

DEVELOPING A PUBLIC SERVICE BY-LAW FOR TORONTO

Date:	October 17, 2012
To:	Executive Committee
From:	City Manager
Wards:	All
Reference Number:	

SUMMARY

This report responds to City Council requests, arising out of consideration of the 2011 Annual Report of the Ombudsman, that the City Manager report, in consultation with the Ombudsman, on the implications of requesting the Province to enact a *Toronto Public Service Act* including its application to elected officials. City Council also requested that the City Manager report further, until a *Public Service Act* is legislated, on an interim by-law that sets out public servants' obligations and accountabilities.

Public service acts, common in most federal and provincial governments, establish in law the employment framework for government officials and entities, including their delegation of authority for human resource management and often also set out the ethical framework for public servants usually related to conduct, conflict of interest and political activity. Public service acts in many jurisdictions were recently amended to also provide for the disclosure of wrongdoing and protections from reprisals for public servants.

This report recommends that City Council enact a public service by-law for Toronto that sets out the human resource management roles, responsibilities and authorities for the City Manager and City agencies, the ethical framework and provisions for disclosure of wrongdoing and protections for public servants. A public service by-law will enable the current legal and policy framework for employment and ethical matters to be consolidated in the Toronto Municipal Code under an overarching by-law. A public service by-law achieves similar objectives to a public service act and supports the principles of transparency, integrity and accountability in the management of government human resources.

A public service by-law will be customized to the City's Agencies as required to take into consideration their legal and governance framework. The specific legislative limitations for the

police, libraries and health will also need to be carefully considered and reflected. Accountability and oversight mechanisms will also need to be considered in the development of a public service by-law including a possible role for some of the accountability functions in its application. The City Manager anticipates reporting back to Executive Committee on a public service by-law for Toronto by the end of 2013.

Accountability officers, elected officials and their staff will not be subject to a public service by-law but their ethical framework, and responsibilities and authorities for human resource management should be clear and transparent. Toronto Municipal Code Chapter 3, Accountability Officers establishes the roles, responsibilities and authorities for the accountability officers' human resource management that is operationalized through a Human Resource Protocol. The City Manager, in consultation with the accountability officers, will consider if there are any elements of the public service by-law that should apply to the accountability officers and their staff and will bring forward amendments as required when the City Manager reports back on the content of the public service by-law for Toronto.

Council Members roles, responsibilities and authorities should be consolidated and formalized and a separate ethical framework established for Members' staff. This report recommends that the City Clerk, in consultation with the Integrity Commissioner, City Solicitor and City Manager, report to City Council on a human resource policy for Council Members to consolidate their human resource responsibilities and authorities and set out the ethical framework for their staff in an overarching policy. The development of an ethical framework for Members' staff will also consider the application of the *Code of Conduct for Members of City Council* to Members' staff.

The City Manager consulted with the Ombudsman in the development of this report.

RECOMMENDATIONS

The City Manager recommends that City Council:

1. Authorize the City Manager to bring forward detailed recommendations on the content of a public service by-law for Toronto before the end of 2013 that includes City divisions and agencies within its jurisdiction and is consistent with the application outlined in section 3 of this report and the key by-law elements summarized in section 6 of this report and in Appendix A;
2. Request the City Manager to consult with the heads and chairs of City agencies, unions and associations, the accountability officers, and division and agency staff in the development of a public service by-law for Toronto; and
3. Request the City Clerk, in consultation with the Integrity Commissioner, City Solicitor and City Manager, to report back on a consolidated Policy for City Council's consideration that sets out the roles, responsibilities and authorities of elected officials for human resource management and the ethical framework for their staff including the application of the *Code of Conduct for Members of Council* to Members' staff.

Financial Impact

There are no financial implications arising from the adoption of this report.

Equity Statement

A public service by-law for Toronto will support the City's equity framework and equity goals and objectives. The by-law will ensure transparency to staff, Council and the public for the management of government human resources. The by-law will also enshrine the ethical rights and requirements and provisions for the disclosure of wrong doing and protections for public servants in one place in the Toronto Municipal Code.

The City Manager will consider equity throughout the development process of a public service by-law for Toronto including ensuring that equity is reflected in refreshed public service principles and values and that equity underpins the key elements of the public service by-law outlined in section 6 of this report.

DECISION HISTORY

At its meeting on February 6 and 7, 2012 in considering the 2011 Annual Report of the Ombudsman, City Council referred recommendation 2 contained in the report to the City Manager for a report, in consultation with the Toronto Ombudsman, to the October 9, 2012 Executive Committee meeting on the implications of requesting the Province to enact a Toronto *Public Service Act*, such report to also include the implications of the proposed Act applying to elected officials.

Recommendation 2 adopted the Ombudsman's recommendations that it ask the Province of Ontario to create a Toronto Public Service Act that embeds expectations and standards for the purpose, role and responsibilities of its public servants.

