



STAFF REPORT INFORMATION ONLY

A Policy Framework for Toronto's Accountability Officers – Response to Executive Committee Motions

Date:	April 23, 2009
To:	City Council
From:	City Manager
Wards:	All
Reference Number:	

SUMMARY

This report responds to motions made at the Executive Committee's April 7, 2009 meeting when the Committee adopted staff report EX31.1, A Policy Framework for Toronto's Accountability Officers.

Financial Impact

There are no financial implications.

DECISION HISTORY

On April 7, 2009, the Executive Committee adopted the recommendations of the staff report, A Policy Framework for Toronto's Accountability Officers, and requested that the City Manager report directly to City Council on April 29 and April 30, 2009 on the issue of dismissal for cause and an outline of the City of Montreal's accountability system.

The Executive Committee also referred the following motion to the City Manager for a possible report directly to City Council should the City Manager have any recommended changes to the Policy Framework, should he deem it necessary after further consultation with the Accountability Officers: 'The Integrity Commissioner, Lobbyist Registrar, Ombudsman and Auditor General each be requested to submit a report directly to City Council for its meeting on April 29, 2009 providing any additional policy framework matters that Council may wish to consider.'

COMMENTS

1. City of Montreal's Accountability System

The City of Montreal has two accountability officers, the Auditor General and the Ombudsman. The Auditor General is a statutory position required since 2001 for municipalities with more than 100,000 residents under the Quebec *Cities and Towns Act*. The Ombudsman was created in 2002 and the City of Montreal's first Ombudsman was appointed by City Council in November 2003.

(a) The Auditor General

The Quebec *Cities and Towns Act* sets out the term, mandate, budget, powers, and reporting requirements for the Auditor General's function.

- The Act establishes that the Auditor General is responsible to audit the accounts and affairs of the City of Montreal, entities in which the City holds more than 50% of the shares or appoints more than 50% of the members of the board of directors, and certain pension funds, with Council approval. Audits may include financial audits, audits for compliance with relevant Acts, regulations, policies and directives and value for money audits.
- The Act requires the Auditor General to be appointed by a 2/3 majority vote of the Members of the Council for a non-renewable term of seven years.
- The Act requires the Auditor General to apply City policies and standards in the management of human, physical and financial resources.
- The Act requires municipalities to include an appropriation in their annual operating budgets to cover expenses related to the exercise of the Auditor General's duties. Municipalities with a budget in excess of \$1 billion are legislated to provide 0.11 per cent of the total City budget for audit services.
- The Act requires the Auditor General to transmit a report each year to Council presenting the results of the audit for the previous fiscal year, indicating any irregularities; and requires the Auditor General to report to Council on the audit of the financial statements of the municipality and the statement fixing the taxation rate.

(b) The Ombudsman

The Quebec *Cities and Towns Act* permits a City Council to appoint a municipal Ombudsman or create a body to act in that capacity and appoint its members.

- The Act requires the Council to appoint or dismiss a municipal Ombudsman by a 2/3 majority vote of Members of City Council and provides that the Council will

determine the term, rights, powers and obligations of the municipal Ombudsman, in accordance with the Act.

- The Act requires the municipal Ombudsman to transmit an annual report on the exercise of their functions to City Council and requires the Ombudsman to apply City policies and standards in the management of human, physical and financial resources.

The City of Montreal has established a by-law respecting the Ombudsman that sets out the appointment and removal processes, responsibilities, powers of investigation, and confidentiality provisions.

- The by-law provides that the Ombudsman is responsible to intervene when there are reasonable grounds to believe that the rights of a person or a group of persons have been adversely affected, or are likely to be, due to an act, decision, recommendation or omission by an employee or representative of the City of Montréal, a municipal agency or a City-controlled corporation.
- The Ombudsman can also intervene with regard to an act or omission of a person acting on the City's behalf, or at the request of a person or group of persons, the City Council, the Executive Committee or a Borough Council. The Ombudsman is also mandated to receive and investigate complaints based on the rights of citizens recognized in the Montreal Charter of Rights and Responsibilities.
- The by-law establishes a 4-year term, once renewable for the Ombudsman.

