

Inside Job

Investigation into matters relating to the
Regional Municipality of Niagara's
hiring of its Chief Administrative Officer,
and its administration of his contract

OMBUDSMAN REPORT
Paul Dubé, Ombudsman of Ontario
November 2019



1-800-263-1830

www.ombudsman.on.ca

Inside Job

**DIRECTOR,
SPECIAL OMBUDSMAN
RESPONSE TEAM**

Gareth Jones

SENIOR COUNSEL

Joanna Bull

LEAD INVESTIGATOR

Chris McCague

INVESTIGATORS

Yvonne Heggie
Patrick Martin

**EARLY RESOLUTION
OFFICER**

Juan Miguel de Villa

GENERAL COUNSEL

Laura Pettigrew

COUNSEL

Robin Bates
Cameron McKeich

Office of the Ombudsman of Ontario

We are:

An independent office of the Legislature that resolves and investigates public complaints about Ontario public sector bodies. These include provincial government ministries, agencies, boards, commissions, corporations and tribunals, as well as municipalities, universities, school boards, child protection services and French language services.

Our Values:

Fair treatment

Accountable administration

Independence, impartiality

Results: Achieving real change

Our Mission:

We strive to be an agent of positive change by promoting fairness, accountability and transparency in the public sector and promoting respect for French language service rights as well as the rights of children and youth.

Our Vision:

A public sector that serves citizens in a way that is fair, accountable, transparent and respectful of their rights.



Ontario Ombudsman



@Ont_Ombudsman



OntarioOmbudsman



Ombudsman Report

**Investigation into matters relating to
the Regional Municipality of Niagara's hiring
of its Chief Administrative Officer,
and its administration of his contract**

“Inside Job”

**Paul Dubé
Ombudsman of Ontario
November 2019**

Table of Contents

Executive Summary	4
Complaints.....	6
Investigative Process.....	8
Identifying individuals in this report	9
Witnesses and co-operation.....	9
Scope of investigation	10
Digital evidence and computer forensics	10
Help Wanted: Hiring a New CAO.....	12
Pre-posting unrest, rumours and schemes	12
Recruitment plans – and leaks – begin.....	14
Recruitment committee makeup.....	15
CAO “traits and competencies”	16
Position posting and preparation for interviews.....	18
The “5 Identified Candidates” memo	19
The “Messaging” document.....	20
The interview questions	21
From first interviews to last candidate standing.....	22
First interview.....	22
Help from a “communications expert”.....	23
More questions, more answers	24
Second interview.....	25
You’re hired: Crafting a contract and checking references.....	26
Reference checks	27
The appointment.....	28
Issues with the hiring process: Lack of fairness and transparency	29
Protecting confidential municipal information	30
Insider assistance	34
Staff role in recruitment.....	35
Use of personal email	39
Job Security: Extending the CAO’s Contract	40
First “final” contract, appraisal and renewal.....	40
The locked cabinet.....	41
“Exceptional” performance	42
Early renewal and “out-of-the-ordinary” protection	42
The new contract	43
No council involvement	44
Salary increase	44
Issues with the contract process: Best practices	45
Respecting council’s authority.....	46
Processing performance	47
Local Probes: What Happened Here?	49
Municipal ombudsman’s investigation	49
Asking for evidence.....	50

Anonymous sources	51
Council receives the report	52
More breaking news.....	54
The external governance audit	55
Issues with the municipal ombudsman's process.....	56
Establishing terms of reference	57
Issue identification	57
Overstepping the mandate	58
Confidential informants	59
Seeking all available relevant evidence.....	60
No preliminary reporting process	63
Issues with the external governance auditors' review.....	65
Opinion.....	66
Recommendations	67
Response	69
Regional Municipality of Niagara	69
Carmen D'Angelo	69
Municipal ombudsman.....	70
Other comments.....	71

Executive Summary

- 1 In the municipal world, chief administrative officers play a key leadership role. They are the administrative head of a municipality and the bridge between staff and the elected council.
- 2 At the end of October 2016, the Regional Municipality of Niagara hired a new Chief Administrative Officer (CAO) after a six-month recruitment process. Almost 18 months later, a local newspaper published allegations that the CAO had improperly received confidential information about the hiring process during the competition. It was suggested that staff in the office of the Regional Chair had leaked the names and biographical details of other candidates to the individual who became the CAO, giving him an unfair advantage. These allegations undermined public confidence in the integrity and transparency of the region's administration.
- 3 Council acted quickly to appoint a municipal ombudsman to look into the matter. In his July 2018 report, that ombudsman found that no confidential information had been disclosed to the CAO before he was hired. However, the investigation did not serve to clear the air. Some, including local media, questioned the adequacy of the municipal ombudsman's investigation.
- 4 After the municipal ombudsman's report was made public, a local newspaper reported that the prospective CAO had not only received information about the other candidates before he was hired, but was improperly given questions and suggested answers to prepare for interviews. Council then directed staff to search the regional municipality's computer servers for evidence of the leaks and to request access to the servers at the local conservation authority, the CAO's previous employer. External governance auditors were appointed to oversee that process.
- 5 At the same meeting at which the auditors were appointed, council became aware that the CAO's contract had been extended for three years without its knowledge, legal advice, or the input of any professional staff. The contract had also been amended to include some unusually favourable terms for the CAO, including a provision for 36 months' notice – even if he were to be terminated for cause.
- 6 When the auditors reported back to council in late August 2018, they explained that they had no expertise to assess the software or methodology used by staff in the search, and that they were unable to search the servers belonging to the CAO's former employer without that body's approval. Council directed the auditors to discontinue their review and asked that I investigate the circumstances surrounding the hiring of the CAO.

- 7 My Office also received 113 complaints from citizens urging that I look into issues relating to the hiring of the CAO, the extension of his contract, and the adequacy of the investigations carried out on behalf of the region. I initiated an investigation into all of these issues.
- 8 My investigation confirmed that staff in the Regional Chair's office shared confidential information, including questions for interviews, suggested answers for a written exercise, and biographical information about other candidates, with the candidate who became the CAO during the 2016 hiring process. We found evidence that the documents were saved to his computer at the conservation authority.
- 9 Some witnesses we interviewed suggested that digital evidence could have been tampered with, fabricated or planted. To assess the reliability of the evidence we collected, I retained computer forensics experts to review the files. They collected digital evidence at the source and assessed it using hash matching technology.¹ The forensics experts found no evidence of hacking or of files being planted, and concluded with reasonable confidence that no tampering occurred in this case.
- 10 In October 2018, while my investigation was ongoing, municipal elections were held throughout Ontario. The election resulted in significant changes to Niagara's Regional Council, as the majority of council members departed or were not re-elected, including the Regional Chair. Shortly thereafter, the CAO, and two other staff members who had involvement in his hiring, left their positions with the regional municipality. In January 2019, the media reported that the new Regional Council had passed a confidential resolution declaring the CAO's contract void. The matter of the extension of the CAO's contract and his departure is currently before the courts. Accordingly, I did not make any findings concerning the validity of the contract, but limited my consideration to best contract practices.
- 11 Although the regional municipality did endeavour to retain external reviewers to shed light on what had happened, there were several flaws with its approach. It did not speak to the auditors ahead of time or take any steps to determine whether the work was within their expertise or scope of practice, which it was not. My investigation also revealed that council provided little direction to the municipal ombudsman about the scope of his appointment or its expectations for the investigative process. We identified several concerns with the ombudsman's approach, including that he neglected relevant avenues of inquiry and did not follow the requirements of the *Municipal Act*.

¹ Hash matching is used by computer forensics experts to determine whether two digital files are identical. It is often compared to fingerprinting, as the likelihood of two different files having the same hash value is extremely low.

- 12 The Regional Municipality of Niagara's 2016 CAO hiring process was an inside job, tainted by the improper disclosure of confidential information to a candidate – a candidate who was ultimately successful and became the region's most senior administrator. Individual actions led to some of the wrongdoing I found during my investigation, but it is not my role as Ombudsman to sanction individuals for malfeasance. Instead, my focus is on the actions taken by the regional municipality in carrying out its hiring process, and in having that process independently reviewed when its integrity was questioned.
- 13 I found that the regional municipality's actions with respect to the CAO hiring process were unreasonable, unjust, and wrong, in accordance with s. 21(b) and (d) of the *Ombudsman Act*. I also determined that its actions regarding the contract extension and the reviews by the municipal ombudsman and external governance auditors were unreasonable, in accordance with s. 21(b) of the Act.
- 14 I have made recommendations addressed at ensuring the integrity and confidentiality of the regional municipality's process for hiring chief administrative officers, encouraging ethical conduct by regional staff, establishing a transparent process for CAO performance management, extending and amending CAO contracts, and developing a procedure for local investigations that is based on best practices.
- 15 I am hopeful that by implementing my recommendations, the regional municipality will regain some of the public trust that was lost during this CAO hiring process, and that in future its practices and policies will result in greater accountability, transparency, integrity and fairness in local governance.

Complaints

- 16 On April 6, 2018, the *St. Catharines Standard* published an article alleging improprieties in the hiring process for the Chief Administrative Officer (CAO) for the Regional Municipality of Niagara. Among other allegations, the article suggested that confidential information had been leaked to the successful candidate prior to his hiring. Within hours, my Office began to receive complaints from the public. Within a week, more than **20** people had asked me to investigate the region's 2016 CAO hiring process.
- 17 As Ombudsman, my Office is intended to be a last resort. Issues are best addressed and resolved at the local level wherever possible. I encourage all municipalities to adopt formal complaints processes and to appoint local accountability officers, including a municipal ombudsman, to address complaints. Generally, I will only review a complaint if the matter is not resolved by local processes.

- 18 In this case, the Regional Municipality of Niagara acted quickly to respond to the allegations raised in the media. At a meeting on April 12, 2018, Regional Council appointed a municipal ombudsman to investigate the 2016 CAO hiring process.² It directed the municipal ombudsman to report back to council by the end of June 2018.
- 19 The appointed ombudsman presented his report to council on July 5, 2018. He found no improprieties in the hiring process and no evidence that confidential information had been leaked to a candidate.³ Council voted to accept his findings, apologize to the CAO, and declare the matter closed.⁴
- 20 On July 26, 2018, the newspaper reported new allegations about the hiring process, including that additional information had been leaked to the successful candidate for CAO before he was hired. The article identified specific documents that it alleged had been leaked. Over the next three days, my Office received an additional **eight** complaints about this matter.
- 21 Again, the regional municipality acted quickly to respond to the allegations. That day, council directed staff to search the municipality's computer servers for the documents identified in the media. Council also directed staff to work with the CAO's previous employer, the Niagara Peninsula Conservation Authority, to search for the documents. Council had already appointed a third party to undertake a governance audit of the region, and it directed those external governance auditors to oversee the efforts of staff in this search.
- 22 On August 10, the media reported new allegations that the CAO's contract had been extended from a three-year term to five years, without council's knowledge or approval.
- 23 On August 23, the auditors provided an interim report to council, stating that the search had not produced any evidence that the documents described in media reports had been sent to the CAO before his hiring. They explained that they did not have the expertise to evaluate the technical methods used by staff to search for digital evidence, and pointed to other limitations on the effectiveness of their review.
- 24 In light of the auditors' interim report, council passed a motion at its August 23 meeting asking my Office to conduct a full investigation into all matters

² The *Municipal Act, 2001* permits a municipality to appoint a local ombudsman to investigate, in an independent manner, any decision or recommendation made, or act done or omitted, in the course of the administration of the municipality, its local boards, and municipally-controlled corporations, as specified by the municipality. (*Municipal Act, 2001*, SO 2001, c 25, ss 223.13-223.18.)

³ The municipal ombudsman did find that confidential information about candidates was improperly disclosed to the public, including the media.

⁴ Council also voted to apologize to an implicated member of Niagara Region staff.

associated with the hiring of the Chief Administrative Officer. It directed the Chair, the Chair's office, and the CAO to provide full co-operation to my Office, and directed the Clerk, independent of the CAO, to co-ordinate and facilitate my investigation.

25 By August 30, 2018, I had received **113** complaints about the regional municipality's CAO hiring process, the alleged unauthorized extension of his contract, and the municipality's efforts to address the concerns. That day, I notified the Regional Municipality of Niagara of my intent to investigate three issues:

- The process it followed in the hiring of its CAO;
- The administration of the CAO's contract, including any extension and amendment; and
- The regional municipality's response to concerns about the CAO's hiring, including the municipal ombudsman's investigation and the external governance auditors' review.

26 In the wake of the announcement of my investigation, I received an additional 58 complaints, bringing the total to **171**.

Investigative Process

27 The Ontario Ombudsman has had the authority to review and investigate complaints about the provincial government since October 30, 1975. As of January 1, 2016, this jurisdiction was expanded to include municipal sector entities, including the Regional Municipality of Niagara.

28 My investigation was conducted by three Investigators (including members of my Special Ombudsman Response Team), one Early Resolutions Officer, and members of my Legal Services team. Investigators obtained and reviewed thousands of hard copy and digital documents from the region, including relevant meeting materials, policies, and emails. The Niagara Peninsula Conservation Authority also co-operated with my investigation, providing access to documents, staff, and officials.

29 My team conducted 46 interviews, many of them in person and under oath. While it is not usually necessary for me to conduct interviews under oath, that process is provided for in the *Ombudsman Act*. In this case, I decided that conducting some interviews under oath would ensure the integrity of my investigation and underscore the importance of witnesses providing full and frank information to my Office.

Identifying individuals in this report

- 30** My Office's general practice is not to name individuals in reports, whether they are complainants whose confidentiality must be protected (in which case their identity is anonymized), or public servants and other officials whose actions are the subject of our investigations. This is because our focus is on administrative conduct, and our intent is never to "name, blame and shame" specific individuals. Even though some officials may be well-known in their communities, our usual practice is to identify them by their position titles, such as Regional Chair or Regional Clerk.
- 31** In this case, the central figure is the individual who became the CAO of the Regional Municipality of Niagara in November 2016: Carmen D'Angelo. This report refers to him before, during and after the time he held that title. For the sake of clarity, therefore, this report refers to him throughout by his name.
- 32** All other individuals are referred to by their position titles. Although several of them (including the Regional Chair, his Policy Director, his Director of Communications, and some members of council) had left those positions by the time of publication of this report, it should be understood that the titles refer to the individuals who held them at the relevant times.

Witnesses and co-operation

- 33** Staff and officials from the regional municipality co-operated with my investigation by providing requested documents and participating in interviews. We received excellent co-operation from staff in response to our requests for documents.
- 34** We also received good co-operation from the Niagara Peninsula Conservation Authority, which was not the subject of this investigation. A third-party company manages the conservation authority's computing services, including its servers. In August 2018, the conservation authority's Chief Administrative Officer directed the company to co-operate with my team and provide access to information relevant to my investigation. In January 2019, the company informed us that conservation authority staff had directed it not to communicate directly with our Office. After we spoke with the Chair of the conservation authority's board, staff clarified that our Office would continue to have access to information at the conservation authority, as long as our requests were made through staff. The conservation authority continued to provide requested documents and information, including by providing direct access to its servers, and our access was not obstructed.

Scope of investigation

- 35 The scope of my investigation was limited to the three issues listed in the notice I sent to the regional municipality on August 30, 2018. Throughout my investigation, some witnesses suggested that I should not limit my review to the CAO hiring process, and should instead investigate other alleged leaks of confidential information at the municipality, including leaks to the media. Mr. D'Angelo himself repeatedly requested that I investigate the alleged leaks.⁵
- 36 My investigation focused on the 2016 CAO hiring process, the CAO's contract extension, and third-party reviews of the process by a municipal ombudsman and external governance auditors. My Office does not condone leaks of confidential information, however, such allegations were outside the scope of my investigation. As I explained to those who raised the issue, concerns about leaked confidential information can be raised through a complaint to the regional municipality. If the allegations involve a member of Regional Council or a local board, complaints can be directed to the region's Integrity Commissioner.⁶ Complaints about the improper disclosure of personal information can also be made to Ontario's Information and Privacy Commissioner.⁷

Digital evidence and computer forensics

- 37 In accordance with the role of the Ombudsman under the *Ombudsman Act*, my focus in this investigation was on the administrative processes and conduct of the regional municipality. It is not my role to assess culpability or to assign blame to individuals. However, in order to review the actions of the region and identify recommendations to improve its processes, I was obligated to investigate allegations made about the region's hiring process. This included whether confidential information was shared with Mr. D'Angelo when he was a candidate for the CAO position.
- 38 This information was stored digitally, in the form of files saved on a computer server. After locating the files in question, my team examined each file for its content, as well as the location where it was saved. We also reviewed the metadata of each file. Metadata is a valuable source of information about a digital

⁵ Although he expressed concerns about leaked confidential information reported in the media, Mr. D'Angelo told us that he routinely received confidential information from staff and officials at the region before he was hired as the region's CAO. He told us that he did not report these leaks to anyone, and did not ask us to investigate incidents where he was the recipient of leaked information.

⁶ Niagara Region, *Complaint Process for Council Code of Conduct*, online: Niagara Region Official Website <<https://www.niagararegion.ca/default.aspx>>.

⁷ IPC Privacy – Individuals, *Filing a Privacy Complaint*, online: Information and Privacy Commissioner of Ontario <<https://www.ipc.on.ca>>.

file, as it may list the author of a file, any other individuals who worked on the file, the date and time that the file was created, and when it was last modified.