Council also directed the City Manager to report further, until a *Public Service Act* is legislated, on an interim by-law that sets out the public servants' obligations and accountabilities and that this report be submitted to Executive Committee for consideration at its October 9, 2012 meeting.

The full report can be found at:

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2012.CC16.4>

COMMENTS

1. Overview of Public Service Acts

Public service acts first emerged in the late 1800s as a mechanism to ensure the neutrality of the public service and separate public service recruitment and promotions and its management from political considerations. For example, Ontario's first public service act dates back to 1878 (and was most recently replaced by a modernized *Public Service of Ontario Act* in August 2007).

Public service acts generally articulate the core public service values and principles and establish in law a government's framework for human resource management and public service leadership. Public service acts may also set out the duties, rights and responsibilities of the public service with regard to ethical conduct and provide for disclosure of wrongdoing. Public service acts are implemented through human resource policies, government directives and the governance structures necessary to operationalize the legislation.

While public service acts are common to many governments, the legislation does vary in depth and breadth across jurisdictions, but generally sets out the following provisions:

- definition of public servants for the purpose of the legislation;
- public service principles and values;
- the employment framework for the management of the public service including delegation of authority and roles and responsibilities for strategic human resource direction, labour relations, and compensation structures; and
- the ethical framework with respect to conduct, conflict of interest, political activity, and disclosure of wrongdoing ("whistleblower") and protections for public servants.

Many jurisdictions, as part of their ethical framework, also require public servants to take an oath of office to reinforce their public sector responsibilities, their duty to comply with applicable laws and their obligation to maintain confidentiality.

Public service acts also generally include accountability and oversight mechanisms, and reporting requirements intended to monitor the application of the legislation, ensure transparency and provide recourse to public servants, if required. The *Public Service of Ontario Act* (PSOA) for example, provides for the Integrity Commissioner to investigate and report on allegations of wrongdoing in instances where a public servant feels it would not be appropriate to disclose wrongdoing through an established management channel. The PSOA also establishes a Conflict of Interest Commissioner responsible to make determinations on certain ethical matters involving public servants, provide advice and direction on ethical matters to government entities and serve as a resource for government officials and entities about conflict of interest and political activity matters. The PSOA also establishes a Public Service Grievance Board to hear complaints from certain non-unionized employees about issues related to terms and conditions of employment.

In Canada, both the Province of Ontario and the Government of Canada have made significant changes to their public service legislation over the last ten years as they pursue a public service renewal agenda and move to strengthen their accountability and transparency regimes for government.

2. A Public Service Act Versus a Public Service By-law

The *City of Toronto Act, 2006* ("COTA") is the fundamental source of the City's power and came into force on January 1, 2007 and sets out a broad permissive legislative framework for the

City. The Act recognizes that it is in the best interests of the Province and the City to work together in a partnership based on respect, consultation and cooperation, and the role of the City is to provide good government within its jurisdiction, through a democratically elected, responsible and accountable government.

City Council has authority over the ethical framework for its public servants and its delegation of authority for human resource management to officials and entities within its jurisdiction. Within its authority under COTA, City Council can enact a public service by-law to achieve similar objectives as an Act. The City Manager therefore recommends that City Council establish a public service by-law as a new chapter in the Toronto Municipal Code that sets out the ethical framework for its public servants and codifies the roles, responsibilities and authorities for human resource management.

Enacting a public service by-law for Toronto does not preclude future discussions with the Province of Ontario to include requirements in COTA or other legislation related to the public service.

3. Application of a Public Service By-law for Toronto

The Public Service Will be Defined Broadly and include City Divisions and Agencies

The City Manager recommends taking a broad approach to a public service by-law for Toronto and recommends that City divisions and agencies be included within its jurisdiction.

A public service by-law will consolidate and codify the ethical requirements for City division and agency staff and more explicitly establish the roles, responsibilities and authorities for human resource management for the City Manager and City agencies. The by-law will be customized to the City's agencies to take into account their legal and governance frameworks, and specific limitations imposed for police, libraries and health.

City Corporations Will Not be Included

City corporations will not be subject to a public service by-law. City corporations are established under the *Ontario Business Corporations Act*, own their own assets and operate independently from the City. City corporations are responsible for their own ethical and employment frameworks established through applicable legislation, collective agreements, employment agreements and corporation policies.

Council may provide direction to City corporations, including policy direction related to ethics and human resource management with some limitations, through the Shareholder Direction. For example, Council recently amended the Shareholder Directions to require all wholly owned City corporations to publicly disclose executive compensation as part of the annual reporting to the Shareholder.

4. The Role of the Accountability Officers in a Public Service By-law

Accountability officers are independent statutory positions under the COTA that play a unique role in Toronto's governance system and serve an oversight and accountability role for City divisions and agencies. The City Manager will need to consider accountability and oversight mechanisms for a public service by-law including the possible role of some of the accountability officers in its application.