(c) Provincial Lobbyist Registry

The Province of Quebec enacted the *Lobbying Transparency and Ethics Act* in 2002. The Act is designed to foster transparency in the lobbying of public office holders and ensure that lobbying activities are properly conducted. The Act requires the appointment of a Provincial Lobbyist Registrar to oversee the Registry. The jurisdiction of the Provincial Lobbyist Registrar includes municipalities with over 10,000 residents, including the City of Montreal.

2. Removal for Cause

The Policy Framework for Toronto's Accountability Officers includes key characteristics of independence and accountability, generally consistent with provisions in place for comparable officers in other parliamentary and legislative models of government.

The framework confirms that Toronto's accountability officers will be appointed and removed by a 2/3 vote of all Members of City Council. Appointment and removal by City Council ensures there is full confidence in the appointee throughout their tenure in the position and appointment by Council is required by the *City of Toronto Act, 2006* for all but the Lobbyist Registrar.

The framework also includes removal of officers (by a 2/3 vote of all Members of City Council) for cause only. Removal for cause is a fundamental policy provision for independent officers as it provides security of tenure and ensures officers are not removed for political reasons or because the result of an investigation is unfavourable. Removal for cause for independent officers is found across most jurisdictions and was approved by City Council for Toronto's Ombudsman. The Government of Ontario, Government of British Columbia and Government of Canada include removal for cause for their independent officers.

As set out in the report, this removal provision means that an officer, once appointed, can only be removed for cause, following a hearing by Council that may in turn be subject to judicial review. The process of removal will be public and may be contentious. If the judicial review determines that no cause existed, an officer may be returned to their position or Council may be prohibited from removing the officer from their position. The removal for cause provision also means that Council will not have the ability to remove the accountability officers without cause. Generally, an employer has the ability to terminate employment without cause but is required to provide reasonable notice of termination or pay damages in lieu of notice. Removal without cause will no longer be available to Council for its accountability officers.

The City Solicitor has provided the following information to Council respecting just cause.

The Supreme Court of Canada decision often referred to in describing "just cause," states:

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.

These are not trivial matters. As the Supreme Court of Canada noted, not all misconduct is just cause, only serious misconduct. Not all neglect of duty is just cause, only habitual neglect of duty. Not all shortcomings in performance are just cause, only where failure in performance constitutes incompetence.

The Supreme Court of Canada has also recognized that context is a key factor in determining whether just cause exists. Courts therefore consider the context of the misconduct, having regard for all the unique circumstances of each case, in assessing whether the allegations were sufficiently serious to justify dismissal for cause, even in cases involving dishonesty. This is known as the "contextual approach," whereby each case is examined on its own particular facts and circumstances. The contextual approach could justify reduction of a penalty imposed by an employer, or could reinforce the decision to terminate employment.

Not all misconduct warrants termination. In *Lachance v Gatineau (City)*, the Quebec Labour Relations Board reviewed the dismissal of the Auditor General of the City of Gatineau for the alleged use of a City credit card for personal expenses. The Board determined that the misconduct that was the basis for the Auditor General's dismissal was insufficient and ordered her reinstatement. The Board observed that the City's loss of confidence in the Auditor General was not justified and the City did not communicate the errors to the Auditor General or provide her an opportunity to correct herself.

In summary, in order to provide just cause for dismissal, misconduct must be serious and amount to more than minor errors. What amounts to just cause in one case may not be just cause in every case. Finally, while the contextual approach warrants a case by case application, any decision to discharge must be grounded on an objective basis.

3. Further Consultation with Toronto's Accountability Officers

In response to Executive Committee's motion, the City Manager consulted again with Toronto's accountability officers respecting the policy framework. As a result, the City Manager does not recommend any changes. The City Manager, in consultation with Toronto's accountability officers, will monitor the implementation of the policy framework and bring forward any recommended changes over time to ensure its continued effectiveness.

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SIGNATURE

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