- 39 The documents in question were found in Mr. D'Angelo's "downloads" folder on the server at the conservation authority. According to the conservation authority's computer services company, when Mr. D'Angelo worked for the conservation authority, he was able to save documents to a local drive on his work-issued computer. This local drive included the downloads folder, where any documents that Mr. D'Angelo downloaded were automatically saved. When a file was opened from an external source, it was automatically saved to this folder; Mr. D'Angelo did not need to intentionally save the file and may not have even been aware that a copy was being saved.
- 40 The company's staff confirmed that, after Mr. D'Angelo left his position at the conservation authority to become CAO at the Regional Municipality of Niagara, a copy of his local drive, including his downloads folder, was preserved on the conservation authority's servers. The documents that were allegedly improperly provided to Mr. D'Angelo during the hiring process were saved to this folder. The folder also included routine personal files, as well as documents that were sent to all candidates for the CAO position.
- 41 Certain witnesses we interviewed suggested that digital evidence is not reliable. Mr. D'Angelo told us that during the 2016 hiring process, both his work laptop and cell phone were stolen, and his email was accessed improperly by an unknown third party. He suggested that someone could have fabricated documents and placed them on his devices. Other witnesses suggested that any files found on the conservation authority's servers could have been "planted" there, or that the metadata associated with those files could have been altered to change the file's author, or the date and time of the file's creation.
- 42 In order to ensure that my investigation was based on credible evidence, and to address some witnesses' allegations of file tampering, I decided to engage the services of a team of computer forensics experts. I asked a respected auditing firm with expertise in computer forensics to review digital evidence obtained by my team. We asked the experts to assess the files for evidence of where they originated, and when they were created, downloaded, or edited. We also asked the experts to assess whether the files were planted or tampered with in any way.
- 43 Using computer forensics software and techniques, the experts examined the integrity of the files relevant to my investigation. They travelled to Niagara Region to obtain data directly from computer servers at the region and the conservation authority. The experts applied an industry standard "hashing algorithm," which is

a tool used in computer forensics to determine whether two files are likely to be identical. Their report to my Office explained:

In computer forensics, hashing is a way to represent a piece of digital data with a unique numerical value by applying a mathematical algorithm to the data. Two files with exactly the same bit patterns will hash to the same value using the same hashing algorithm. Hashing is considered a best practice for digital forensic practitioners. A popular analogy is to compare hashing to fingerprinting, in that each distinct pattern of data has its own unique hash value similar to each person's fingerprints.⁸

- 44 After a thorough examination of the files obtained by my Office in this investigation, the forensics report concluded that the likelihood that files were planted is very low. The experts found no evidence of any hacking, or that any files were tampered with or planted, and concluded with reasonable confidence that no tampering occurred.
- 45 Based on the expert computer forensics review I obtained, my Office's review of the metadata and the location of the documents on the conservation authority's servers, as well as information we obtained through interviews, I am satisfied that there was no tampering, hacking, or other manipulation of the evidence considered in this investigation.

Help Wanted: Hiring a New CAO

Pre-posting unrest, rumours and schemes

- 46 Long before the position of Chief Administrative Officer for the Regional Municipality of Niagara became open in April 2016, there were rumours of unrest at regional headquarters. One employee in the Regional Chair's office described "challenges" between the Regional Chair and the then-CAO.⁹ We were told they disagreed about how much political influence the Chair and council should have over the regional municipality's operations, which are the CAO's responsibility.¹⁰ A member of council recalled explosive arguments in the halls and told us that the Chair and the then-CAO were "fighting all the time."

⁸ According to the computer forensics experts retained by my Office, if the hash values of two files match, there is a 1 in 3.4×10^{38} chance that the files are not identical – in other words, it is extremely improbable that the two files are not identical.

⁹ The Regional Chair is the head of council for the regional municipality, like a mayor, warden, or reeve.

¹⁰ Section 229 of the *Municipal Act, 2001* provides that a CAO is responsible for, "exercising general control and management of the affairs of the municipality for the purpose of ensuring the efficient and effective operation of the municipality", and any other duties assigned by the municipality. (*Municipal Act, 2001*, SO 2001, c. 25, s. 229.)

- 47 The rumours even reached beyond the walls of regional headquarters. At the Welland offices of the Niagara Peninsula Conservation Authority, Mr. D'Angelo heard about the tension between the region's Chair and its then-CAO. Mr. D'Angelo, who was then the CAO of the conservation authority, told us that he even called his counterpart at the regional municipality to encourage him to "keep his chin up." At the same time, Mr. D'Angelo was sketching out a timeline for the then-CAO's termination, and the hiring process to replace him.
- 48 On December 13, 2015, Mr. D'Angelo saved a spreadsheet entitled "CAO Critical Path" on his computer at the conservation authority. It envisioned a vote by Regional Council to terminate the then-CAO on January 14, and set out dates for a series of steps, including the formation of a selection committee, selecting a recruitment firm, posting the CAO job for four weeks, ranking candidates, two rounds of interviews, a committee recommendation, and council approval of the recommendation – with the new CAO starting in the position on May 6. It also indicated that the region's Commissioner of Public Health should be the Acting CAO from January 14 to March 14, followed by the Commissioner of Planning. According to metadata reviewed by my Office, the document was last saved to Mr. D'Angelo's computer, and printed, on December 14, 2015.
- 49 Mr. D'Angelo told us he did not recall creating this plan to replace the region's CAO, but he explained that he often received confidential information from regional councillors, especially those who were also members of the conservation authority's board of directors. He told us that staff and councillors at the regional municipality considered him a confidant, and often asked for his opinion on confidential matters.
- 50 On January 14, 2016 – the same date identified in the spreadsheet on Mr. D'Angelo's computer for a council decision to terminate the then-CAO – Niagara's regional council did consider a motion to direct the Chair to terminate the then-CAO. The minutes show that the meeting lasted more than three and a half hours, and the motion was defeated by only four votes.
- 51 Although the bid to fire the then-CAO failed, we were told that the relationship between him and the Chair remained rocky. On April 6, 2016, the media reported that the then-CAO had accepted a job at another municipality. Two days later, he officially resigned, in a letter explaining that he had observed actions and behaviours at the leadership level that inhibited his efforts to deliver on his commitments to the Regional Municipality of Niagara.
- 52 Rumours about discord between the then-CAO and the Chair soon turned to rumours about who would step in to fill the newly vacated position. A former senior employee at the regional municipality told us that, shortly after the then-

CAO resigned, a councillor reached out to him to arrange a meeting to discuss Mr. D'Angelo as a "successor." The employee told us it was clear to him that Mr. D'Angelo was the councillor's choice for the position; he said the councillor assured him that he could "get the votes" to complete the hire.

- 53 This councillor told us that he does not recall speaking with the employee about Mr. D'Angelo as a CAO candidate. However, we obtained an email from the councillor to the employee dated April 15, 2016, in which the councillor thanks the employee for the meeting, and suggests that the employee mention Mr. D'Angelo's name to other staff as a good candidate for CAO. The email states that this messaging early on "may provide some ease as we move forward and regional staff start hearing all kinds of rumours."

Recruitment plans – and leaks – begin

- 54 Staff at the regional municipality quickly started working on plans to recruit a new CAO. On April 18, the Director of People Services and Organizational Development¹¹ sent two draft reports by email to the Clerk, the Director of Legal and Court Services, the Regional Chair, and three staff in the Chair's office: The Chair's Policy Director, Director of Communications, and Administrative Assistant. Marked confidential, one report recommended that council appoint a member of senior staff as the acting CAO. The other proposed the creation of a recruitment committee and set out a process for it to follow. It stated:

A transparent, competitive, and comprehensive recruitment process, in alignment with Niagara Region employment policies, is essential to fill the CAO position in an expeditious manner.

- 55 During our investigation, we found that copies of these draft memos had been saved in the downloads folder on Mr. D'Angelo's computer at the conservation authority. Both documents were marked as drafts, and both were exact copies of the drafts on the regional municipality's servers.¹² The data we obtained indicates that the draft memo about appointing an interim CAO, which was marked confidential, was last opened or saved on Mr. D'Angelo's machine at 12:29 p.m. on April 19, 2016. The draft memo describing the recruitment process for a new CAO was opened or saved 10 minutes later, at 12:39 p.m.
- 56 Mr. D'Angelo initially told us that he does not recall whether he received these draft reports. He later told us that he was familiar with the content of the reports

¹¹ At the time, this was Niagara Region's name for the director responsible for human resources.

¹² This was confirmed by the forensic experts using hash matching. Identical copies of these drafts were also found as email attachments on laptops issued by the regional municipality to the Chair's Policy Director and Director of Communications, which is consistent with the email they received on April 18 attaching the draft memos.

and could have received them. No one we interviewed told us they sent these documents to Mr. D'Angelo, but given the small number of staff and council members who had access to them, and the exact technical match between the document properties, I am confident that the documents were shared with Mr. D'Angelo by someone at the regional municipality.

Recruitment committee makeup

- 57 At a meeting on April 28, 2016, Regional Council considered the final versions of the Director of People Services' two memos. The meeting minutes show that council appointed an Acting CAO and created a CAO recruitment committee, composed of five members of council, including the Regional Chair.¹³
- 58 Council also approved Terms of Reference governing the recruitment committee at the same meeting. They state that the committee was to engage an external executive search firm to undertake a national candidate search. The search firm was to consult with all members of council and other stakeholders to develop "key CAO character traits and competencies required." These traits and competencies were to be approved by council before the committee began the search phase of the process.
- 59 The Terms of Reference state that committee members should actively participate in a transparent, competitive, and comprehensive recruitment process, while protecting all confidential information considered by the committee. They say the committee "shall hold in strict confidence all confidential information concerning matters dealt with by the Committee." The Chair was to provide regular updates to council on the committee's progress. Upon completion of the process, the committee was to recommend a preferred candidate and terms for a conditional offer of employment for council's consideration.
- 60 The Terms set out the five members of council who would form the committee, including the Chair. They state that the committee and the search firm would be supported in an advisory capacity by the Director of People Services, the Director of Legal and Court Services, and the Clerk. The Terms do not mention a role for the Chair's staff.
- 61 The recruitment committee met for the first time on May 10, 2016. The committee discussed retaining an external search firm, and directed human resources staff to reach out to potential search firms to solicit interest. In addition to the committee members and the staff identified in the Terms of Reference, the

¹³ At the meeting, council decided to suspend the rules in its procedure by-law to allow the Regional Chair to act as committee Chair. The by-law provides that the Chair shall be a member of all committees, but cannot sit as committee Chair, Co-Chair, or Vice-Chair.

attendance list in the minutes includes the Chair's Policy Director and his Director of Communications.

- 62 The Chair's Director of Communications told us that he may have attended on May 10, but he did not attend the rest of the committee's meetings. The Chair's Policy Director did attend most of the committee's meetings. He told us that, although he was not mentioned in the committee's Terms of Reference, he understood his role to be assisting the Chair "on any internal related matter."
- 63 On May 26, the Director of People Services sent copies and summaries of submissions received from six potential executive search firms to the Clerk for consideration at the next committee meeting, copying staff, including the Chair's Policy Director. The next day, the Policy Director forwarded the email to the Chair and his Director of Communications, noting that he would be reviewing the documents over the weekend and "doing background checks on the individuals." During interviews, the Chair told us it was normal for his staff to do these kinds of background checks. The Policy Director told us that the checks consisted of a cursory Internet search to look for any controversies, in order to do his own "due diligence."
- 64 The recruitment committee next met on June 13, 2016. The minutes indicate that, again, the Chair's Policy Director attended the meeting, including a closed portion. While in the closed meeting, the committee directed the Director of People Services to negotiate with one of the external search firms. In open session, the committee delegated authority to the Chair, in conjunction with the Director of People Services and the external search firm, to "be the liaison in the hiring process." Although he was not mentioned in the committee's direction, the Policy Director told us that he believed he also had a role in liaising with the external search firm. He claimed to have been under the impression that he was responsible for facilitating the exchange of information between the Clerk's office, the external search firm, and the committee.

CAO "traits and competencies"

- 65 On June 17, 2016, the Chair sent a memo informing council that the committee had selected an external search firm and that council would be required to approve a consultation process on the traits and competencies desired in the new CAO.
- 66 Four days later, at 11:44 p.m. on June 21, 2016, Mr. D'Angelo created a document on his computer at the conservation authority, setting out characteristics and experience required in a CAO. Saved as "CAO Criteria," the document refers specifically to Niagara Region. Under the heading "Knowledge," the document lists "a thorough knowledge of Niagara Region's community

strengths, opportunities and challenges, and an in-depth understanding of the culture of the area.”

- 67 Mr. D’Angelo told us that, although he could not recall who or when, someone had reached out to him to ask about the attributes of a CAO, because he was a “key stakeholder.” He told us he was also asked about external search firms, and how to run a CAO selection process. He explained that, before he applied for the position, he was not shy about his goal of becoming a municipal CAO. He said he would speak to people to “gather intel” about what kind of person the region was seeking, the culture of the organization, and how it tracked progress, such as through the use of performance measurement tools.
- 68 Mr. D’Angelo was once again one step ahead of the regional municipality when he drafted his list of CAO characteristics. The recruitment committee did not approve the character traits consultation process until the following day, during a meeting on June 22, 2016. That day, the committee reviewed a timeline for the hiring process put forward by the external search firm. It also approved a process proposed by the Director of People Services, which involved consulting stakeholders about CAO traits and competencies, including council, senior staff, other municipalities, and representatives from the business, education, and health sectors.
- 69 On June 28, the Director of People Services sent a spreadsheet listing potential stakeholders to the Chair’s staff, as well as other senior staff and the external search firm. The list included individuals from a variety of sectors, including regional council and staff, local municipalities, the health and education sectors, and businesses. It also included individuals from agencies, boards, and commissions, including the Niagara Peninsula Conservation Authority; Mr. D’Angelo’s name and contact information were on this list.
- 70 On July 4, the Policy Director emailed an edited stakeholders list to the external search firm. His list included only members of council, staff, local area municipalities, and business and community leaders. He wrote that representatives of agencies, boards, and commissions were removed from the list, as they were “outside the scope” of the consultation process that council approved on June 30. Although Mr. D’Angelo told us that he was consulted at some point about the character traits of a CAO, his name was not on the final stakeholders list.
- 71 On July 20, 2016, after the stakeholder consultation, the recruitment committee met to review the feedback received. The committee approved a list of character traits, experience, and credentials that Niagara Region would seek in CAO candidates. It decided that the required experience and credentials should include senior administrative experience within a large organization, such as a

municipality, experience working with the municipal sector, and business acumen and/or private sector experience. The committee determined that the CAO should be a strategic thinker with high emotional intelligence, with an understanding of the role of the CAO, Chair, and council, and “an open door to [the] Chair.” The next day, council approved the character traits, but not before changing “open door to the Chair” to “Open door between the Chair, Council, and CAO.”

Position posting and preparation for interviews

- 72** The Policy Director continued to drive the recruitment process. On July 28, the Director of People Services emailed him to ask about next steps and noted that the human resources department was fully available to support the process. The Policy Director responded to thank her and suggested they discuss next steps before the next committee meeting.
- 73** However, as the Policy Director and the Chair’s Director of Communications drafted a job posting for the CAO position over the next two weeks, they did not involve human resources staff or the committee. The Policy Director approved the posting and it went online on August 9, 2016. The Director of People Services did not know the job had been posted until two days later, when a member of her staff saw it online. When we asked the Policy Director about this process, he told us that it would have been impractical to convene the committee over the summer break, and that if human resources did not know about the posting, it was an administrative oversight.
- 74** While the regional municipality continued to accept applications for the position throughout August, one senior staff member told us that, amongst senior and middle management, “everyone knew [Mr. D’Angelo] was the lead candidate.” He said he had considered applying for the CAO position himself, until August 25, when he attended a meeting with a member of council and Mr. D’Angelo, at which the councillor suggested that his application for the job would “complicate things” for Mr. D’Angelo. The employee recalled Mr. D’Angelo sketching out an organizational chart for the region that included a new “Deputy CAO” position; he interpreted the message as an inducement for him to drop his application for CAO, in exchange for a chance to become Deputy CAO.
- 75** The councillor told us that he did not recall speaking to the employee about Mr. D’Angelo, and suggested that the employee was speculating or making an “off the cuff kind of comment.” However, another senior staff member recalled the employee saying in September 2016 that he had been encouraged not to apply, as a councillor had the votes to hire Mr. D’Angelo. Other members of senior staff told us the employee told them he would be offered the Deputy CAO position if he withdrew his application for CAO.

- 76 Mr. D'Angelo told us that he most likely did speak to people about restructuring staff ahead of applying for the CAO position, because restructuring organizations is his strength. He told us that he saw the regional municipality's structure as "too flat," and said that, if asked, he would have suggested creating a Deputy CAO or General Manager position. In fact, on September 14, Mr. D'Angelo saved a document to his desktop showing an amended organizational chart for Niagara Region, including a Deputy CAO position.

