

**Report on the Decision to Terminate the Investigation of a
Complaint Against Former Councillor Justin Di Ciano**

**Jonathan Batty
Integrity Commissioner**

December 10, 2020

ICT

OFFICE OF THE
**INTEGRITY
COMMISSIONER**
TORONTO

A. Decision

I am writing to report to Council that, pursuant to section 4.4(E)(2) of Chapter 3 of the Toronto Municipal Code, I have terminated the investigation into a complaint dated August 2, 2016 made against Councillor Justin Di Ciano¹.

For the reasons set out below, I am of the opinion that resuming the investigation would serve no useful purpose.

B. Background

Councillor Di Ciano served one term on Toronto City Council. He ran unsuccessfully in November 2010 but was elected in the November 2014 election to represent Ward 5. He did not seek re-election in November 2018.

On May 11, 2016, the Councillor attended the Planning and Growth Management Committee and was present for its consideration of a report² dealing with lands south of Judson Street between Royal York Road and Willowbrook Road. While the Chief Planner and Executive Director had recommended these lands be designated as “Core Employment,” he moved they be re-designated as “Mixed Use” with some stipulations concerning employment. This motion was carried, the item was adopted, and the item was reported to Council in June 2016.

At the June 7, 2016 Council meeting, Councillor Di Ciano rose on a point of privilege to state that he had sought legal advice and that he did not have an interest in the item and looked forward to participating in the debate on it.

When the item was considered by Council on June 8, 2016, however, he was absent for both the debate and voting. The item was further amended following the report from Committee, but the re-designation of the lands first proposed by him at Committee remained intact.

On August 2, 2016, the Office of the Integrity Commissioner received a complaint alleging that Councillor Di Ciano had contravened Article VIII (Improper Use of Influence) of the *Code of Conduct for Members of Council* (the “Code of Conduct”).

The complaint alleged that a development company, Dunpar, owned property in this area and had an interest in buying the lands at issue. The complaint further alleged that the Councillor had a beneficial relationship with Dunpar, and the Councillor ought not to have participated in the consideration of this matter at Committee or at Council. It was alleged that the longstanding

¹ Mr. Di Ciano is no longer a member of Council but, for sake of brevity, he is referred to as “Councillor Di Ciano” in respect of the time he was in office.

² Item PG 12.8 Mimico-Judson Secondary Plan and Urban Design Guidelines - Final Report.

relationship between the Councillor and Dunpar pre-dated the 2010 election and involved support of his election campaigns in 2010 and 2014.

The Integrity Commissioner at the time, Valerie Jepson, commenced her investigation of the complaint in the autumn of 2016.

Before her investigation was completed, she determined there were reasonable grounds to believe that there had been a contravention of the *Municipal Elections Act, 1996*. As was required by section 164 of the *City of Toronto Act, 2006*, on August 11, 2017, Commissioner Jepson referred the matter to the Toronto Police Service and immediately suspended her inquiry.

On September 22, 2017, the Toronto Police Service advised her that it, in turn, had referred the investigation to the Ontario Provincial Police (the “OPP”). Councillor Di Ciano was advised by the Integrity Commissioner on November 8, 2017 that her inquiry was suspended, and this was reported to Council in her 2018 Annual Report.

Having conducted its own investigation, the OPP announced on November 16, 2018 that it had charged Councillor Di Ciano under the *Municipal Elections Act, 1996* with filing an incomplete financial statement-auditor’s report for the 2014 election.

The Crown, when it subsequently withdrew this charge on February 24, 2020, explained the grounds were an alleged failure to report the benefit of polling data from a company called Campaign Research. The Crown stated it was not in a position to prove beyond a reasonable doubt that Councillor Di Ciano personally requested or received this data or that he deliberately failed to report the receipt of that data when he filed his financial statement-auditor’s report.

With the withdrawal of the charge, the proceedings under the *Municipal Elections Act, 1996* concluded, and I now have discretion to continue the investigation of Councillor Di Ciano, if I think it is advisable to do so³.

C. Reasons

At this juncture, I must decide whether it is best to continue or terminate this investigation.

The fact that the respondent to the complaint is no longer a member of Council is a fact that needs to be considered but does not conclusively answer the question about whether to continue the investigation. As previous Integrity Commissioners have noted, jurisdiction over the

³ Commissioner Jepson’s five-year appointment concluded on November 29, 2019 and I became the Integrity Commissioner for the City of Toronto effective November 30, 2019.

subject matter of a complaint is not removed if the person whose conduct is at issue is no longer on Council⁴.

