



Report to: General Committee

Meeting Date: March 25, 2019

SUBJECT: Indemnification of Employees and Members of Council
PREPARED BY: Catherine M. Conrad, City Solicitor and Acting Director of
Human Resources
Ext. 4737

RECOMMENDATION:

- 1) THAT the report entitled “Indemnification of Employees and Members of Council”, dated March 25, 2019, be received;
- 2) AND THAT Attachment “A”, the proposed Indemnification of Employees and Members of Council By-law, be enacted;
- 3) AND THAT the contract for the City’s Integrity Commissioner be amended to include the responsibilities set out in the By-law attached as Attachment “A”;
- 4) AND THAT the Chief Administrative Office and the City Clerk be authorized to enter into indemnification/reimbursement agreements with eligible persons where the Integrity Commissioner has authorized indemnity, in a form satisfactory to the City Solicitor; and
- 5) AND THAT Staff be authorized and directed to do all things necessary to give effect to this resolution.

PURPOSE:

The purpose of this report is to recommend a by-law that provides for indemnification and defence of employees and Members of Council against loss or liability arising out of acts or omissions that occur while acting on behalf of the City.

BACKGROUND:

Legislated Legal Protection

The Municipal Act, 2001 (the “Act”) contains several immunity provisions that protect the municipality, municipal councillors, officers and employees from personal liability in legal actions in certain circumstances: neglect from “any act done in good faith” (section 448); nuisance from water or sewage works (section 449); negligence for policy decisions (section 450) in the performance of their public duty; damages for highway and bridges (section 45); sale of land for tax arrears (section 386). The Building Code Act contains immunity provisions that specifically protect Chief Building Officials. This legislation provides protection from legal liability for municipal councillors and employees in the stated circumstances, as long as the acts are done in “good faith” and in “performance of their duty.”

The general immunity provision reads as follows:

Immunity

448 (1) No proceeding for damages or otherwise shall be commenced against a member of council or an officer, employee or agent of a municipality or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this Act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.

Liability for Torts

(2) Subsection (1) does not relieve a municipality of liability to which it would otherwise be subject in respect of a tort committed by a member of council or an officer, employee or agent of the municipality or a person acting under the instructions of the officer, employee or agent.

However, these provisions do not protect municipalities or Councillors from other legal actions, such as a tort (a civil legal action involving a wrongful act that results in injury to another), see subsection (2) above, or misfeasance, which is a knowingly/deliberate unlawful act. Former or retired employees and former or retired Members of Council are not specifically addressed in these provisions.

Furthermore, the legislation does not require a municipality to undertake a defence or pay legal costs on behalf of an employee or Councillor, even in circumstances where the municipality is also named as a defendant.

Finally, the Act does not require the municipality to pay any costs associated with any legal action (although legal costs may be ‘awarded’ to a successful defendant and ordered to be paid by the plaintiff, those costs rarely, if ever, fully indemnify a successful defendant for all of their costs). Consequently, an employee or Councillor who is sued undertakes the defence at their own expense.

Insurance

The City’s insurance policies provide coverage to Councillors, employees, members of Committees of Council and volunteers against claims for bodily injury, personal injury, and property damage caused while performing their City duties during the policy term, subject to limits of liability, exclusions, conditions and other terms of the policy. The areas of coverage relevant to this report include; General Liability, Errors and Omissions, and Legal Expense & Conflict of Interest.

Indemnity By-law

Section 279 of the Municipal Act, 2001 (the “Act”) permits a municipality to act as an insurer for current and former employees and Councillors against any risk that may involve pecuniary loss or liability, subject to certain limitations. One such limitation is contained in section 14 of the Municipal Conflict of Interest Act (the “MCIA”), which

provides that a municipal council may only reimburse a Councillor's legal expenses if that Councillor has been found not to have contravened sections 5, 5.1, and 5.2 of the MCLA.

The Act authorizes councils to pass indemnification by-laws or adopt policies to defend or reimburse Councillors and employees for legal expenses they may incur while acting "in their capacity as members of council" or in the course of their public duties, respectively.

Presently, the City does not have an indemnity policy or by-law in effect. The City has relied on the provisions of the Municipal Act to determine indemnification eligibility.

The purpose of a legal indemnification by-law would be to:

- establish a framework for indemnifying employees and Councillors for defence and other costs;
- extend protection into additional types of legal disputes or actions;
- extend protection for legal fees to employees and municipal Councillors, including former employees and Councillors; and
- establish a process to determine when such indemnification applies and how litigation is managed.