The "5 Identified Candidates" memo

- 77 On September 16, 2016, the external search firm emailed a list of all applicants for the CAO position to the Policy Director, "for the Chair's reference." Three days later, at 5:10 p.m. on September 19, the Policy Director created a document with the file name "CAORC 5 identified candidates msging," according to metadata we reviewed. It consisted of a memo stating that the shortlist should "reflect a diverse range of backgrounds and candidates that align with the character traits outlined in the motion passed by Council," and "limit candidates with no previous history at the Regional Municipality of Niagara." The memo lists four candidate types: Ontario municipal candidate; Ontario provincial candidate; out-of-province candidate; and "provincial experience." It notes that an internal candidate should also be interviewed, bringing the total up to five.
- 78 The memo then names five candidates who appear to fit those descriptions. All five candidates were on the longer list of applicants sent to the Policy Director by the external search firm earlier that week. Four would end up being interviewed as part of the recruitment committee's shortlist. Mr. D'Angelo, who was then the CAO of the conservation authority, is identified in the place reserved for an "Ontario municipal" candidate, and is described as having "experience working with elected Niagara Board. Great working relationship with Chair of [the conservation authority]."
- 79 The Policy Director told us that it was his general practice to write down his thoughts, then brief the Chair before deleting (or closing without saving) his notes, and shredding any hard copies. He said that this document would not have been a written memo provided to the Chair, but simply for his own use as a memory aid while briefing the Chair. He told us that although he could not confirm that he wrote this document, it was written in his usual style and format and "could very well" be his work.
- 80 The Policy Director told us he does not recall why he would have written that candidates with no previous history at the Regional Municipality of Niagara should be limited. This was not a requirement in the character traits list approved by Regional Council. A member of the recruitment committee told us that the

committee never intended to limit the recruitment to candidates with such experience, and that the members never discussed making sure the shortlist had a specific range of backgrounds like those listed in the Policy Director's memo.

- 81 The day after the Policy Director's memo was created, on September 20 at 11:48 a.m., a copy of it was saved to the downloads folder on Mr. D'Angelo's computer at the conservation authority.
- 82 Mr. D'Angelo initially told us that he does not recall receiving this document, but later told us that he may have received it and that it "looked really familiar." He explained that he remembers "learning of candidate information and discarding it, thinking well, that's nice, right?" He told us that if he did see the memo, he would have discarded it because he already knew who some of the other candidates were, and it would only have been of interest to confirm that he was on the shortlist and satisfy his "curiosity on who my competition is." Mr. D'Angelo later wrote, in an email to my staff, that it was possible that he received this document during the hiring process, and "[u]pon further reflection, in the absence of my emails during this time frame and to the best of my recollection, I believe the primary source of the information would have been from [the Policy Director]."

The "Messaging" document

- 83 While Mr. D'Angelo was downloading the memo about identified candidates, the Policy Director was working on a second memo about the recruitment process, saved as "Messaging." The memo identifies four candidates for the CAO position by name, and sets out reasons why each would not be a good choice for the region. All four candidates listed in his memo are on the list that was sent to the Policy Director by the external search firm. None of the four listed candidates would go on to be included on the short list.
- 84 Metadata shows that the Policy Director created the "Messaging" document at 10:38 a.m. on September 20, and last saved the document at 12:09 p.m. that day. At 7:39 p.m. that evening, the "Messaging" document was saved to Mr. D'Angelo's downloads folder at the conservation authority. It was saved again twice on September 25, 2016 at 10:09 a.m.¹⁴
- 85 The Policy Director told us that he remembers discussing the content of this memo with the Chair. Although he did not recall if he wrote it down, he said he

¹⁴ The computer forensics experts consulted by my Office explained that when a document is opened multiple times, it is saved to the downloads folder, and the computer automatically adds a number in brackets after the file name to indicate each subsequent opening. In this case, the "Messaging" document was saved three times; first as "Messaging" on September 20 at 7:39 p.m., then as "Messaging(1)" and again as "Messaging(2)" at 10:09 a.m. on September 25, 2016.

likely would have done so. He said that, to the best of his recollection, he did not send this document to Mr. D'Angelo.

- 86 Mr. D'Angelo initially told us that he did not recall receiving the document, but later told us: "I could have received this. I'm not going to deny it." As with the "5 identified candidates" document, he told us that if he received the document, it would have come from the Policy Director. He told us that he did not see how the information in the memo would have assisted him as a candidate, and that if he did receive it, he would not have taken any steps to report the leak or inform anyone about the disclosure of confidential information.

The interview questions

- 87 On September 21, the external search firm emailed a draft copy of questions for the CAO candidate interviews to the Clerk and the Policy Director. Later that day, the Chair sent a confidential memo to the members of the recruitment committee with the draft interview questions attached.
- 88 The committee met on September 23, 2016 at 9:06 a.m. at regional headquarters. It went into a closed session to discuss the draft interview questions and a long list of candidates provided by the search firm. The closed session minutes indicate that the committee directed the search firm to incorporate the committee's feedback in the interview questions, and to contact specific individuals for interviews. The committee set the first round of interviews for October 4, 2016 between 10 a.m. and 6 p.m., and the second round for October 12 from 11 a.m. to 3 p.m.
- 89 The minutes record the committee's decision to have all of its members sign a non-disclosure agreement provided by the external search firm to protect the confidentiality of the hiring process. It is unclear whether Niagara Region staff participating in the recruitment were also required to sign; the search firm could not locate copies of the signed agreements. The Policy Director told us that he does not remember if he signed an agreement. A partner from the search firm told us that only committee members would have signed the agreements, because staff would typically be covered by the confidentiality obligations of their employment.
- 90 On September 29, the Policy Director emailed the external search firm to ask if the revised interview questions would be circulated to the committee members. The firm responded that they developed the questions based on their notes from a committee meeting and discussions with the Clerk, and planned to provide the questions to the committee on the first day of interviews. The Policy Director replied that he did not know why the firm was talking to the Clerk without including the Chair, when the Chair was the designated contact person for the

firm. He suggested that the committee intended for the firm to bring the questions back for approval ahead of the interviews. In response, the search firm sent the edited questions to the Policy Director and the Clerk on September 30. The document listed 10 interview questions, and provided for time for the candidate to ask questions and make a closing statement.

- 91 Despite the Policy Director's assertion about committee approval, the revised questions were not circulated to committee members until October 3, 2016, the day before the interviews. They were, however, circulated to Mr. D'Angelo.
- 92 At 9:22 p.m. on October 2, the Policy Director saved a version of the questions as "Revised Questions" after making a few minor formatting changes. Just over an hour later, at 10:35 p.m., the revised document, including the Policy Director's formatting changes, was saved to Mr. D'Angelo's downloads folder at the conservation authority.
- 93 The Policy Director told us that, to the best of his recollection, he did not send the questions to Mr. D'Angelo. Initially, Mr. D'Angelo told us that he did not recall receiving the questions ahead of his first interview. He later said that there is a "good possibility" and it was "more likely than not" that he did receive the questions, though he could not be sure because they were quite standard for a CAO recruitment, and he had participated in other such processes. He told us that if he did receive the questions document, it would have come from the Policy Director.

From first interviews to last candidate standing

- 94 Staff at the external search firm told us that, around the time of the first interviews, they became aware of rumours that Mr. D'Angelo had been pre-selected, and that there was a version of an organizational chart circulating that already named him as CAO. They told us that the firm was concerned enough to raise this allegation with the Chair during a phone call. They described the Chair as "aggressive, defensive" and "initially extremely hostile to the suggestion." The firm's staff noted that by the end of the phone call, the Chair committed to a fair and open process. The Chair told us he did not recall this discussion or the allegation.

First interview

- 95 The committee held the first round of interviews on October 4, 2016, at a local hotel. After the interviews, members discussed the candidates' performance. The Chair recalled not being impressed with Mr. D'Angelo during the first interview, but told us he thought he was "good enough" to deserve another chance. Another member of the committee told us that, after the first interview, they were

not impressed by Mr. D'Angelo's performance. The committee member had also heard the same rumours that had reached the search firm, and was concerned that the hiring decision had been pre-determined. The member raised these issues with the committee, but told us that the other members argued that the allegations had not been proven and were part of a "witch hunt" against Mr. D'Angelo. Despite the concerns of the member, the committee decided to move Mr. D'Angelo forward for a second interview.

- 96 In addition to discussing the candidates, the committee set out the process for the second round of interviews, including that candidates should be asked to answer five questions in writing in a total of 500 words or less by October 10, and be asked to give a 10-to-12-minute presentation on economic development during the second interview. The meeting minutes indicate that the committee directed the search firm to contact three of the candidates for second interviews, including Mr. D'Angelo.

Help from a "communications expert"

- 97 On October 5, 2016, the search firm sent a document to the three selected candidates, asking them to prepare a written submission, as well as a presentation on economic development for the second interview. The written assignment asked candidates to answer five questions, explaining how they would bring economic opportunities to the region, encourage economic development, implement the region's strategic plan, measure success, and build and maintain relationships amongst the Chair, council, senior staff, and the region's lower-tier municipalities. The assignment was saved to Mr. D'Angelo's downloads folder at the conservation authority the following day, October 6, at 4:34 p.m. Later that day, Mr. D'Angelo created a document that was saved as "CAO Written Submission – 2nd Interview."
- 98 Mr. D'Angelo told us that, to prepare his presentation for the second interview, he conducted telephone interviews with local economic development officers. He said he then sent his draft presentation to the regional Chair's Director of Communications, whom he believed had "communications attributes." He asked the Chair's Director of Communications to help fine-tune his presentation for spelling, grammar, and wording. Mr. D'Angelo and the Director of Communications each told us they knew each other professionally through local functions and events.
- 99 On Friday, October 7, 2016 at 12:51 p.m., the Director of Communications created a document saved as "Q&A," which appears to answer the questions assigned to the CAO candidates. A list of suggestions at the top of the page is specific to Mr. D'Angelo's experience at the conservation authority. For example, it cites "Success with Council relations to date via NPCA [Niagara Peninsula

Conservation Authority],” and “2-3 concrete examples of NPCA working with particular Niagara community to resolve issues.” The rest of the document is organized with the five assigned questions as headings. Under each heading are points specific to the region that could be used to answer the questions, such as encouraging a Bank of China branch to open in Niagara, working with the private sector to seek efficiencies, and changing the conservation authority from an enforcement body to a “compliance partner.”

- 100 On Saturday, October 8, 2016 at 7:20 a.m., the Q&A document was saved to Mr. D’Angelo’s downloads folder at the conservation authority. At 7:27 a.m., it was saved again, this time as “[Director of Communications’ initials] Q&A Suggestions.” At 7:36 a.m., it was saved a third time, as “Q&A (1),” which likely indicates that the original document was opened again.¹⁵
- 101 Metadata from Mr. D’Angelo’s drive at the conservation authority indicates that he accessed the official questions document sent by the search firm at 7:28 a.m., suggesting that he opened that document while reviewing the suggested answers sent by the Director of Communications. Twenty-three minutes later, at 7:51 a.m., Mr. D’Angelo saved a presentation on his computer called “Economic Development in Niagara” – the first draft of the presentation he would deliver during his second interview.
- 102 Mr. D’Angelo told us he might have received the suggestions document from the Director of Communications in the course of consulting people for help with his interview materials. The Director of Communications told us that Mr. D’Angelo had his phone number and may have called to discuss the questions from the search firm. He told us that Mr. D’Angelo provided him with some proposed answers, and that the Director gave him “some insight to” those answers. After our interviews, Mr. D’Angelo confirmed in an email to my Office that he did exchange these two documents with the Director of Communications. He noted that he sought the Director’s expertise “in my preparation for the second interview.”

More questions, more answers

- 103 On October 10, 2016, at 7:58 a.m., the Chair’s Policy Director created a document called “Questions.” Most of the two-page document is organized into four headings: Transit; Growth/Planning; Growth/Planning Case Study question; and Relation [sic]. The document sets out questions under each heading, and then answers them.

¹⁵ There are no differences between these three copies of the document, aside from the name.

- 104 One answer refers to the role that the conservation authority played in helping major companies locate in the region. It suggests that a new Niagara Region CAO would review the regional municipality's reporting structure within the first 30 days in the job. The document emphasizes working with the Chair, and states that staff should be replaced when required.
- 105 The Policy Director last modified the "Questions" document at 12:21 p.m. Later that day, at 7:08 p.m., the "Questions" document was saved in Mr. D'Angelo's downloads folder at the conservation authority. It was saved as "Questions (1)" three minutes later, indicating that it was opened a second time.
- 106 The files show that after receiving the "Questions" document, Mr. D'Angelo got down to work on the materials for his second interview. The document called "CAO Written Submission – 2nd Interview," which he had created on October 6, was accessed, modified or saved repeatedly over the next two and a half hours – at 8:17 p.m., 9:22 p.m., and 9:25 p.m. Finally, at 9:31 p.m., it was saved again as "CD CAO Written Submission – 2nd Interview – Oct 12 2016." Mr. D'Angelo's "Economic Development in Niagara" presentation was also accessed or modified that evening, at 8:53 p.m.
- 107 The Policy Director told us he does not recall creating this document or providing it to Mr. D'Angelo. Initially, Mr. D'Angelo told us he did not recall receiving the "Questions" document, but he later said he "could have received it," and if so, the "primary source" would have been the Policy Director.

Second interview

- 108 The second round of interviews took place on October 12. Mr. D'Angelo accessed his written submission one final time that morning at 10:02 a.m. The recruitment committee met at a local hotel at 11:05 a.m., and the minutes indicate that interviews began at 11:15 a.m. The committee interviewed three candidates that day, including Mr. D'Angelo.
- 109 After the interviews, the committee discussed the candidates, and agreed to direct the search firm to check Mr. D'Angelo's references. The minutes state that, if the references were satisfactory, the search firm was to work with the Chair to negotiate a conditional three-year employment contract, with the option for council to extend the contract by two years.
- 110 The meeting ended at 2:55 p.m. The next day, after hearing the news of his selection by the committee, Mr. D'Angelo began gathering his references for the regional municipality.

You're hired: Crafting a contract and checking references

- 111** On October 24, 2016, the search firm emailed the Chair's Policy Director to suggest terms for Mr. D'Angelo's contract, including a salary of \$215,000, six weeks' vacation and an \$800/month car allowance, for a three-year term with the option for two additional years. The firm asked if the Chair had thought about a severance structure for termination without cause.
- 112** The Policy Director emailed the Director of People Services the next day to ask for a template offer of employment for Mr. D'Angelo, based on what had been offered to the previous CAO. He noted that the offer should be conditional on council's approval. The Director of People Services responded, copying the municipality's in-house lawyer, to explain that the conditional offer would also serve as Mr. D'Angelo's employment contract. She obtained sample executive contracts from Niagara Region's external employment lawyer in order to develop a draft contract, so that the Chair's office could "enter in the employment details" in consultation with the candidate.
- 113** On October 26, 2016, the search firm, the Chair, and the Policy Director discussed the offer with Mr. D'Angelo by teleconference at 11:45 a.m. Emails we obtained show a flurry of activity throughout the afternoon following the call, as the Chair's staff filled in the blanks in the new CAO's offer. Between 2:47 p.m. and 9:19 p.m., the Policy Director and the Chair's administrative assistant corresponded with the region's external lawyers, as well as its internal human resources and legal staff, about the wording of Mr. D'Angelo's offer letter.
- 114** Despite a request from the region's in-house lawyer for a copy of the detailed offer to review, the actual terms of the contract were never shared with the regional municipality's internal human resources or legal staff. The versions they reviewed included blanks where that information would be entered. The Policy Director told us that the offer terms were reviewed by the external lawyer, but were not shared with legal or human resources staff in order to protect confidentiality. He also told us that even the recruitment committee never saw the terms of the new CAO's contract because of concerns over confidentiality, and because it didn't ask to see them.
- 115** In the Policy Director's exchanges with the external lawyer, the length of the contract is described as three years, with the option to extend by two years on the basis of two positive performance appraisals. The emails do not refer to the recruitment committee's direction that any extension should require council's approval.¹⁶

¹⁶ The terms of the contract were never reviewed by council, and the discrepancy between the committee's direction and the final wording of the contract was not addressed.

- 116 The circulated drafts stated that the offer was subject to Mr. D'Angelo's acceptance of the terms, and council's approval of the recruitment committee's recommendation. Throughout the afternoon's revisions, all the draft versions of the offer stated: "Any change to your annual salary is subject to... Council approval..." This language echoed the same requirement in the previous CAO's contract.
- 117 At 7:31 p.m. on October 26, the Chair's assistant sent a draft to the external lawyer, stating that the letter had been amended to align salary increases with those of other non-union staff at the region. In this draft, the requirement for any change to the annual salary to be subject to council approval was deleted. The assistant told us that she does not recall changing the offer letter. She said that when she worked with the Policy Director, he would "just tell me the words and I would send it off..." This change was not in any of the versions of the contract reviewed by the region's internal legal or human resources staff. The next morning at 11:51 a.m., the assistant sent the offer letter to Mr. D'Angelo.