Section 4.4(E) of Chapter 3 of the Toronto Municipal Code provides that:

The Integrity Commissioner may refuse to conduct, or terminate, an investigation in the following circumstances:

- (1) There has been a substantial delay between the request and the incidents that are the subject matter of the complaint, and because of the delay the inquiry would serve no useful purpose; or
- (2) The Integrity Commissioner is of the opinion that the inquiry would serve no useful purpose.

This provision explains my discretion to terminate an investigation.

This is not a case where there was “substantial delay” between the alleged misconduct and the making of the complaint. The alleged misconduct took place in May and June 2016 and a complaint was received about it in August 2016.

However, I do need to assess if continuing this inquiry would serve no useful purpose. Having learned of the withdrawal of the charge against Mr. Di Ciano, I invited submissions from both the complainant and the respondent on this question and took that information into account as I considered this question.

I need to determine whether continuing the investigation would serve a useful purpose and these are the factors I have weighed in making my decision:

- 1) When the misconduct is alleged to have occurred,
- 2) The nature of the alleged misconduct,
- 3) The interests of the complainant,
- 4) The interests of the respondent, and
- 5) Public confidence in Code of Conduct investigations.

Let me address each factor in turn.

⁴ Report Regarding the Conduct of Former Councillor Doug Ford (December 6, 2016): see <https://www.toronto.ca/legdocs/mmis/2016/cc/bgrd/backgroundfile-99042.pdf>

When the Misconduct is Alleged to have Occurred

This complaint is about alleged misconduct that took place over four years ago and prior to the last municipal election. I am concerned about the period of time that has passed, which is directly attributable to the fact that the Code of Conduct investigation was mandatorily suspended from August 2017 to February 2020 (a period of 30 months).

When the investigation was suspended, it had not been completed. To resume the investigation now would be difficult. While some documents, witness statements, and analyses have been obtained, a full investigation was not completed as the statute required an immediate “downing of tools.”⁵

The inevitable consequence of a lengthy delay in an investigation is that the memories of relevant witnesses fade, and evidence is lost.

The Code of Conduct investigation did not resume as soon as the one charge against Mr. Di Ciano was dropped in late February of this year. Both the complainant and the respondent were first provided an opportunity to make submissions as to whether my Office should continue the Code of Conduct Investigation. At that time, the City of Toronto was also instituting the first wave of public emergency measures to address the COVID-19 pandemic, and it was not practicable to immediately resume the investigation.

Given the passage of time since the matter was last actively investigated by my Office, some investigative steps would need to be retraced if we were to continue. Additional investigation would also be required to complete the inquiry. This would take months, and I am very concerned it would add considerably to the years that have elapsed since the complaint was made.

The Nature of the Alleged Misconduct

The complaint alleged that Councillor Di Ciano, improperly motivated by the relationship that he had with Dunpar, moved at Committee to change the designation of certain lands for Dunpar’s potential benefit.

The complaint alleges a breach of Article VIII (Improper Use of Influence) of the Code of Conduct, which prohibits a Councillor from using the legislative process for the private advantage of himself, his family, his friends, and his associates. It is one of the central pillars of integrity in public office that elected representatives not put such personal interests before their public duties.

In response, Councillor Di Ciano denies that he acted improperly.

⁵ Section 164 of the *City of Toronto Act, 2006*.

Terminating investigations into allegations of this nature should not be done lightly. This is especially true where the alleged misconduct is continuous or demonstrates a continuing pattern of behaviour. Although this factor generally weighs in favour of continuing the investigation, it is one of a few factors that need to be considered.

The Interests of the Complainant

The complaint did not allege that Councillor Di Ciano's conduct had a direct adverse effect upon the complainant's personal interests or well-being. One might consider it a complaint that was made in the public interest.

Over the course of the investigation, regular contact was lost with the complainant. In February of this year when the Crown withdrew its charge, I invited the complainant to make submissions on the question of continuing this inquiry. I received no response, and, as a result, I am not specifically aware of what concerns the complainant may have.

For that reason, while it might be contextually helpful to understand the complainant's views about continuing the investigation, the lack of information on this point is not a factor that weighs significantly in favour, or against, continuing the investigation into a complaint made in the public interest.

The Interests of the Respondent

Councillor Di Ciano responded to this complaint when he was advised of it in 2016, he retained legal counsel and denied any misconduct.

