assessed entirely subjectively, from the perspective of the person affected by the conduct. In the context of proceedings and complaints, “vexatious” has an objective element (whether the proceeding lacks reasonable grounds and chance of success) and the subjective element, when applicable, is the intention of the person initiating the proceeding or complaint.²⁴

113. Here, the conduct that is alleged to constitute harassment was a complaint to law enforcement. It is clear that Councillor Mercer’s call to the police and the constable’s subsequent visit to Ms Wallace’s home were unwelcome to Ms Wallace. Nonetheless, in light of the jurisprudence, because this case deals with a request for police assistance, the word “vexatious” cannot be determined subjectively by reference to Ms Wallace’s perception. If every call to the police were assessed subjectively based on the feelings of the person complained about, then almost every call to the police would be “vexatious” and constitute harassment. This cannot be the standard by which calls to the police are judged.

114. The OPP did not treat Councillor Mercer’s call as vexatious. The OPP did not treat her complaint as groundless, incapable of success, or made in bad faith and without good cause. In light of the OPP response, it is impossible to describe Councillor Mercer’s call to the police as “vexatious” conduct under section 1.15 of the Code. (Further, as I have already explained, an Integrity Commissioner is not in a position to assess the merits of an elected official’s request for police assistance.) Consequently, Councillor Mercer’s January 27 contact with the OPP did not constitute harassment of Ms Wallace.

CONCLUSION AND RECOMMENDATION

115. This report finds no contravention of the Code of Conduct. I recommend that Council receive it for information.

CONTENT

116. 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.

²⁴ *Carby-Samuels v. Carby-Samuels II*, 2017 ONSC 6834 (CanLII), at footnotes 1-2.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Guy Giorno". The signature is fluid and cursive, with a prominent initial "G" and a long, sweeping tail.

Guy Giorno
Integrity Commissioner
Township of Melancthon

May 31, 2022

APPENDIX: EXCERPTS FROM CODE OF CONDUCT FOR MEMBERS OF COUNCIL AND MEMBERS OF LOCAL BOARDS

- 1.3 The Council of Melancthon Council and Local Boards Code of Conduct is a general standard that augments the provincial laws and municipal By-laws that govern conduct. It is not intended to replace personal ethics.

All Members shall serve their constituents in a conscientious and diligent manner. No member shall use the influence of office for any purpose other than the exercise of their official duties.

...

- 1.15 Harassment is defined in accordance with the Ontario *Human Rights Code* as vexatious comment or conduct that is unwelcome or ought reasonably to be known to be unwelcome.

Members of Council and Members of Local Boards acknowledge that every person who is a Councillor or employee has a right to freedom from harassment in the workplace.

Harassment of another Member, Staff or any Member of the Public is misconduct.

- 1.16 Workplace bullying is defined as “repeated” unreasonable behaviour directed towards an employee or a group of Staff, that creates a risk to health and safety. Unreasonable behaviour can be defined as behaviour that harms, intimidates, threatens, victimizes, undermines, offends, degrades or humiliates another Staff Member/s.

...

Bullying another Member of Council, Board Member, Staff or any Member of the Public is misconduct.