Reference checks

- 118 While the Chair's staff were plugging the terms into Mr. D'Angelo's offer letter, they were also negotiating the content of a summary of his references that was to be provided to the recruitment committee.
- 119 According to staff at the firm, their normal process is to speak with references and then to combine all comments received into one document, so that no comment can be attributed to a specific person. On October 25, the search firm sent the Policy Director a summary of nine of Mr. D'Angelo's references.
- 120 The Policy Director responded by email to ask that the firm include information from two references that Mr. D'Angelo had provided – one from a local mayor and one from a former Canadian prime minister. Staff at the search firm explained that this request was outside their normal practice, as they don't normally include information from candidate-provided reference letters. The Policy Director wrote again a few hours later, asking if they could connect early the next morning, as the Chair had "further comments" about the references summary.
- 121 The firm responded at 6:45 a.m. the next morning, offering to make further edits to the references. At 7:58 a.m., an employee of the firm saved a new version of the references summary with the file name "[First name of the Policy Director]'s changes." Along with changes to grammar and wording and inclusion of information from the candidate-provided references, one statement was removed from the document in its entirety. The deleted portion stated that the process through which Mr. D'Angelo had become CAO of the conservation authority was

suspect, and although the person did not think there was a problem, “there is some perception of hanky-panky going on.”

- 122 Staff at the search firm told us that the Chair’s office wanted the comment removed from the report because they considered it to be “hearsay,” and the result of previous negative media coverage. The Policy Director sent another email to the firm at 8:19 a.m. to say he appreciated “the opportunity to ensure all information in the report is related to the candidate.” Later that day, he wrote again to thank the firm for “recognizing the validity of the edits.”
- 123 According to the Policy Director, through conversations with the firm’s staff, he edited the references summary to better reflect what he believed Mr. D’Angelo’s references “meant to highlight” and “actually said.” He told us that he did not make any changes that were not sanctioned by the firm, and that it was ultimately the firm’s responsibility to stand up for the content of the references summary.
- 124 The Policy Director told us he did not know whether the recruitment committee knew that the references were edited, but he “would guess no.” The Chair told us he did not recall hearing about any negative comments in the original reference summary. Another member of the committee told us they did not know about the edits, and in fact, the glowing references were part of why they supported the decision to hire Mr. D’Angelo. Based on the references, the member told us, “the man walked on water.”

The appointment

- 125 Even though the Chair’s office had already sent the offer to Mr. D’Angelo, the recruitment committee met at 4:15 p.m. on October 27 to discuss his references and the proposed employment terms. After the discussion, the committee decided to meet again the following day.
- 126 The committee met again just after noon on October 28, and held a half-hour closed meeting, during which it directed the Chair to bring Mr. D’Angelo’s name forward to council as the recommended candidate, along with the terms of a conditional offer.
- 127 The Chair wrote a confidential memo to council, putting forward Mr. D’Angelo as the committee’s choice and summarizing the terms of the employment offer, for consideration at the October 31 special council meeting. The memo describes the recruitment committee’s process, and notes that it received 10 positive recommendations for Mr. D’Angelo, including one from a former prime minister.

- 128** The Policy Director told us he drafted the memo, using a template created by the Director of Communications. Both told us that the Policy Director sent the draft memo to the Director of Communications for review. On October 30, a copy of the confidential memo was saved to Mr. D'Angelo's downloads folder at the conservation authority. Mr. D'Angelo told us he did not know if he saw the document at the time, but said it might have been sent to him as part of his contract negotiations. No one we spoke with recalled sending this document to Mr. D'Angelo.
- 129** Council held a special meeting on October 31, 2016. Prior to the meeting, the Chair's memo was circulated to council members. Council was not provided with a full copy of Mr. D'Angelo's offer or copies of his references.
- 130** The council meeting began at 1:41 p.m. in council chambers. After considering the recruitment committee's recommendation in a closed session, council returned to open session at 3:35 p.m. and voted to appoint the committee's recommended candidate as the region's CAO, with the terms and conditions outlined in the Chair's memo to council. Mr. D'Angelo told us that he started work in his new position on November 14, 2016.

Issues with the hiring process: Lack of fairness and transparency

- 131** The documents we found on the conservation authority's servers show a trail of information from Niagara Region staff to Mr. D'Angelo.
- 132** Even before the regional municipality had formed a recruitment committee, Mr. D'Angelo received copies of two internal memos about the proposed hiring process. The Chair's Policy Director drafted a memo naming five CAO candidates; some 13.5 hours later, that memo was saved to Mr. D'Angelo's computer at the conservation authority. A second memo by the Policy Director listing reasons not to hire four specified candidates was saved by Mr. D'Angelo seven and a half hours after it was written.
- 133** The Policy Director asked that the external search firm send him a copy of the first-round interview questions; the questions were saved to Mr. D'Angelo's computer two days later, complete with formatting changes made by the Policy Director. Mr. D'Angelo told us that, if he did receive the candidate information and interview questions, they came from the Policy Director.
- 134** More information flowed from the Chair's Policy Director to assist Mr. D'Angelo with his second interview and written submission. A list of suggested answers to questions about economic development – written by the Policy Director – was saved by Mr. D'Angelo later the same day.

- 135 The Chair's Director of Communications provided information to help Mr. D'Angelo draft his written submission and presentation. Both Mr. D'Angelo and the Chair's Director of Communications confirmed this assistance was given, and this is supported by the digital evidence I reviewed.
- 136 The external forensics computer experts I retained found no evidence of manipulation, hacking, or tampering with any of the digital evidence.
- 137 On the strength of this evidence, I conclude that information that should have been kept confidential by regional officials and staff was instead provided to an external job applicant. Confidential information about the 2016 CAO hiring process was improperly shared with Mr. D'Angelo during that process, and Mr. D'Angelo received information from insiders at the regional municipality to assist him in the competition.
- 138 Mr. D'Angelo was the only candidate provided with confidential information about Niagara Region's CAO hiring process during the competition. We spoke with the other candidates who were interviewed during the CAO recruitment process. All confirmed that they did not receive any confidential information related to the hiring process. I found no other evidence suggesting that any other candidate received confidential information during the process, and no complaint to my Office suggested that any other candidate received such assistance.

Protecting confidential municipal information

- 139 Protecting confidential information is a fundamental expectation of staff and officials working in the public sector.¹⁷ Information about an ongoing hiring process is particularly sensitive. It may include personal information about applicants, such as their employment history or home address.¹⁸ Even the fact that an individual has applied for a job may be found to be personal information.¹⁹ Hiring processes typically rely on the confidentiality of information to maintain a fair process, in which all applicants have an equal opportunity to compete for a position. It is unfair to disclose interview questions in advance to only one candidate.
- 140 Public sector employees are subject to a common law duty not to disclose confidential information.²⁰ Organizations often take steps to emphasize and

¹⁷ Kenneth Kernaghan & John Langford, *The Responsible Public Servant*, 2d ed (Toronto: Institute of Research on Public Policy, 2014).

¹⁸ *Markham (City) (Re)* (30 March 2015), MO-3177-I, online: Ont IPC OM <<https://www.ipc.on.ca/>>.

¹⁹ *A Public Board of Education (Re)* (28 October 1994), I94-031M, online: Ont IPC OM <<https://www.ipc.on.ca/>>.

²⁰ The courts may find a breach of confidence if the information was confidential, it was communicated in confidence, and it was misused by the party to whom it was communicated. The test for breach of confidence was confirmed by the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona*

reinforce that duty through codes of conduct, confidentiality policies, confidentiality agreements, and confidentiality clauses in employment contracts.

- 141** Many municipalities underscore confidentiality obligations by establishing codes of conduct for officials and employees. The protection of confidential information is a fundamental aspect of conduct. When the provincial government developed a regulation requiring council and local board codes of conduct to address certain subjects, confidential information was one of the four matters that were deemed necessities.²¹
- 142** Municipalities are required to have a code of conduct for members of council and local boards, but codes of conduct for employees are optional. Having such a code can establish expectations for conduct and increase accountability. As the City of Ottawa states in its Code of Conduct for employees:

A Code of Conduct sets out the core values we apply to our everyday experiences. When we demonstrate these values, we build a City with integrity that has the trust and confidence of the public. City employees have, and should be seen to have, the highest standards of ethical behaviour – anything less undermines our integrity, our effectiveness, and ultimately our reputation.²²

- 143** Many employee codes of conduct prohibit staff from disclosing confidential information.²³ The Regional Municipality of Niagara has a Code of Conduct for members of council and local boards, which prohibits members from disclosing confidential information.²⁴ The region has a Code of Ethics/Conflict of Interest Policy, but it does not address the protection of confidential information belonging to the regional municipality. To clarify its expectations for employee conduct, it should establish an employee code of conduct that addresses confidential information, or amend its existing code of ethics to do so, and make the code public on its website.

Resources Ltd., [1989] 2 SCR 574, at para 10, [1989] CLD 1140. See also *Stenada Marketing Ltd. v. Nazareno*, 1990 CarswellBC 1655, [1990] BCWLD 2493.

²¹ O. Reg 55/18.

²² City of Ottawa, *Employee Code of Conduct Booklet*, online:

<https://documents.ottawa.ca/sites/documents/files/documents/code_conduct_en.pdf>.

²³ City of Brampton, policy/procedure No 2.1.0, *Employee Code of Conduct* (1 October 2013), s 2(b); County of Renfrew, *Employee Code of Conduct: Security of County Information*, online:

<<http://www.countyofrenfrew.on.ca/documents/human-resources/EmployeeCodeOfConduct.pdf>>.

²⁴ Regional Municipality of Niagara, *Code of Conduct for Members of Council*, online:

<<https://www.niagararegion.ca/government/council/code-of-conduct/code-of-conduct.pdf>>.

Recommendation 1

The Regional Municipality of Niagara should ensure it has an employee code of conduct or ethics that provides for the protection of confidential information.

- 144 Municipalities can also address confidentiality in employment contracts and confidentiality statements or oaths. At Niagara Region, confidentiality is addressed in some employment contracts. For example, Mr. D'Angelo's 2016 contract required him to agree not to disclose confidential information belonging to the region, and to take all reasonable precautions to prevent its inadvertent disclosure.
- 145 The Policy Director's 2015 contract was silent on confidentiality, but he was required to sign a "Confidentiality Commitment" after he started work in January 2015. It states that he would not, "without due authority, disclose, discuss, or make known to any third party any matter that would not normally be disclosed to the public except where required by law."
- 146 The regional municipality would benefit from having a consistent approach to confidentiality requirements for employees. It should ensure that all employment contracts address the requirement to maintain confidentiality.

Recommendation 2

The Regional Municipality of Niagara should ensure that the protection of confidential information is addressed in all employment contracts.

- 147 Municipalities can take additional steps to protect sensitive information associated with a specific process by requiring participants to sign a confidentiality agreement. In this case, the external hiring firm required all members of the recruitment committee to sign a confidentiality agreement, but Niagara Region staff were not required to sign such an agreement. When we spoke with the external hiring firm, they explained that they did not believe staff needed to sign an agreement because they were bound to maintain confidentiality as a condition of their employment. However, they told us that since this incident, they now believe everyone participating in the hiring process should be required to sign a confidentiality agreement.
- 148 As a best practice, all officials and employees with access to confidential hiring process information should sign a confidentiality agreement before receiving any confidential information.

Recommendation 3

The Regional Municipality of Niagara should require all officials and staff with access to confidential hiring process information to sign a specific confidentiality agreement at the outset of the process.

- 149 Confidentiality in a particular hiring process may also be addressed through a recruitment committee's terms of reference. In this case, the recruitment committee's Terms of Reference required it to hold all confidential information in strict confidence. The Terms set out a role for the five committee members, and three employees who were to advise the committee – the Director of People Services, the Director of Legal and Court Services, and the Clerk. The Terms of Reference did not specify that confidential information should not be shared with anyone other than those listed.
- 150 Throughout the CAO hiring process, confidential information was shared with staff who were not listed in the Terms of Reference, including the Chair's Policy Director. If it were the committee's intention to share confidential information with the Policy Director, it should have listed him in the Terms of Reference. Had that been done, the committee could have extended the committee's confidentiality requirements to the Policy Director, in order to preserve the integrity of the process.

Recommendation 4

The Regional Municipality of Niagara should ensure that the terms of reference it establishes for a recruitment committee provide for a complete list of the staff and officials permitted to access confidential information.

- 151 In addition to the requirement to protect confidential information in general, there are specific requirements for municipalities to protect the personal information of individuals. In this case, Niagara Region employees disclosed information to an external party that included the names of job applicants for the CAO competition. Disclosure of the fact that an individual has applied for a job can negatively impact that individual.
- 152 The *Municipal Freedom of Information and Protection of Privacy Act* prohibits municipalities from disclosing personal information about individuals, subject to certain exceptions.²⁵ The Ontario Information and Privacy Commissioner reviews complaints about the improper disclosures of personal information, and has found that the disclosure of the identity of job applicants may constitute a breach

²⁵ RSO 1990, c. M56, s. 32.

of the Act.²⁶ The region should ensure that all officials and employees with access to personal information understand their obligations to protect that information, in accordance with the Act.

Recommendation 5

The Regional Municipality of Niagara should ensure that all officials and employees with access to personal information understand their obligations under the *Municipal Freedom of Information and Protection of Privacy Act*.

Insider assistance

- 153 In addition to the confidential information he received during the CAO hiring process, Mr. D'Angelo also received assistance in the form of suggested content for his written assignment and presentation. The Chair's Director of Communications provided Mr. D'Angelo with help while he was preparing his materials, as both confirmed to us. A document saved as "Questions" by the Policy Director was sent to Mr. D'Angelo, containing information about economic development relevant to the assignments. Mr. D'Angelo told us that, if he received this document, the "primary source" would have been the Policy Director.
- 154 Mr. D'Angelo told us that, in his capacity as Niagara Region CAO, he would not be concerned if an employee helped a job candidate, as long as they were not part of the hiring decision. He said that he received calls "all the time" from candidates, and would talk openly with them about their prospective jobs. Mr. D'Angelo told us the regional municipality had no policy that would stop an employee from giving this kind of assistance to a candidate.
- 155 The Chair's Director of Communications told us that he often helped people with their resumes, but only when he had no decision-making authority in the hiring process. He confirmed that he did not check with anyone at Niagara Region about whether it was a conflict of interest for him to assist Mr. D'Angelo.
- 156 One member of the recruitment committee told us that once they learned that the Chair's Director of Communications had "coached" a candidate, they felt "the process was corrupt." The councillor said this was not the kind of thing a municipality should need a policy on, as it is "basic rightness and wrongness," and does not fit any definition of appropriate behaviour.

²⁶ *Markham (City) (Re)* (30 March 2015), MO-3177-I, online: Ont IPC OM <<https://www.ipc.on.ca/>>. Also: *Temiskaming Shores (City) (Re)* (23 March 2012), MO-2705, online: Ont IPC OM <<https://www.ipc.on.ca/>>.

- 157 It is a common practice for job candidates to reach out to employees at their prospective workplace.²⁷ These are often called informational interviews, and generally give a candidate the chance to ask questions about the culture of an organization or what a job there would entail. What took place between Mr. D'Angelo and staff in the Regional Chair's office during the 2016 hiring process went far beyond an informational interview. Mr. D'Angelo was provided with substantive content to be used in his application materials by insiders who had access to information not available to the general public or to other candidates.²⁸ During our investigation, we spoke with each of the other candidates who were interviewed for the CAO position and confirmed that no other candidate received any assistance from any staff or official at Niagara Region. One of the two employees who prepared the information for Mr. D'Angelo was integrally involved in the hiring process. This assistance was inappropriate, compromised the integrity of the process, and gave Mr. D'Angelo an unfair and improper advantage over other candidates for the position.

Recommendation 6

The Regional Municipality of Niagara should adopt a policy clarifying that employees should not engage in any behaviour that provides an unfair advantage to a candidate during a hiring process, including assisting candidates by providing inside information such as interview questions and suggested answers.

Staff role in recruitment

- 158 As the person responsible for exercising general control and management of a municipality, the CAO is the administrative head of the organization.²⁹ The CAO exercises "full managerial authority for the daily operation of municipal

²⁷ Student Services – Career & experience, *Informational Interviews*, online: University of British Columbia <<https://students.ubc.ca/career/career-resources/informational-interviews>> ; Susan Adams, "30 Questions To Ask In An Informational Interview," *Forbes* (4 March 2015) online: *Forbes* <<https://www.forbes.com/sites/susanadams/2015/03/04/30-questions-to-ask-in-an-informational-interview/#22317e91215f>>.

²⁸ During his review of our preliminary report, the Chair's Director of Communications stated that the information he provided to Mr. D'Angelo was all available publicly, such as in regional council reports and strategic plans. While the content may have been available publicly, spread over a variety of sources, the Chair's staff were privy to the priorities and values internal to that office. The Director of Communications would have been particularly familiar with the Chair's goals and preferred messaging around those goals. This curated insider perspective on the information was provided to Mr. D'Angelo, and was not available publicly or to other candidates.

²⁹ *Municipal Act, 2001*, SO 2001, c. 25, s. 229. See generally, Ministry of Municipal Affairs, *The Ontario municipal councillor's guide 2018*, online: Government of Ontario <<https://www.ontario.ca/document/ontario-municipal-councillors-guide-2018>>.

government and for managing its staff....”³⁰ When faced with the prospect of recruiting a new CAO, the Regional Municipality of Niagara created a recruitment committee made up of council members, and engaged the services of an external search firm. Although the process was to be driven by the committee and external firm, the committee recognized that it would benefit from support from Niagara Region staff. It adopted Terms of Reference that stated that the Director of People Services, Director of Legal and Court Services and the Clerk would serve an advisory function for both the committee and the external search firm.