When invited to provide submissions on the question of resuming the investigation, I was asked to immediately discontinue it. Mr. Di Ciano's lawyer submitted I should do so because:

- of the delay as a result of the suspension of my Office's investigation;
- of the fact that the only charge to which his client was subject ended up being withdrawn by the Crown; and,
- it would not be in the public interest to pursue the investigation given the respondent is no longer in office, that it would be expensive to resume the investigation, and that it was inadvisable to do so in the midst of the current public health emergency.

Mr. Di Ciano is no longer a member of Council and, even if I were to continue the investigation and find he had violated the Code of Conduct, there is no penalty that could be imposed on him.

If the investigation continues and Mr. Di Ciano continues to retain legal counsel (which is not required but respondents may opt to do so), that poses additional costs for him even if, in the end, there was no finding of misconduct.

Mr. Di Ciano does not urge me to conclude the inquiry for the potential of an exoneration. I am also concerned about the potential prejudice that any respondent faces if forced to defend against a finding of misconduct based on such a very long-suspended investigation. This factor weighs in favour of terminating the inquiry.

Public Confidence in Code of Conduct Investigations

My Office exists by virtue of the *City of Toronto Act, 2006* and Chapter 3 of the Toronto Municipal Code. While the statutes describe what my Office does, the purpose of my Office and the Code of Conduct is captured in the Preamble for the Code of Conduct. It states:

Improving the quality of public administration and governance can be achieved by encouraging high standards of conduct on the part of all government officials. In particular, the public is entitled to expect the highest standards of conduct from the members it elects to local government. In turn, adherence to these standards will protect and maintain the City of Toronto's reputation and integrity.

The public expect their elected representatives to be held to account for not maintaining a high standard of conduct. My Office has a general obligation to do its work in a manner that serves the public and members of Council in a timely, fair, and cost-efficient manner.

Where an investigation cannot be fairly and thoroughly completed before an election, the public may still be well-served when an investigation is completed after someone has left office. The completion of an investigation results in one of two outcomes:

- 1) It exonerates a member of Council because an integrity commissioner finds that, on a balance of probabilities, misconduct has not been proven; or
- 2) It results in a finding of misconduct that may also include a recommendation as to penalty and remedial actions.

While terminating an investigation midstream may provide a technical end to a matter, that may not, for the public record, conclusively resolve the substantial questions about conduct and proper administration that may be at issue. This is an important reason why it may be in the public interest to report on matters once a member of Council has left office. It provides finality to the individual who is the subject of a complaint and, for others in office now or in the future, it may provide useful guidance with respect to a novel or precedentially-important question about the ethics of their activity and decisions.

There are also considerations that weigh against continuing some investigations. It may be a disproportionate response to continue to make significant expenditures of time and resources to pursue an isolated matter that dates back a number of years. Similarly, it may not be justified to continue to pursue matters where, because an investigation has been suspended, the

respondent is substantively prejudiced from being able to respond to the allegations. I find this factor weighs in favour of discontinuing the investigation.

D. Conclusion

Due to the lengthy suspension of my Office's investigation (and the fact it was lifted shortly before the declaration of the current public health emergency), were I to continue this investigation, I believe it would take some months to complete our work and would add to delay that is already considerable.

While the allegations of misconduct are serious, I am concerned about the prejudice to the respondent if my Office continues the investigation. I also note his lawyer requested the investigation be discontinued rather than completed.

It also appears that the complainant has disengaged from this process, but I have not given this factor significant weight in my reasons.

In this case, Mr. Di Ciano did not return to office in 2018. Were my Office to complete this investigation and find there had been a contravention of the Code of Conduct, the only consequence that would be available is a public report of misconduct.

It is significant that, although the allegations are serious, the alleged misconduct conduct is not ongoing. There is also no compelling public interest to have a report issued now about alleged misconduct dating from 2016 and before. The issues raised in the complaint are not unique or precedent-setting. Given this, it is not justified to continue to devote time and resources to this investigation.

Having considered these factors, I am of the opinion that continuing this investigation would serve no useful purpose and have terminated this investigation. Given the referral to the OPP, the public comment on this investigation, and its duration, I believe it is in the public interest to report to Council about this outcome and have exercised my discretion under section 4 of my Office's Complaint and Application Procedures to issue this report.

Respectfully submitted,

Jonathan Batty
Integrity Commissioner

December 10, 2020