Indemnification by-laws are relatively common among mid to large sized municipalities. In 2018, Richmond Hill surveyed municipalities in the GTA and 19 out of 22 municipalities have an indemnification by-law, including York Region, Vaughan, Newmarket, Mississauga and Brampton.

OPTIONS/ DISCUSSION:

Proposed Markham Legal Indemnification By-law

A proposed Indemnification By-law (the "By-law") for City employees and Members of Council is attached as Attachment 'A'. The proposed By-law includes the following provisions:

1. Indemnification for present and former:

- a. Councillors
- b. Employees
- c. Contract employees
- d. Volunteers

2. Indemnifiable Employee and Councillor actions:

- a. acts done in performance of duty and statutory duties
- b. acts done honestly and in good faith with a view to the best interests of the City and with no improper, immoral or objectionable purpose;
- c. the act or omission was done while acting on behalf of the Corporation or done or made by them in good faith in their capacity as Employees or Members;
- d. in cases involving monetary penalties, the conduct was believed to be lawful.

3. Covered Proceedings:

- a. any civil or administrative proceeding before any court or tribunal, subject to certain exclusions.

4. Excluded Conduct or Proceedings:

- a. proceedings relating to a grievance filed under the provisions of a collective agreement;
- b. complaints made pursuant to the Council Code of Conduct where the Integrity Commissioner has found that the Member breached the Code;
- c. proceedings in which the interests of the Councillor or Employee are adverse in interest or in conflict with the City's interests;
- d. *Municipal Elections Act* (coverage available under insurance subject to limits);
- e. *Highway Traffic Act*;
- f. the *Criminal Code*; and
- g. municipal parking and traffic by-laws.

5. Extent of Indemnification:

- a. legal fees;
- b. fines;
- c. damages;
- d. settlements; and
- e. reasonable expenses incurred.

5. Process:

- a. by written request, forwarded to the Integrity Commissioner, via the City Clerk;
- b. determination of eligibility for indemnification is made by Integrity Commissioner, taking into consideration the criteria in the By-law;
- c. Indemnified Person must execute Indemnification Agreement.

6. Limits to Indemnification:

- a. reasonable defence costs;
- b. City to be reimbursed by any award of costs (but not damages awards to the employee or Councillor) paid to employee or Councillor;
- c. Council may, where the employee or Councillor breaches any provision of the Indemnification By-law, or acts in bad faith or with intentional or malicious wrongful conduct, discontinue indemnification with notice to the employee or Councillor

7. Process for Approval of Lawyer

- a. City selects and retains lawyer;
- b. Employee or Councillor may retain their own lawyer, in lieu of the City's choice of lawyer, provided that the fees are billed at not more than the rate charged by the City's lawyer in insurable claims;
- c. approval of lawyer must be by written request.

8. Investigation costs:

- a. Up to \$15,000 may be provided to assist an employee or Councillor with the costs of representation during an investigation which may lead to charges (criminal, provincial or municipal)

Approval Process and Delegated Authority

Section 3 of the proposed By-law sets out the approval process to determine when indemnification is applicable. The City's Integrity Commissioner, an independent and impartial arbiter, will evaluate requests for indemnification and respond within a reasonable time, with his/her decision based on the criteria for indemnification and the exclusions set out in the By-law. The Integrity Commissioner will ensure that persons assigned to this work will not also work on or have access to any other Markham files, so that the decision is made independently.

FINANCIAL CONSIDERATIONS

The Integrity Commissioner's work related to the By-law will be included within the scope (and fee structure) of their existing contract.

HUMAN RESOURCES CONSIDERATIONS

N/A

ALIGNMENT WITH STRATEGIC PRIORITIES:

This By-law aligns with the provision of exceptional services by exceptional people: fostering a safe and healthy work environment, embracing an organizational culture and adopting management systems that empower and inspire our employees to be champions of excellent service delivery and innovative practices.

BUSINESS UNITS CONSULTED AND AFFECTED:

Legislative Services and Financial Services were consulted in the preparation of this Report.

RECOMMENDED BY:

Catherine M. Conrad, City Solicitor
And Acting Director of Human Resources

ATTACHMENTS:

Attachment "A" - Proposed Indemnification By-law