- 159** Despite the Terms of Reference, as the committee progressed through the hiring process, the staff named in the Terms played a decreasing role, while others not included in the Terms took the lead. The Director of People Services, who was named in the Terms of Reference, was directed by the committee to work with the Chair to liaise with the search firm. However, in September 2016, she told us that the Chair’s office directed that she not attend any further closed meetings of the committee, or be privy to any information about candidates. This decision was not made by the committee and no amendment was made to the Terms of Reference.
- 160** During his interview, the Chair told us that he felt internal human resources staff could be involved at the start of the process, but should step away as it progressed because they would be reporting to the new CAO. The Policy Director echoed the Chair’s statement, noting that there was concern about involving staff in “the hiring of [their] boss,” so they relied on the executive search firm, particularly for interviewing. He later told us that the committee reached “broad consensus” that human resources staff should not be involved with interviews and candidate information. We did not find any evidence to suggest that the committee reached consensus on this point.
- 161** The external search firm confirmed that it is normal for internal human resources staff to be excluded from a hiring process when they will report to the new hire, but told us that in this case, human resources staff were excluded from “all dialogue... earlier than usual.”
- 162** The Terms of Reference also state that, upon council’s approval of a recommended candidate, the terms of the CAO’s employment were to be “in form satisfactory to the Director Legal and Court Services in consultation with the Director People Services and Organizational Development.” Although both Directors were consulted by the Policy Director on the general language in Mr.

³⁰ Michael Fenn & David Siegel, *The Evolving Role of City Managers and Chief Administrative Officers*, IMFG Papers on Municipal Finance and Governance, (Munk School of Global Affairs, University of Toronto, 2017) at 3, online:

https://munkschool.utoronto.ca/imfg/uploads/420/imfgpaper_no31_cao_fennsiegel_may_5_2017.pdf.

D'Angelo's contract, neither was consulted on the specific terms, including the salary or the amount of notice that would be provided in the case of termination. Despite the requirement in the Terms of Reference, the Policy Director told us he did not share this information in order to preserve confidentiality.

- 163 The decision to limit the Director of People Services' involvement in the hiring process was not consistent with the committee's direction or the Terms of Reference. Similarly, the decision to not share the specific terms of the CAO's contract with internal staff was made without returning to the committee for direction.

Recommendation 7

The Regional Municipality of Niagara should ensure that staff and officials act in accordance with the direction of council and committees of council.

- 164 It is not unusual for staff in a municipal councillor's office to assist the councillor with their work. Municipal experts have acknowledged that political staff can play a valuable role as constituency assistants or political advisors, but cautioned that, "if they try to usurp the role of managerial and professional staff or insert themselves as intermediaries between the political decision-makers and the public service advisors that those political decision-makers need, they pose a threat to a well-functioning CAO model".³¹
- 165 In this case, a committee of elected officials adopted Terms of Reference that specified how the committee would operate in the recruitment and selection of the new CAO. When staff were to assist the committee or participate in the hiring process, the Terms specifically identified them by title. The Terms did not name the Policy Director or any other member of the Chair's staff as having a role in the CAO selection process, yet the Policy Director played an active and central role.
- 166 The Policy Director told us that he understood his role on the committee to be supporting the Chair, including by acting as liaison between the Clerk's office, the external search firm, and the committee, and that he was acting on direction from the Chair throughout the process. He attended a majority of the committee's meetings, including when it went into closed sessions. He was privy to the confidential information considered by the committee. He determined the final list of stakeholders who would be consulted about the characteristics and traits the

³¹ Michael Fenn & David Siegel, *The Evolving Role of City Managers and Chief Administrative Officers*, IMFG Papers on Municipal Finance and Governance, (Munk School of Global Affairs, University of Toronto, 2017) at 24, online:

<https://munkschool.utoronto.ca/imfg/uploads/420/imfgpaper_no31_cao_fennsiegel_may_5_2017.pdf>.

region should seek in a CAO. He approved the job advertisement without consulting human resources staff or the recruitment committee. Four out of five candidates chosen by the Policy Director from the initial long list ended up being interviewed by the region. The Policy Director's decision to limit candidates to those with experience in Niagara Region was made without the input or knowledge of the committee.

- 167 When the external search firm followed its regular process by compiling Mr. D'Angelo's references into one document for the committee, the Policy Director insisted that it make specific changes to the document. This included removing a negative reference, which consequently never reached the recruitment committee. When it came to setting the terms of Mr. D'Angelo's contract, the Policy Director and the Chair's Administrative Assistant drafted the details, including the entitlements, after consulting with external legal counsel. Shortly before the offer letter was sent to Mr. D'Angelo, they deleted the requirement for any change to his annual salary to be approved by council.
- 168 Had the committee intended for the Policy Director to play this central role in the hiring process, and in determining the specifics of the CAO's contract, this involvement should have been specified in detail in the Terms of Reference and specifically approved by the committee. This would have given the members the opportunity to turn their minds to the appropriate role of the Chair's staff and provided for accountability to the committee with respect to the actions of the Chair's staff in influencing the process and the selection of the new CAO.

Recommendation 8

The Regional Municipality of Niagara should ensure that staff in the Chair's office do not usurp or undermine the role of professional staff, especially when those roles have been set by council or a committee.

- 169 Niagara Region staff and officials could have benefited from a policy setting out the process to be followed when hiring a CAO. Other staff are hired in accordance with an Employment and Staffing Policy, and related guidelines. These set out the roles of various staff in the hiring process, and specify that hiring should be free from favouritism and discrimination. This policy did not apply to hiring the CAO. Instead, Regional Council created the recruitment committee and approved its Terms of Reference.
- 170 Although the Terms provided some guidance for the committee and supporting staff, a standalone policy could provide a consistent process over time. A policy could address the role of staff in the process. It could also clarify the role of

council, including which information should be shared with council and which aspects of the process require council approval.

- 171 Reflecting the central role of the CAO in municipal administration, and the importance of the relationship between the CAO and council, the provincial governments in Alberta, Nova Scotia, and Manitoba have developed guides to hiring a municipal CAO.³² These guides may be a useful resource for Niagara Region in developing a CAO hiring policy.

Recommendation 9

The Regional Municipality of Niagara should adopt a policy setting out the process for hiring a Chief Administrative Officer, including the appropriate roles of staff and their accountability to council or a committee of council charged with the hiring.

Use of personal email

- 172 My investigation was unable to determine conclusively how confidential information was sent from Niagara Region staff to Mr. D'Angelo. Our review of the municipality's official email accounts did not locate emails attaching the documents. It is possible that these records existed at one time, but were deleted by users. It is also possible that the documents were shared using another tool, like a file-sharing program, or that they were shared from personal email accounts.
- 173 The Chair's Director of Communications told us that he would have used his personal email when he provided assistance to Mr. D'Angelo during the hiring process. He told us that he did not think it would be appropriate to use the regional municipality's resources, including time or email, to provide assistance to a candidate.
- 174 Our review of documents revealed examples of other staff using personal emails to conduct regional business. For example, I received copies of emails sent from the Policy Director's personal email address to members of council, instructing them to move specific motions at an upcoming meeting. The Policy Director told

³² Alberta Municipal Affairs, *Municipal Affairs – Hiring a Chief Administrative Officer*, online: Government of Alberta

<http://www.municipalaffairs.alberta.ca/documents/ms/Hiring_Chief_Administrative_Officer.pdf>; Nova Scotia, Service Nova Scotia and Municipal Relations, *Local Government Resource Handbook*, section 4.5; Manitoba Municipal Government, *A Guide to Hiring Your Chief Administrative Officer*, online: Government of Manitoba <https://www.gov.mb.ca/mr/mfas/pubs/cao_hiring_guide.pdf>.

us he did not consider this to be Niagara Region business from a corporate records perspective, because his job description did not include “political strategy,” and the emails “could have been authored, not that specifically, by any member of the public who kept themselves apprised on public documents regarding budget process and that had personal relationships with each of those councillors.” He told us he did this on a “semi-regular” basis, and he considered the emails to be personal because they fell outside the “four corners” of his job description. He also told us that he never received any training on the distinction between personal and regional documents.

- 175 The proper use of email by staff in their communications with council and other staff about the regional municipality’s business ensures a proper level of accountability, integrity and transparency, because such emails are subject to legal and corporate record-keeping requirements. Such transparency and accountability also serves to ensure that communications between staff and elected officials are appropriate, and prevents improper communications and attempts to improperly influence members of council or committees.
- 176 To ensure that Niagara Region complies with all applicable record-keeping requirements, and in the interest of maintaining important corporate records, it should ensure that all staff and officials receive training on any requirement to use corporate email for Niagara Region business, including communications with committees or members of council, and related to the retention of corporate records.

Recommendation 10

The Regional Municipality of Niagara should ensure that all staff and officials receive training on the proper use of corporate email and retention of corporate documents.

Job Security: Extending the CAO’s Contract

First “final” contract, appraisal and renewal

- 177 On November 1, 2016, the day after council’s vote to hire Mr. D’Angelo as the new CAO, the Chair sent the Director of People Services a copy of Mr. D’Angelo’s signed contract. It provided for six weeks’ vacation, a salary of \$230,000, and a car allowance of \$800/month. The contract covered a period of three years (to November 2019), but stated that it would be extended if the CAO received positive performance appraisals in October 2017 and 2018. It provided 18 months’ notice for termination without cause, increasing to 24 months if Mr. D’Angelo was terminated without cause after November 2017. It also stated that

the region could terminate the CAO for “just cause” – defined in the document as “serious and wilful misconduct” – at any time without notice.

- 178 The contract stated that no amendment or waiver of its terms would be binding unless signed in writing by the parties. Unlike the last draft reviewed by the region’s in-house lawyer ahead of the hiring, this final version did not require that council approve changes to the CAO’s salary. Instead, it stated that salary changes were subject to Mr. D’Angelo’s participation in the region’s performance management program.
- 179 Mr. D’Angelo began in his new role on November 14, 2016. He worked quickly to enact some of the organizational changes he told us he had planned prior to joining the regional municipality. For instance, a new General Manager position was created in March 2017 and filled in May, and a new Director of Human Resources³³ started in September 2017.

The locked cabinet

- 180 On October 2, 2017, shortly after his arrival, the new Director of Human Resources instructed his staff to provide him with the employment files for nine senior managers, including Mr. D’Angelo. An email between staff noted that the files were to be handed over to the Director as soon as possible, “at the direction of the CAO.” The email stated that these nine files were to be secured in a locked cabinet in the Director’s office. We were told that all other regional employment files were stored in locked cabinets in the human resources department.
- 181 Mr. D’Angelo told us he wanted those files moved out of the “open environment” where just “anybody” could access them. He said information was being leaked from the regional municipality, and he believed only the Director of Human Resources should have access to the files of senior administrators. He did not point to any information that had been leaked from the human resources department, and the human resources employees we interviewed told us they were not aware of any such leaks.
- 182 The Director of Human Resources told us he was not surprised by Mr. D’Angelo’s request, because he had been asked during his hiring process if he could directly provide human resources support for the CAO and the Chair’s office. He said he did not find the request unusual because he knows of other employers who store executive employment information separately. The Director told us he secured the files with a lock because they included confidential employment information, including contracts and performance reviews.

³³ This position had been known as the Director of People Services and Organizational Development.

“Exceptional” performance

- 183 Mr. D’Angelo’s contract provided for a three-year term, with the possibility of an additional two years contingent on positive performance appraisals in 2017 and 2018. The contract stated the appraisals were to be conducted “under the direction of the Regional Chair.” Mr. D’Angelo told us he met with the Chair on October 5, 2017, to discuss his performance appraisal. A written appraisal dated October 10 rated Mr. D’Angelo’s performance at the region as “exceptional.”
- 184 The Director of Human Resources told us he found a copy of the appraisal on his desk in a manila envelope. He added it to Mr. D’Angelo’s file in the special locked cabinet in his office. The Chair told us that he conducted Mr. D’Angelo’s appraisal on his own, apart from some assistance from human resources staff with documents. Members of council told us they were not consulted about the CAO’s performance, and council was not informed that the appraisal had been done, or of its findings.

Early renewal and “out-of-the-ordinary” protection

- 185 The same day the Chair signed Mr. D’Angelo’s first performance appraisal, he also signed a letter making significant amendments to the terms of Mr. D’Angelo’s contract. This letter, marked “Private and Confidential” and printed on the letterhead for Niagara Region’s human resources department, states that the requirement for Mr. D’Angelo to receive two consecutive positive performance appraisals before his contract was extended had “been revised.”
- 186 The Chair’s letter extended the contract a year early on the basis of Mr. D’Angelo’s single performance appraisal. He also added another year, bringing the overall length of the contract from five to six years. The amended contract also included new benefits, and a significant change to the termination provisions in the contract, granting 36 months’ notice in the event that the CAO was terminated – with or without cause.
- 187 Mr. D’Angelo told us that he had asked the Chair to add “strong, out-of-the-ordinary protection” to his contract because he felt that council members had created a “poisoned work environment.” He said councillors were in a “proxy war” with each other and he was caught in the middle. The Chair told us that “special interest groups” were manufacturing “out-and-out lies” in order to discredit the CAO, so that when Mr. D’Angelo raised concerns about his contract, the Chair agreed that something had to be done.
- 188 At his first interview with my Office, the Chair told us that although he is “not an HR expert,” he does not recall getting legal advice or consulting human resources staff on the terms of the renewal before signing the letter. During a

subsequent interview, the Chair's recollection changed. He told us he was "sure" that he had consulted human resources staff, and that they had drafted the renewal letter, but he could not recall whom he consulted.

- 189 Although he was listed as copied on the renewal letter, the Director of Human Resources told us he did not learn of the contract amendments until a week later, on October 18, 2017, when Mr. D'Angelo sent him a copy of the letter and asked to discuss it. No one else we interviewed, including human resources staff, told us they played any role with respect to drafting or providing advice about the renewal letter.

The new contract

- 190 The Chair's letter extended the CAO's contract to November 21, 2022 – adding three years to the original contract's length. Mr. D'Angelo told us he chose this new end date so his contract would not expire before the end of the next term of council. The Chair told us he agreed with Mr. D'Angelo's reasoning, as this extended timing would allow the next council, to be elected in October 2022, to determine whether to keep or replace Mr. D'Angelo as the CAO. The Chair said he did not think extending Mr. D'Angelo's full contract term by another year made a significant difference in its length.
- 191 The letter also drastically changed the termination provisions in Mr. D'Angelo's contract. Whereas the original contract provided for 18 or 24 months' notice for termination without cause,³⁴ the Chair's renewal letter provided for 36 months' notice. More significantly, where the original contract provided for no notice or payment if termination was for "just cause," the renewal letter provided for the same 36 months' notice "with or without cause." During the notice period, Mr. D'Angelo would continue to receive his salary and all the entitlements provided under the contract.
- 192 Mr. D'Angelo told us that he drafted the provision giving him three years' notice with or without cause. He recalled explaining to the Chair that it would be "working notice," such that if he were dismissed, even for cause, he would continue to work at the region as CAO for another three years. Later, Mr. D'Angelo, through his counsel, said the additional three years is better understood as "salary continuance."
- 193 The Director of Human Resources, who learned of the renewal terms after the letter had been signed, told us that he found the 36-month termination provisions "generous," and mentioned as much to Mr. D'Angelo when they met shortly after the signing. However, he told us he did not question it further because the Chair

³⁴ The notice would be 18 months if the contract was terminated within the first year of employment, or 24 months if it was terminated after that date.

had already signed the letter. During our interviews, Mr. D'Angelo, the Chair, and the Director of Human Resources each confirmed that their understanding was that, even if terminated for cause, Mr. D'Angelo would continue working in his position for another three years. The Chair said that the only reason the working notice period might be cut short would be if Mr. D'Angelo could not come to work. The Chair volunteered an illustrative example, noting that Mr. D'Angelo could not continue to work during the notice period if he were incarcerated. Although Mr. D'Angelo later changed his evidence, I find that his earlier characterization of the provision as working notice is consistent with the testimony of the other witnesses.

- 194 Human resources staff told us that they had never seen a similar working notice clause in another Niagara Region contract. Staff who had experience with administering terminations told us if Niagara Region employees are terminated for cause, they are immediately removed from the premises, and all pay and benefits stop. Mr. D'Angelo, through his counsel, advised us that he is aware of similar provisions in employment contracts.
- 195 The Chair's letter provided Mr. D'Angelo with a new 12-month "retirement allowance," including all benefits and pension contributions, if his contract was not extended beyond November 2022. It provided for additional insurance, a health care spending account, and for annual increases to his car allowance. Mr. D'Angelo told us that he added these provisions to the agreement, and the Chair told us that the changes did not cause him concern, as they were "relatively minor in nature."

No council involvement

- 196 Mr. D'Angelo's original October 2016 contract stated that it was only valid once approved by Regional Council. In contrast, the renewal letter did not reference council. Members of council told us they did not know the CAO's contract had been amended at the time, and no resolution or by-law was passed by council authorizing the extension.

Salary increase

- 197 Neither the renewal letter nor the first performance appraisal had any immediate impact on Mr. D'Angelo's salary, which was still at the \$230,000 level approved by council in 2016.
- 198 On October 8, 2017, three days after the performance appraisal meeting with the Chair, a spreadsheet comparing Mr. D'Angelo's salary to the salaries of CAOs at 23 other municipalities was saved to his computer at Niagara Region. The document set out the CAO's salary and what it would be if increased by 2%, 3%,

4%, 5%, or 10%. The document properties indicate that this spreadsheet was last edited on October 18, 2017.

199 The Director of Human Resources told us that Mr. D'Angelo forwarded him a copy of his contract renewal letter that day and the two met to discuss it. The Director told us he raised the matter of a salary increase with Mr. D'Angelo because in his experience, an increase often accompanies a positive performance appraisal. He recalled the CAO saying that he thought an increase was coming, but that the Director should speak with the Chair. On November 6, 2017, Mr. D'Angelo sent the Director a copy of the spreadsheet of CAO salary comparators.

200 The Director of Human Resources told us that he raised the issue with the Chair and recommended Mr. D'Angelo's salary be increased to \$250,000, because it was a round number and still left some room within the municipality's prescribed maximum salary for the CAO.³⁵ An email sent from the Chair's email account on January 9, 2018, approved the increase, stating:

Further to our recent conversation regarding the CAO's performance rating, and your advice on moving the CAO to the comparable job rate, please arrange for the CAO's salary to increase to \$250,000 per annum, commencing the next available pay period.

201 The Director forwarded the email to his staff to implement the change.

202 When we showed a copy of that email to the Chair during our first interview, he told us that it was not from him and that he did not recall ever writing it. He told us he was not aware that the CAO's salary had been increased. A week after we spoke with him, the Chair emailed us to say that, after more thought, he remembered seeing a spreadsheet comparison of CAO salaries and discussing Mr. D'Angelo's salary with human resources staff. He told us that someone else in his office sent the email authorizing the increase, using his email account with his permission.

Issues with the contract process: Best practices

203 The circumstances surrounding Mr. D'Angelo's contract extension are currently before the Ontario courts. Accordingly, I am not making findings in this report with respect to its validity or as to whether the Chair had the legal authority to approve it. Instead, based on the information gathered during my investigation, I

³⁵ In accordance with its "Non-Union Compensation Policy," the regional municipality provided us with a table of its 2018 non-union salary structure, which sets the salary range for the CAO's band at between \$204,640 and \$255,800. Staff confirmed that the CAO position is compensated within this salary range.

have identified best practices for the Regional Municipality of Niagara to apply in future.

Respecting council's authority

- 204** Under the *Municipal Act, 2001*, all powers of a municipality must be exercised by its council.³⁶ A municipality's powers may be delegated to staff and officials, subject to certain exceptions listed in the Act. When it established the CAO recruitment committee, council delegated authority to the committee to carry out the duties listed in the committee's Terms of Reference, including to facilitate the CAO recruitment process and recommend a candidate to council.
- 205** The Chair told us that he believed he had the authority to extend the CAO's contract without involving council in 2017 because, more than a year earlier, the recruitment committee had delegated its authority to negotiate the contract to the external search firm and the Chair. He told us that he interpreted that direction as extending to "any and all ongoing negotiations in managing the contract." In other words, the Regional Chair understood that being directed to assist with the 2016 contract negotiations permitted him to, on his own, negotiate and manage any subsequent changes to the contract, even more than a year after it was signed.
- 206** Mr. D'Angelo told us he was sure the Chair had the authority to amend his employment contract because the Chair had negotiated the terms of his first contract. He explained that he believed the original contract's requirement that it be approved by Regional Council was a "cut-and-paste error," and that the administration of his contract was entirely within the authority of the Chair. He could not point to any source for the Chair's authority, but suggested that it came from the by-law council passed when first appointing him to the CAO position.³⁷ That by-law appoints the regional CAO, with all the power and duties of the CAO provided for in the *Municipal Act, 2001* and by council. It is silent on changes to the CAO's contract and does not delegate any authority to the Chair.
- 207** As the validity of Mr. D'Angelo's contract is before the courts at the time of writing, I am not making any findings with respect to whether the Chair had the authority to amend or extend it. However, to avoid confusion in the future, the region should clarify the role of council with respect to the negotiation and approval of a CAO contract.
- 208** The Canadian Association of Municipal Administrators has created a "CAO Performance Evaluation toolkit" to assist municipalities with the relationship

³⁶ *Municipal Act, 2001*, s. 5. All powers must be exercised by by-law unless the municipality is specifically authorized to do otherwise.

³⁷ The Regional Municipality of Niagara, *A By-law to appoint Carmen D'Angelo as Chief Administrative Officer for the Regional Municipality of Niagara*. (By-law 67-2016) (October 31, 2016).

between council and the CAO.³⁸ The toolkit includes a template “Municipal Manager By-Law,” which specifies the powers and duties of the CAO.³⁹ The template bylaw provides that council shall establish the terms and conditions of the CAO’s appointment, including the term of the appointment and salary and benefits. It specifies that any change to the CAO’s salary or benefits must be made by council.

Recommendation 11

The Regional Municipality of Niagara should adopt a by-law setting the parameters of the relationship between council and the CAO, including the role of council with respect to amending the CAO’s contract and salary.

- 209** The Chair agreed to Mr. D’Angelo’s proposed contract changes without taking any steps to consult with staff or seek legal advice. Nothing was done to ensure that the added provisions were consistent with Niagara Region’s standard contract language or to ensure they reflected its interests. Although the regional municipality does not have a specific policy or guide governing the administration of the CAO’s contract, it does have human resources staff who are experienced in administering its employee contracts. It has both an internal legal department and external employment lawyers who could have been consulted before the contract changes were approved.

Recommendation 12

Before making changes to a contract affecting its legal interests, the Regional Municipality of Niagara should require staff to consult legal and human resources staff to ensure the terms are lawful and consistent with the municipality’s interests.

Processing performance

- 210** Despite the central role the CAO plays in managing the regional municipality, we were told there is no by-law, policy or procedure that clearly sets out how and when the CAO’s performance should be reviewed, and who should do it. This lack of clarity has resulted in an inconsistent approach in Niagara Region.

³⁸ CAO Evaluation Kit, online: Canadian Association of Municipal Administrators <<http://www.camacam.ca/about/resources/cao-performance>>. The kit includes examples of performance review templates from municipalities across Canada.

³⁹ CAO Evaluation Kit, online: Canadian Association of Municipal Administrators <<http://www.camacam.ca/sites/default/files/inline-files/1.1%20B%20Municipal%20Manager%20Bylaw.pdf>>.

- 211** When it hired Mr. D'Angelo's predecessor as CAO in 2013, the regional council at the time reviewed his draft employment offer, including the contract's terms, and directed staff to include a requirement for council to approve annual performance appraisals and salary increases.
- 212** Consistent with that requirement, we were told the Regional Chair sought input from all of council on the then-CAO's performance. Several of the regional councillors we spoke with recalled council being consulted at that time about the then-CAO's performance before his appraisal was finalized. Emails provided to my Office also reflect council's involvement in those appraisals. In an email the Chair sent to council in early 2015, attaching a survey in which councillors could provide input on the then-CAO's performance, he stated: "Part of your role as a Regional Councillor is to provide input into the Chief Administrative Officer's (CAO) performance appraisal."
- 213** In 2016, the same Chair applied a very different approach to Mr. D'Angelo's performance as the new CAO. He signed off on a contract that said Mr. D'Angelo's appraisals would happen under his direction. Council did not see that contract; a memo about the contract that was provided to council was silent with respect to how appraisals would be done. The Chair then conducted Mr. D'Angelo's performance appraisals on his own, without consulting or informing council.
- 214** This situation could have been avoided. In 2015, Niagara Region staff contacted other municipalities and researched how best to handle the then-CAO's performance appraisals. The Director of People Services then wrote to the Chair, recommending – based on this research – that council be involved in the CAO performance review process. However, this issue was never put before council.
- 215** To promote consistency and clarity, Niagara Region should adopt a policy specifying the process for CAO performance appraisals. Such a policy should provide guidelines on how to conduct an appraisal, and clarify who should be involved. As noted in paragraph 209, the Canadian Association of Municipal Administrators has developed a toolkit that includes templates and best practices for evaluating CAO performance and providing feedback.⁴⁰ The region may also want to seek out similar policies at other municipalities using the municipal Google search created by the Association of Municipal Managers, Clerks, and Treasurers.⁴¹

⁴⁰ CAO Evaluation Kit, online: Canadian Association of Municipal Administrators <<http://www.camacam.ca/sites/default/files/inline-files/1.1%20A%20Municipal%20Policy%20Monitoring%20CAO%20Performance.pdf>>.

⁴¹ Online: Association of Municipal Managers, Clerks and Treasurers of Ontario <<https://www.amcto.com/amcto/googlesearchpage.html>>.

Recommendation 13

The Regional Municipality of Niagara should adopt a policy governing the process for CAO performance appraisals.

Local Probes: What Happened Here?

Municipal ombudsman's investigation

- 216** On April 6, 2018, the local newspaper reported that Niagara Region's CAO hiring process was "tainted" because confidential information had been leaked to Mr. D'Angelo during the process. The following week, at a meeting on April 12, Regional Council appointed an independent dispute resolution firm to undertake "an unfettered third-party investigation with all of the power of a municipal ombudsman pursuant to Sections 223.13 to 223.18 of the *Municipal Act*".⁴² Council directed the third party to investigate "the 2016 hiring process of the Chief Administrative Officer" and report back to a quorum of council by the end of June 2018. The Acting Regional Clerk was to facilitate the investigation, with the co-operation of all departments.
- 217** Council's resolution was forwarded to the firm, which selected one of its investigators to act as municipal ombudsman. The firm drafted a retainer agreement that set out the ombudsman's fees and estimated hours. The selected investigator is a lawyer, mediator, and arbitrator. He told us that he has conducted many workplace investigations, but had never acted as a municipal ombudsman before this appointment.
- 218** The regional municipality did not establish terms of reference for the municipal ombudsman. The retainer agreement did not describe his role, other than a reference to the powers of an ombudsman under the *Municipal Act*. The only instructions provided to the municipal ombudsman were those contained in council's April 12 resolution. During our investigation, the municipal ombudsman told us that he based his understanding of his mandate entirely on that motion.
- 219** On April 13, Niagara Region's legal staff informed all council members that they were barred from deleting or destroying any documents subject to a "legal hold" in preparation for the municipal ombudsman's investigation. The hold also applied to employees who were believed to have relevant documents because of their role at the municipality, including staff in the Chair's office.

⁴² The Regional Municipality of Niagara, Meeting of Regional Council, April 12, 2018, at 6. Online: <<https://www.niagararegion.ca/council/Council%20Documents/2018/council-minutes-april-12-2018.pdf>>.

Asking for evidence

- 220** On April 19, the municipal ombudsman spoke with Niagara Region staff to discuss the information he required for the investigation. Notes taken by staff during the discussion indicate that he asked for lists of council members and members of the recruitment committee, links to all recruitment committee meetings, and links to the media coverage describing the alleged leaks. In a follow-up meeting on April 26, the municipal ombudsman asked for all emails sent or received by all members of council, and four members of staff, between April 28, 2016 and April 12, 2018. He also requested hard copy documents and memos, and asked for the request to cover the external search firm, as well as any other employees at the regional municipality who might have relevant information.
- 221** On April 30, staff spoke with the municipal ombudsman about the scope of his request. Contemporaneous call notes indicate that staff advised the municipal ombudsman that because his request was so broad, involving a large number of staff and officials over a long time period, it would capture a vast number of documents. Staff told the ombudsman that they could not be responsible for determining whether a document was “relevant” to his investigation, and asked him to provide search criteria that they could apply instead. For example, instead of asking them to identify which employees might have relevant documents, they suggested limiting the search to employees based on their role at the region, such as those already subject to the legal hold.
- 222** During the discussion, the municipal ombudsman also requested information held by the conservation authority, Mr. D’Angelo’s former employer. The regional municipality’s staff explained that they could not access those records and that the ombudsman should make that request directly to the conservation authority.
- 223** On May 8, the municipal ombudsman wrote to Niagara Region staff to clarify the scope of his request for documents. He asked for:
- Copies of all records, emails, texts, memos, letters, handwritten notes, calendars, social media posts, and other documents (including paper and electronic documents in whatever format and wherever they may be stored, as well as sound (e.g. voicemail), video and digital recordings, for the period of time from April 28, 2016 to October 31, 2016, that may be relevant to the investigation, in the possession or control of all members of Council and Regional Staff, and others to whom the Notice of Legal Hold, dated April 13, 2018 was given, who were involved in the hiring process.

- 224** He confirmed that he wanted documents from all members of council, all staff involved in the CAO hiring process, and all employees subject to the legal hold.
- 225** The Clerk cautioned that staff were not in a position to determine the relevance of a document, and would provide him with all documents from that time period unless he could provide them with criteria to limit the search. Instead of taking steps to make a focused request to the region, the municipal ombudsman responded that relevance is a “critical criterion,” but that staff should provide him with all documents if they felt it necessary.
- 226** The Clerk emailed all staff and councillors to ask that all documents relevant to the municipal ombudsman’s request be provided by June 6, 2018. The region’s IT staff retrieved emails that met the search criteria from the server. Staff also provided the municipal ombudsman with 424,704 documents, or 3.7 terabytes of data.
- 227** On June 4, staff at the municipal ombudsman’s firm signed a confidentiality agreement provided by Niagara Region. The agreement required the firm to maintain the confidentiality of all materials provided by the region, and at the end of the investigation, to “delete, destroy or return” all information.

Anonymous sources

- 228** The municipal ombudsman told us he decided not to accept any evidence from witnesses who wished to remain anonymous. On June 17, a member of council wrote in an email to the municipal ombudsman that he had heard the ombudsman had refused to communicate with a source who wanted to remain anonymous. The source was apparently the person who had supplied the newspaper with details of the leaked hiring information. The municipal ombudsman responded that the source should seek legal advice about their rights and obligations. He confirmed to our Office that he did not speak with the media’s source or sources during his investigation.
- 229** The municipal ombudsman conducted 16 interviews. Those interviewed included six members of Regional Council (including the five members of the CAO recruitment committee), seven Niagara Region staff, and three representatives from the external search firm. Interviews took place at a local hotel. The municipal ombudsman told us he did not conduct his interviews under oath, as he felt it would be more productive not to, and everyone he interviewed was “forthcoming.”
- 230** On June 25, the municipal ombudsman informed the Clerk that his report would be provided by June 30. He directed her not to share the report with anyone before it was provided to council at a meeting. The regional municipality was not

provided with a preliminary version of the report to review before the final report was made public.

Council receives the report

- 231** The municipal ombudsman's report listed nine "concerns" that he believed needed to be investigated based on the media coverage, including that:
- The CAO hiring process was "tainted by back-room dealing";
 - confidential documents were leaked to Mr. D'Angelo from the Chair's office;
 - The Policy Director had access to confidential information that he should not have had, as he was not a member of the recruitment committee;
 - The hiring decision was predetermined;
 - Members of the recruitment committee were also on the conservation authority's board, such that they were Mr. D'Angelo's employers; and
 - Niagara Region human resources staff were excluded from the hiring process, despite being listed in the recruitment committee's terms of reference.
- 232** The report indicated that the municipal ombudsman identified eight additional concerns based on his discussions with councillors, staff and members of the public. These included that due process was not followed, councillors breached the region's code of conduct and the *Municipal Conflict of Interest Act*, councillors used personal email for Niagara Region business, and morale was low. The municipal ombudsman wrote that he considered the evidence on a balance of probabilities, and set out his approach to making credibility assessments.
- 233** It detailed the CAO hiring process, from the formation and meetings of the recruitment committee and the retention of the external search firm, to the identification of a list of desired traits and competencies for the CAO, the interviews, and council's decision to hire Mr. D'Angelo.
- 234** The municipal ombudsman concluded that some of the concerns raised by the media and witnesses in relation to the CAO hiring process were based on "rumour, gossip, innuendo, or hearsay of doubtful veracity or accuracy," misinformation, speculation, conjecture, or an improper disregard for clear and cogent evidence. He gave this evidence no weight.
- 235** He found that the CAO hiring process was not contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, based wholly or partly on a

mistake of law or fact, or wrong. His report made specific findings on the various issues identified by the municipal ombudsman. For instance, he found that the recruitment committee fulfilled its mandate by hiring an executive search firm, and participating in a “transparent, competitive, and comprehensive recruitment process, and held in strict confidence all confidential information.”

- 236** The report stated that committee members held all confidential information relating to the committee “in strict confidence.” It said allegations that confidential information was leaked, including the names and biographies of CAO candidates, “are not sufficiently supported by the evidence.” It concluded that the Chair’s Policy Director was permitted to attend recruitment committee meetings as part of his job duties, and that the confidential information was “not leaked in a memo created in late September 2016 by [the Policy Director], and sent to Carmen D’Angelo – while he was a candidate for the position....”
- 237** The municipal ombudsman’s basis for this conclusion was that, as a member of regional staff, the Policy Director had committed to not disclose confidential information, and that the Policy Director told him that he did not disclose any confidential information. He wrote that the Policy Director had confirmed that he created a memo listing identified candidates and their biographies, but asserted that he had not shared the memo with anyone else.⁴³ He also relied on the Chair’s statement that he did not send the document to anyone, and Mr. D’Angelo’s assertion that he did not receive the document. The municipal ombudsman told us he also relied on the lack of any evidence to the contrary within the documents he reviewed and the interviews he conducted.
- 238** As to whether any members of the recruitment committee breached Niagara Region’s Code of Conduct, the municipal ombudsman’s report stated that during his investigation, allegations were made that some members of the committee had a conflict of interest because they were also members of the conservation authority’s board, and therefore Mr. D’Angelo’s employers.⁴⁴ He considered whether the committee members breached the provision in the Code of Conduct that requires members to “avoid conflict of interest,” and concluded that they did not have a conflict of interest. He also found that the recruitment committee “complied with all open meeting provisions.”
- 239** The municipal ombudsman did find that certain allegations were supported by the evidence, including that:

⁴³ The memo referenced in the municipal ombudsman’s report fits the description of the “5 Identified Candidates” memo.

⁴⁴ Two of the five members of the recruitment committee were also members of the conservation authority’s board.

- Confidential information about CAO candidates was wrongly disclosed to the public and the media;
- Council did not operate in a transparent manner; and
- Some members of council treated the public, regional staff, and other members of council inappropriately, with a, “lack of respect, mutual support and understanding, and with abuse, bullying or intimidation.”

The report did not set out the evidence or analysis that led to these conclusions.

240 The municipal ombudsman made three recommendations to the regional municipality. He recommended that:

- Members of council be vigilant in adhering to their obligations under the *Municipal Act*, the region’s Code of Conduct, and its procedure by-law;
- Council should engage an independent external governance auditor to evaluate its governance framework; and
- Council should develop education, training, and reference materials regarding the roles and responsibilities of council members, staff, lower tier municipalities, and the public.

241 The report was provided to Regional Council at an open meeting on July 5, 2018. The municipal ombudsman presented his findings to council for just over 30 minutes, and then answered questions from council members. Council then voted to consider the matter closed, to adopt the report’s recommendations by December 2018, and to apologize to the CAO and the Chair’s Policy Director “for a personal perceived damage to their reputation from the report.”

242 Following council’s decision, Niagara Region staff asked an external consulting team to propose a work plan for an external governance audit, as recommended in the municipal ombudsman’s report.

More breaking news

243 On July 26, 2018, the local newspaper published another article about the hiring process, this time alleging that Mr. D’Angelo had received the questions and answers ahead of his second interview for the regional CAO position. At a meeting that evening, council went into a closed session to discuss the allegations. The newspaper would later report that during this session, staff told members of council that, if the regional municipality were to terminate the CAO’s employment, it would have to pay him \$1 million because of his new contract. Some of the council members we interviewed told us that the first they had heard about a new contract was at this meeting.

The external governance audit

- 244** In open session, council appointed the external governance auditors to undertake the work proposed in their work plan. It also directed legal counsel and the Chief Information Officer, under the oversight of the external governance auditors, to facilitate a search of the regional municipality's servers, and the phones of the CAO, the Policy Director, and the Communications Director. Council also directed staff to seek permission from the conservation authority to conduct a search of its records.
- 245** Throughout August 2018, the external governance auditors spoke with Niagara Region staff who were undertaking the search, to discuss logistics. Staff contacted the conservation authority about searching its records, but the authority responded that it would need permission to co-operate with the search from its board, which did not meet again until September 19, 2018.
- 246** At a special meeting on August 23, 2018, council considered an interim report from the external governance auditors.⁴⁵ The report stated that council directed the auditors to oversee the document search, which was not part of the auditors' proposed work plan. The auditors recognized that they could have refused the assigned task, "perhaps on the grounds that we had no special expertise relating to computer investigations." They explained that they accepted the assignment because they understood their role as being limited to overseeing the Niagara Region staff who were conducting the search and, in the event that staff located potentially relevant documents, assessing their relevance.
- 247** In their interim report, the auditors stated: "We do not claim that our own expertise enables us to judge whether the software and methodology used by [staff] were the most effective ways of conducting the search." They noted that they did not find evidence that any of the documents referenced in media reports were sent to Mr. D'Angelo during the hiring period. They also noted that they were unable to search the conservation authority's servers due to the time required to obtain approval from its board.
- 248** They also explained that they were unable to search Mr. D'Angelo's phone because the regional municipality did not have any software capable of such a search. They noted that such a search would require legal authority or Mr. D'Angelo's formal consent, and that it would be futile, because Mr. D'Angelo was no longer using the phone he used during the hiring process. They cautioned that there are many ways that information could have been sent to Mr. D'Angelo,

⁴⁵ Special Meeting of the Council of the Regional Municipality of Niagara, *Interim Report: "Facilitation of Documents Search", August 21, 2018*, CL-C 56-2018; online: <https://www.niagararegion.ca/council/Council%20Documents/2018/council-agenda-aug-23-2018-2.pdf>.

such as via personal email or file-sharing programs. The region's Chief Information Officer also reported to council, setting out the technical details of the search undertaken to that point of the municipality's servers.

- 249** After considering these reports, council resolved that the auditors did “not have the broader based power to properly conduct a complete investigation into the hiring of the Chief Administrative Officer.” It directed the auditors to continue only with the governance review, and opted to ask my Office to investigate.

Issues with the municipal ombudsman's process

- 250** The *Municipal Act, 2001* provides that municipalities may appoint a municipal ombudsman. The municipal ombudsman reports to council. Their function is to investigate in an independent manner any decision or recommendation made, or act done or omitted, in the course of the administration of the municipality, its local boards, and municipally-controlled corporations. The decision, recommendation, act, or omission must affect a person or body or persons in their personal capacity.⁴⁶
- 251** When appointing a municipal ombudsman, the municipality assigns them duties and powers, keeping in mind the independence and impartiality of the ombudsman, and the confidentiality and credibility of their investigative process. A municipal ombudsman may be appointed on a full-time basis or for a specific function assigned by council. In this case, the Regional Municipality of Niagara appointed a municipal ombudsman for a specific purpose: To investigate the 2016 CAO hiring process.
- 252** My Office is intended to be a recourse of last resort. In most cases, issues with municipal governance administration are best addressed at the local level. When a municipal ombudsman is appointed, I do not have jurisdiction to investigate matters within that ombudsman's jurisdiction until they have completed their review, declined to review the matter, or the time for bringing a complaint has expired.⁴⁷ In this case, I did not begin my investigation until the appointed municipal ombudsman had completed his review. As my Office is intended to be a last resort, I also waited until the external governance auditors were no longer reviewing the matter.
- 253** When I review a complaint about an appointed accountability officer, including a municipal ombudsman, I do not act as an appeal body. I look at such matters as whether they acted within their authority in accordance with the relevant legislation, terms of reference, and policy; considered the issues before them;

⁴⁶ *Municipal Act*, SO 2001, c 25, s. 223.13.

⁴⁷ With the exception of investigations on my own motion, in accordance with the *Ombudsman Act*, s. 14(4.5).

followed a fair practice; obtained and considered relevant evidence; and provided sufficient reasons to support their decision based on the available evidence.

- 254** Based on my findings in this investigation, I have identified best practices that may be of assistance for Niagara Region – and all municipalities – when appointing accountability officers in the future.

Establishing terms of reference

- 255** Under the *Municipal Act, 2001*, council can appoint a municipal ombudsman to carry out a specific task or on a broader basis. In either case, council determines the scope of the municipal ombudsman's authority and responsibilities. It is incumbent on council to be as specific as possible in setting the terms of the appointment, so that council, the appointed ombudsman, and the public understand the officer's mandate, authority and the investigative process to be followed.
- 256** When council for Niagara Region appointed a municipal ombudsman in April 2018, it did not establish terms of reference or other procedures setting out the terms of the appointment and governing the process. Instead, the appointed ombudsman was provided only with the information in council's resolution, which lacked any detail or instruction beyond the subject of the investigation and the due date. The retainer that the regional municipality signed with the firm provided no additional information about the role the municipal ombudsman should play or the focus of his investigation.

Issue identification

- 257** Identifying and framing the issues is one of the most important aspects of any investigation. The issues set the course for the investigation; they lead to the questions that must be answered in order to address the issues, which in turn lead to findings. The first step in an investigation should involve formulating an investigation plan that includes the allegations or issues to be investigated. Without a clear understanding of the issues at the beginning, an investigator may find themselves on a fishing expedition, casting their net widely to see what comes in. The result is an unfocused and ineffective investigation.
- 258** The failure of the region to clarify the ombudsman's mandate meant that, at the outset of the investigation, its focus was unclear. In his report, the municipal ombudsman stated that the first issue he investigated was whether the 2016 CAO hiring process was contrary to law, unreasonable, unjust, oppressive,

improperly discriminatory, based in a mistake of law or fact, or was wrong.⁴⁸ The second issue he identified was whether there were any recommendations he could make to address any concerns.

- 259 It was open to the municipal ombudsman to find that aspects of the administrative conduct he reviewed were unreasonable, contrary to law, or wrong. However, these outcomes should not be confused with issues.
- 260 The municipal ombudsman does list 17 “concerns” in his report that resemble investigatory issues. However, he told us that he did not formulate the concerns he would investigate until after he concluded his investigation. He said that he dealt with each of the allegations raised in the media, and then added the others on the basis of the information he gathered. He confirmed that he identified these concerns only after he finished gathering evidence and conducting witness interviews.

Overstepping the mandate

- 261 When we asked the municipal ombudsman about his mandate, he told us that he understood his mandate as covering the CAO hiring process between May and October 2016. He said he looked at the entire process, including everything from compliance with the regional municipality’s procurement and procedure by-laws, to whether there were any breaches of its obligations with respect to confidentiality, transparency, and accountability. He described reviewing legislation and case law, including reading “probably 200 decisions” by my Office. He told us he collected “tons and tons of documents” and “looked at all of that stuff and... sprung board off of one witness to the other,” starting with the search committee members and moving outwards in “concentric circles.”
- 262 As a result of the failure to clearly identify the issues for investigation at the outset, the municipal ombudsman’s investigation meandered, including into areas outside of his jurisdiction. It is fundamental for investigators to limit their review to matters that are within their legal authority to consider. However, in this case, in addition to exercising the powers of a municipal ombudsman, the municipal ombudsman considered whether the recruitment committee complied with open meeting provisions in sections 238 and 239 of the *Municipal Act* – something that is actually in my jurisdiction, as my Office is the closed meeting investigator for Niagara Region. He also made findings under the region’s Code of Conduct, which is the role of an Integrity Commissioner (under sections 223.3 to 223.8 of the *Municipal Act*), not a municipal ombudsman. He told us he felt all

⁴⁸ The municipal ombudsman used this terminology from the *Ombudsman Act* to characterize the administrative conduct he was reviewing. Although this language from s. 21 in the *Ombudsman Act* does not apply to a municipal ombudsman, he decided to incorporate these concepts into his analysis.

of these lines of inquiry fell within his mandate because he was asked to look at whether anything was unlawful.

- 263** The municipal ombudsman also found that certain members of council engaged in inappropriate conduct, including bullying, abuse or intimidation and that the region did not operate with transparency. It is unclear what evidence these findings were based on and how they were connected to the CAO hiring, if at all.

Confidential informants

- 264** Under the *Municipal Act, 2001*, a municipal ombudsman has broad powers to obtain information relevant to their investigation. The appointed ombudsman “may hear or obtain information from such persons as he or she thinks fit.”⁴⁹ In keeping with a municipal ombudsman’s broad authority to obtain information, their investigation is subject to strong confidentiality provisions. Every municipal ombudsman investigation is to be “conducted in private.” The Act requires the municipal ombudsman to preserve secrecy with respect to all matters that come to their knowledge during an investigation.⁵⁰ Any information obtained during an investigation is privileged, and the municipal ombudsman cannot be called to give evidence in court with respect to anything learned while exercising their functions under the Act.⁵¹ The municipal ombudsman may only disclose matters in a report that, in their opinion, “ought to be disclosed in order to establish grounds for his or her conclusions and recommendations.”⁵²

- 265** According to emails we reviewed and our interview with the municipal ombudsman, he was contacted directly by between one and three people who wanted to provide him with information on the condition that he keep their identities confidential. This included the source or sources who allegedly provided the leaked documents to the media. The emails we reviewed indicated that the source(s) asked for assurances that their identity would be kept confidential before they agreed to identify themselves or speak with the municipal ombudsman. The municipal ombudsman told us that he felt that he could not assure a witness that he would not identify them publicly. As a result, these witnesses did not agree to speak with him. He told us he felt it would undermine the credibility of his process if he were to accept information from a source without knowing the source’s identity or from sources whom he could not identify in his report.

- 266** Although it is important to be cautious about accepting information from anonymous or confidential sources, there are many reasons why a witness may

⁴⁹ *Municipal Act*, SO 2001, c. 25, s. 223.14.

⁵⁰ *Municipal Act*, SO 2001, c. 25, ss. 223.14(1) and 223.15(1).

⁵¹ *Municipal Act*, SO 2001, c. 25, s. 223.17.

⁵² *Municipal Act*, SO 2001, c. 25, s. 223.15(2).

wish to remain anonymous in a public report, such as if they believe giving evidence would lead to reprisals in the workplace. An investigation is not served by refusing to accept or review such information.⁵³ A municipal ombudsman's process is confidential, and the ombudsman can accept information from sources without publicizing their identity. Accepting information from a confidential source does not mean the ombudsman could not weigh the evidence and make a credibility finding; it would have meant only that he did not name the individual(s) in his report. By refusing such information, the municipal ombudsman bypassed potentially relevant evidence and compromised the validity of his investigation. In the context of integrity commissioner investigations, the courts have recognized that the statutory discretion to disclose in a report to council such matters as are, in the investigator's opinion, necessary for the purposes of their reports, includes the ability to protect informants' identities.⁵⁴

Seeking all available relevant evidence

- 267** The allegations in the media that led to the municipal ombudsman's appointment hinged on confidential documents being sent from the regional municipality to Mr. D'Angelo when he was employed at the conservation authority. The municipal ombudsman included information from the conservation authority in his initial request for documents from Niagara Region. When Niagara Region staff explained that they could not access conservation authority documents, they suggested that the municipal ombudsman make the request directly. However, the municipal ombudsman told us that he did not take any steps to obtain any documents or information from the conservation authority.
- 268** Some of the witnesses we spoke to told us they were surprised and concerned that the municipal ombudsman did not seek or review digital evidence from the conservation authority. One member of council said it was "like he just sat down in the middle of the road and stopped."
- 269** The municipal ombudsman confirmed that many witnesses encouraged him to look for the leaked documents on the conservation authority's servers, and he had the option to do that. He told us he did not take steps to obtain these documents because no one made a compelling case that the evidence was at the conservation authority. He explained that most of the allegations suggested Mr. D'Angelo had received the documents on his personal email, so he assumed they would not be on the conservation authority's server. He also told us that

⁵³ See: Kelly J. Harbridge, "Workplace Investigations: A Management Perspective", delivered at the Canadian Bar Association 2011 National Administrative Law, Labour & Employment Conference, November 25 & 26, 2011; Ottawa. <http://www.cba.org/cba/cle/PDF/ADM11_Kelly_Harbridge_paper.pdf> at p. 24.

⁵⁴ *Michael Di Biase v. City of Vaughan; Integrity Commissioner of the City of Vaughan*, 2019 ONSC 5620 at paras 120-121.

most of the people making this suggestion were emotional or politically motivated, and that he felt there would always be more places to look, making the search “endless.”

- 270** It is incumbent on an investigator to take steps to obtain evidence relevant to the investigation. This is particularly true where that evidence, if obtained, could determine the outcome of the investigation. At the time of the municipal ombudsman’s investigation, allegations made both publicly and directly to him suggested that there might be relevant evidence on servers at the conservation authority. Instead of asking the conservation authority for this information, the municipal ombudsman decided to rely on the witness statements of those accused of participating in the leaks, and the lack of evidence of leaks in the evidence he had already collected. As a result, he failed to obtain relevant evidence and reached wrong conclusions in his report.
- 271** Investigators who gather evidence through witness interviews will sometimes face conflicting or dubious witness statements. The investigator is required to assess the witness evidence for credibility. Credibility assessments involve determining both whether the investigator believes the witness is being honest, and whether the witness’s version of events is reliable. It is particularly important to seek out other sources of evidence for the purpose of corroborating or refuting witness accounts.
- 272** The municipal ombudsman reported that Mr. D’Angelo could not recall receiving documents containing the names and biographies of other candidates during the CAO recruitment process. He stated that Mr. D’Angelo pointed to two events that affected his memory of the process. First, Mr. D’Angelo said he “was engaged at that time in a recruitment process for a CAO for Niagara-on-the-Lake, and received a lot of documents, including briefing documents and briefing opportunity packages, containing names and biographies of candidates for that position.” Second, because his cellphone was stolen during the recruitment process, Mr. D’Angelo maintained that he could not check his email to see what information he received from the region.
- 273** The municipal ombudsman wrote that he found Mr. D’Angelo’s answers “improbable,” but he was “unable to conclude that his statements are not credible or reliable,” because they did not contradict any other statement or document reviewed in his investigation. He told us he could not devalue Mr. D’Angelo’s evidence, even though he found it suspicious, in the absence of any evidence to the contrary. He told us he relied on two court decisions, which are cited in his

report, for this principle.⁵⁵ These are criminal decisions, which do not appear particularly relevant to the issues that the ombudsman was examining.⁵⁶

- 274** The lack of contradictory evidence is not a strong basis for a finding of fact.⁵⁷ In this case, there was actually evidence available that contradicted the account that Mr. D'Angelo gave to the municipal ombudsman, which he took no steps to obtain. This evidence related to the comments regarding another CAO hiring process in Niagara-on-the-Lake. On August 31, 2018, after reviewing the municipal ombudsman's report, the Town of Niagara-on-the-Lake passed a resolution stating:

[T]he Town wishes to issue a factual clarification to this report, specifically Section 74 that at no time would any candidate for the position of CAO for Niagara-on-the-Lake ever receive the names and biographies of other candidates for that position, and that the Town undertook considerable expense and effort to ensure the integrity of the hiring process...⁵⁸

The resolution also asked that the municipal ombudsman correct the factual error in his report.

- 275** On September 6, 2018, the municipal ombudsman wrote to Niagara-on-the-Lake to say that he did not investigate or reach conclusions about the town's hiring process in his report. He said the statement about the town's process was based on Mr. D'Angelo's comment, which he had called "improbable." He noted that after he issued his report, Mr. D'Angelo had publicly clarified that he did not receive documents containing the names of other candidates during the Niagara-on-the-Lake hiring process. This post-report clarification could have been avoided if the municipal ombudsman had contacted Niagara-on-the-Lake during his investigation.
- 276** Similarly, the municipal ombudsman told us he took no steps to look into Mr. D'Angelo's claim that he could not access his emails from 2016 because his cell phone had been stolen. He commented that he would be opening a "can of worms" if he started to look for information on phones and servers. However, our investigation confirmed that despite a lost phone, email communications are

⁵⁵ The municipal ombudsman's report cites *R. v. A.F.*, 2010 ONSC 5824, and *R. v. Tran*, 1994 CanLII 56 (S.C.C.).

⁵⁶ In criminal cases, allegations must be proven beyond a reasonable doubt, whereas in civil cases, proof must be established on a balance of probabilities. See *F.H. v. McDougall*, [2008] 3 SCR 41, 2008 SCC 53 (CanLII).

⁵⁷ *Faryna v. Chorny*, 1951 CarswellBC 133 (BC Court of Appeal), paras 8-10.

⁵⁸ Niagara-on-the-Lake, Committee of the Whole meeting, August 13, 2018, online: <<http://cotw.notl.org/sites/notl/NOTLCOTW.nsf/74C6E02BCBF6FC1C8525783E00620D4E/385349080A52B246852582CC005B5B2E>>.

generally retrievable, as they are not only stored locally on one device, but can be accessed through other means.

- 277** The municipal ombudsman told us he concluded that the confidential documents were not sent to Mr. D'Angelo during the hiring process because the Chair, the Policy Director, and Mr. D'Angelo all denied the allegations, and he found no evidence to prove they were sent. He told us that he felt it important in this case to make a direct finding that the documents were not leaked, rather than a "passive" finding that there was no evidence to indicate that they were leaked, because the allegations affected individual reputations, and it was an election year.
- 278** There are times when there is insufficient evidence to support a conclusion in an investigation. As demonstrated by my investigation, the fact that the municipal ombudsman did not collect evidence showing that the documents were leaked did not mean that the leaks did not occur. It was open to the municipal ombudsman to state that he was unable to make a finding or unable to reach a certain conclusion. In such cases, the best practice is for the investigator to state in their report that they were unable to reach a particular conclusion on the basis of the evidence, and explain why.

No preliminary reporting process

- 279** Under the *Municipal Act*, no one is entitled to a hearing before a municipal ombudsman.⁵⁹ Instead, before issuing a report or recommendations that "may adversely affect" the municipality or any other person, the *Municipal Act, 2001* requires a municipal ombudsman to give the affected municipality or person the opportunity to make representations respecting the adverse report or recommendation.⁶⁰ This preserves the procedural fairness of the ombudsman's process, by giving the impacted party the chance to know and speak to the case against it.⁶¹
- 280** Despite this requirement, the first time Regional Council saw the municipal ombudsman's findings was when his final report was made public at a council meeting on July 5, 2018. The municipal ombudsman did not provide the regional municipality with the opportunity to review his findings and provide comments on them before the report was finalized and made public.
- 281** The municipal ombudsman initially told us that he did not provide a preliminary version of his report because he did not make any adverse findings against

⁵⁹ *Municipal Act*, SO 2001, c. 25, s. 223.14(2).

⁶⁰ *Municipal Act*, SO 2001, c. 25, s. 223.14(2).

⁶¹ Gregory J. Levine, *Ombudsman Legislation in Canada: An Annotation and Appraisal*, (Toronto: Carswell, 2012) at 90-91.

individuals. However, he then confirmed that he did make adverse findings against Niagara Region, by referring to “their lack of transparency and accountability, and so on and so forth.” Despite these adverse findings and the requirements of the *Municipal Act*, the municipal ombudsman said he did not see any purpose in providing a preliminary report, as it he “didn’t think it was going to change anything.” Instead, he told us he believed he met the requirement in the Act by speaking with the councillors he interviewed about his concerns around transparency and accountability. He confirmed that he only spoke with the six councillors he interviewed; at no time were the other 25 councillors made aware of his adverse findings, and council as a whole was never given the opportunity to review the report and provide comments.

- 282 During our interview, the municipal ombudsman said he could not give council a preliminary version of the report to review because he had to provide the report “to a quorum of council,” and that could only be done in open session. However, the *Municipal Act* provides for a process that allows an appointed ombudsman to provide a preliminary report to council in a closed meeting while preserving the confidentiality of their investigation.⁶² In fact, if council discusses an ongoing municipal ombudsman investigation, including a preliminary report, it must do so in a closed meeting. Council’s direction for the municipal ombudsman to report back to a quorum of council did not act as a waiver of the statutory requirement to provide a preliminary report.
- 283 To ensure focused, fair, thorough, legal, and effective municipal ombudsman investigations in future, Niagara Region should ensure that before appointing a municipal ombudsman, it adopts terms of reference or procedures, governing all aspects of the investigative process.

Recommendation 14

The Regional Municipality of Niagara should ensure that it establishes comprehensive terms of reference when appointing a municipal ombudsman, including reference to requirements for:

- **Scope of issues to be investigated;**
- **Evidence collection;**
- **Confidentiality, including of witnesses; and**
- **Preliminary reporting.**

⁶² Section 239(3)(b) of the *Municipal Act* provides that preliminary municipal ombudsman reports must be considered by council in a closed meeting.

Issues with the external governance auditors' review

- 284** As recommended in the municipal ombudsman's report, council appointed external governance experts to review Niagara Region's practices. Before making that appointment, staff reached out to the prospective reviewers to obtain a proposed work plan. The work plan described the work the auditors felt they could undertake and how they planned to complete it.
- 285** When news of more confidential document leaks broke just ahead of the council meeting on July 26, 2018, council directed the same auditors to oversee a search for evidence of the leaks on regional servers. Council did not direct staff to reach out to the auditors or do any other research ahead of the meeting to determine whether they were available and qualified to complete the task. Had the auditors been contacted in advance, they could have explained that they did not have the technical capacity to oversee a server search.
- 286** When external investigators are retained on a contract, their work is paid for by the municipality. Their findings may be made public. A poorly done investigation can cost more in the long run if it requires subsequent investigations of the same issue or the municipality requires legal advice to respond to the work.
- 287** Prior to appointing any external investigator, including an accountability officer, workplace investigator, or auditor, it is a best practice for municipalities to learn about the prospective professionals' services and experience and to confirm that information with the investigator.

Recommendation 15

Before appointing or retaining external investigators, the Regional Municipality of Niagara should obtain information about their skills, experience, and availability, so that council can make an informed decision about their qualifications for the position.

Opinion

- 288** My investigation found that the Regional Municipality of Niagara's 2016 hiring process for a new Chief Administrative Officer was compromised, as confidential information about other candidates and the interview process was improperly provided by staff to the candidate who was ultimately successful in the competition. The significance of the breach of confidentiality became apparent when the media uncovered evidence of the conduct involving the municipality's most senior administrator two years later. The lack of fairness and transparency in the hiring process created controversy and distrust within the region and served to undermine public confidence in local government. I find that Niagara Region's failure to preserve the integrity and fairness of the hiring process was unreasonable, unjust and wrong, in accordance with s. 21(b) and (d) of the *Ombudsman Act*.
- 289** The Chief Administrative Officer's contract was subsequently amended by the Regional Chair without the involvement or knowledge of council, staff, or external legal counsel. I make no findings as to the validity of that contract, as the matter is currently before the courts. However, the process followed was not transparent and lacked appropriate checks and balances necessary to protect the public interest. I find that Niagara Region's failure to have a by-law governing the relationship between council and the Chief Administrative Officer – including with respect to performance appraisals, salary increases and contract changes – was unreasonable, in accordance with s. 21(b) of the *Ombudsman Act*.
- 290** When the regional municipality undertook to address concerns about the 2016 CAO hiring process by retaining a municipal ombudsman, it failed to provide terms of reference or investigation procedures setting out the municipal ombudsman's mandate, scope of authority, and the elements of the investigative process. It subsequently appointed external governance auditors to oversee a server search without first ascertaining whether the selected auditors had the expertise or capacity to carry out the assigned task. I find that Niagara Region's actions in responding to concerns about the CAO hiring process were unreasonable, in accordance with s. 21(b) of the *Ombudsman Act*.
- 291** The inside job described in this report was carried out by a few individuals, and their actions should not be taken to impugn the conduct of other Niagara Region employees. Most regional staff we spoke with told us that they either did not know about the problems with the CAO hiring process, or heard only rumours. Overwhelmingly, they were distraught about what transpired in this case.
- 292** In order to foster transparency and good governance, the Regional Municipality of Niagara should report publicly and to my Office every six months on its

progress in implementing my recommendations, until I am satisfied that adequate steps have been taken to address them.

Recommendations

293 To address the concerns I identified in this investigation, I make the following recommendations to the Regional Municipality of Niagara:

- 1. The Regional Municipality of Niagara should ensure it has an employee code of conduct or ethics that provides for the protection of confidential information.**
- 2. The Regional Municipality of Niagara should ensure that the protection of confidential information is addressed in all employment contracts.**
- 3. The Regional Municipality of Niagara should require all officials and staff with access to confidential hiring process information to sign a specific confidentiality agreement at the outset of the process.**
- 4. The Regional Municipality of Niagara should ensure that the terms of reference it establishes for a recruitment committee provide for a complete list of the staff and officials permitted to access confidential information.**
- 5. The Regional Municipality of Niagara should ensure that all officials and employees with access to personal information understand their obligations under the *Municipal Freedom of Information and Protection of Privacy Act*.**
- 6. The Regional Municipality of Niagara should adopt a policy clarifying that employees should not engage in any behaviour that provides an unfair advantage to a candidate during a hiring process, including assisting candidates by providing inside information such as interview questions and suggested answers.**
- 7. The Regional Municipality of Niagara should ensure that staff and officials act in accordance with the direction of council and committees of council.**
- 8. The Regional Municipality of Niagara should ensure that staff in the Chair's office do not usurp or undermine the role of professional staff, especially when those roles have been set by council or a committee.**
- 9. The Regional Municipality of Niagara should adopt a policy setting out the process for hiring a Chief Administrative Officer, including the appropriate roles of staff and their accountability to council or a committee of council charged with the hiring.**

10. The Regional Municipality of Niagara should ensure that all staff and officials receive training on the proper use of corporate email and retention of corporate documents.

11. The Regional Municipality of Niagara should adopt a by-law setting the parameters of the relationship between council and the CAO, including the role of council with respect to amending the CAO's contract and salary.

12. Before making changes to a contract affecting its legal interests, the Regional Municipality of Niagara should require staff to consult legal and human resources staff to ensure the terms are lawful and consistent with the municipality's interests.

13. The Regional Municipality of Niagara should adopt a policy governing the process for CAO performance appraisals.

14. The Regional Municipality of Niagara should ensure that it establishes comprehensive terms of reference when appointing a municipal ombudsman, including reference to requirements for:

- **Scope of issues to be investigated;**
- **Evidence collection;**
- **Confidentiality, including of witnesses; and**
- **Preliminary reporting.**

15. Before appointing or retaining external investigators, the Regional Municipality of Niagara should obtain information about their skills, experience, and availability, so that council can make an informed decision about their qualifications for the position.

16. The Regional Municipality of Niagara should report publicly, and to my Office, in six months' time on its progress in implementing my recommendations, and at six-month intervals thereafter until such time as I am satisfied that adequate steps have been taken to address them.

Response

- 294 The *Ombudsman Act* (s.18(3)) requires that I give persons and public sector bodies adversely affected by my investigations an “opportunity to make representations” regarding my reports and recommendations. As is my Office’s practice in all formal investigations, I provided the Regional Municipality of Niagara and relevant individuals with an opportunity to comment on a preliminary version of this report and recommendations before they were finalized.

Regional Municipality of Niagara

- 295 Council for the Regional Municipality of Niagara agreed to and expressed unanimous support for my recommendations. Council asked for additional clarity about the intended scope of Recommendations 7, 8 and 12, as they relate to my recommendation to report back on the Region’s progress (recommendation 16).
- 296 The recommendations in question were based on best practices concerning staff and official compliance with committee and council directions, ensuring staff in the Chair’s office don’t undermine the functions of professional staff, and that legal and human resources staff are consulted on contracts affecting the regional municipality’s legal interests. These recommendations are intended to be broad and apply to various fact situations that may arise in future. They are not limited to circumstances involving the hiring of a CAO. Any report that Niagara Region makes to my Office on its progress can reflect its commitment going forward to implement these best practices whenever appropriate.

Carmen D’Angelo

- 297 Mr. D’Angelo, through counsel, made several comments in response to the preliminary report. He asserted that he had a reasonable expectation of privacy in the computer he used while employed with the Niagara Peninsula Conservation Authority, and questioned my legal authority to obtain the information relied on in this report without his consent. I disagree. Mr. D’Angelo had no reasonable expectation of privacy relating to the information considered in this report, which was not his personal information. The Ombudsman is also not subject to *Municipal Freedom of Information and Protection of Privacy Act* (“MFIPPA”). Our requests for documents from the conservation authority were not made under that act, but rather under s. 19 of the *Ombudsman Act*. Section 19(3.1) states that MFIPPA does not prevent the provision of personal information to the Ombudsman.
- 298 Mr. D’Angelo also requested that his name be removed from the report, as he is the only individual so identified. As noted, to refer to Mr. D’Angelo by his titles,

which changed throughout the events documented in this report, would be extremely confusing. The events described were extensively reported in the media. It is not my intention to single Mr. D'Angelo out, however, not naming him would not protect his anonymity at this stage.

- 299 In addition, Mr. D'Angelo submitted that it was inappropriate to suggest that he had been given an unfair advantage because it had not been established that he would have been unsuccessful without the information. The disclosure of confidential information to only one candidate in a competition is intrinsically unfair. There is no method of quantifying the extent to which Mr. D'Angelo benefited from improper disclosure of insider knowledge. However, this does not mean he wasn't given an unfair advantage. It is the very definition of one.
- 300 Mr. D'Angelo also argued that I "should indicate that while the process is perceived to have been unfair, the outcome caused no demonstrable harm to the Region." I disagree with the assertion that Niagara Region has suffered no harm. The events described in this report led to significant controversy and reputational damage, as attested to by many of the individuals we interviewed. Niagara Region also expended considerable funds attempting to respond to public concern about Mr. D'Angelo's hiring.

Municipal ombudsman

- 301 The municipal ombudsman provided comments on the preliminary report. In particular, he submitted that contrary to my findings, he did comply with the legal requirement to provide the regional municipality with an opportunity to review and respond to any adverse report or recommendations prior to a final report. He told us that he fulfilled this obligation by providing the Director of Legal and Court Services with a copy of the report before it was released publicly to council.
- 302 I found no evidence that the municipality was provided with the opportunity to review and comment on the report in accordance with the *Municipal Act*. Instead, the municipal ombudsman provided a copy to the Clerk to facilitate distribution to council. He gave explicit directions that no one else was to review the report in advance. However, he explained in an email to the Clerk that she could have the region's legal counsel review the report to ensure it was in compliance with the open meeting provisions of the *Municipal Act*.
- 303 In our interview with the Director of Legal and Court Services, she confirmed that her review of the report was limited to assessing whether it was appropriate for an open session council meeting. At no time did the municipal ombudsman indicate that he was providing the report to give Niagara Region the opportunity to make representations as required by the *Municipal Act*.

- 304** The municipal ombudsman explicitly told staff they could not share the report with council. It would be disingenuous to suggest that municipal staff should have interpreted the provision of the report under these circumstances to be the region's opportunity to comment on the report's findings and recommendations on a preliminary basis.

Other comments

- 305** Additional comments received by the regional municipality and individuals were considered and, where appropriate, have been reflected in the body of this report.
- 306** I am encouraged by Niagara Region's unanimous acceptance of my recommendations and commitment to implementing changes to preserve the accountability, transparency, integrity and fairness of its administration in the interest of its citizens.



Paul Dubé
Ombudsman of Ontario



ONTARIO'S WATCHDOG

Office of the Ombudsman of Ontario
483 Bay Street, 10th Floor, South Tower
Toronto, Ontario
M5G 2C9

www.ombudsman.on.ca
1-800-263-1830

Facebook:
Ontario Ombudsman

Twitter:
@Ont_Ombudsman
@Ont_OmbudsmanFR