The responsibilities and authorities for human resources management for the accountability officers are explicitly established in Toronto Municipal Code Chapter 3, Accountability Officers, and operationalized through a Human Resource Protocol. A separate Municipal Code Chapter for the accountability officers was established in order to reinforce both their separation from the City organization and their independent status within the City's governance system.

Toronto Municipal Code Chapter 3, Accountability Officers, also establishes an annual external audit of each accountability officer's office. The external auditor is appointed by and reports directly to City Council. The annual audit provides Council assurance that the accountability officers are carrying out their operations within delegated authorities, including for human resource management and in compliance with applicable City by-laws and policies.

The accountability officers and their staff are also subject to the City's ethical related policies with the exception of the *Whistle Blower and Protection Policy* which Council determined does not apply to its accountability officers but applies to the accountability officers' staff.

Similar to the approach of other governments, the City Manager recommends that the accountability officers and their staff not be included in a public service by-law. However, if there are key elements of a public service by-law that should apply to the accountability officers and their staff, these requirements can be achieved through amendments to Toronto Municipal Code Chapter 3, Accountability Officers. The City Manager, in consultation with the accountability officers, will consider the implications of a public service by-law on Toronto Municipal Code Chapter 3, Accountability Officers, and bring forward amendments as required when the City Manager reports back on the content of the public service by-law for Toronto.

5. Implications for Members of Council

Public service acts do not apply to elected officials or their staff. Most governments have separate policies for elected officials that set out their responsibilities and authorities for human resource management and establish a separate ethical framework for their staff.

Similar to other governments, Members of Council have human resource management responsibilities as it relates to their offices and staff. Human resource responsibilities and requirements for Members of Council are currently established through applicable employment laws, employment agreements and applicable City policies. Delegation of authority for human resource management has not yet been formalized.

The ethical framework for Members of Council is established through the *City of Toronto Act, 2006*, the *Municipal Election Act 1996*, the *Municipal Conflict of Interest Act, 1990*, the *Municipal Freedom of Information and Protection of Privacy Act, 1990*, the Criminal Code of Canada, Toronto Municipal Code Chapter 27, Council Procedures and the *Code of Conduct for Members of Council*. Council has also directed Council Members are subject to some key City ethical related policies such as the *Hate Activity Policy* and *Fraud Prevention Policy*. The 2010 to 2014 Council Handbook provides additional information to Council Members about their ethical framework including the role of the City Solicitor and Integrity Commissioner in these matters.

Members' staff are already subject to many of the City's ethical related policies. However, a separate ethical framework, customized to their role, may be more appropriate. The Integrity Commissioner in 2006 and again in 2010 raised the issue of the application of the *Code of Conduct for Members of Council* to Members' staff and in 2006 City Council extended its application in principle. However, the extent of the jurisdiction of the Integrity Commissioner over complaints against Members' staff when carrying out directions from a Member, the scope of those obligations and the interaction between the *Code of Conduct for Members of Council* and other Policies which apply to Members' staff need to be clarified.

The City Manager therefore recommends that City Council request the City Clerk, in consultation with the Integrity Commissioner, City Solicitor and City Manager, report back with a Policy that consolidates the human resource responsibilities and authorities for Council Members and sets out the ethical framework for their staff, including clarification of the application of the *Code of Conduct for Members of Council*.

6. Key Elements of a Public Service By-law for Toronto

A public service by-law will enhance transparency and accountability to City Council, staff and the public by setting out the roles, responsibilities and authorities for human resource management, ethical requirements and provisions for disclosure of wrongdoing and protections for public servants under an overarching bylaw in the Toronto Municipal Code.

A public service by-law for Toronto will consider the practice and experience of other jurisdictions but also reflect Toronto's legislative context. The key elements of public service acts from other jurisdictions are generally appropriate and applicable to Toronto and will guide the development of a public service by-law with modifications to reflect the City's governance structure as appropriate.

The by-law will consolidate and codify many existing human resource management responsibilities and authorities and ethical rights and requirements already established through applicable legislation, agreements and policies in an overarching By-law Chapter in the Toronto Municipal Code.

Recent Council decisions and directions to the City Manager related to the disclosure of executive compensation for City agencies, agency human resource policies and procedures and the City's *Whistle Blower Protection Policy* will also need to be considered in the development

of the public service by-law. For example, at its meeting on April 12 and 13, 2011, City Council in considering the report, *Managing through Agencies and Corporations*, requested the City Manager to review board human resource policies and practices and recommend changes to ensure alignment with City objectives including compensation, appointment and performance management of senior board staff and labour relations. The City Manager will consider this and other related Council directions in the development of a public service by-law for Toronto and report back as part of that process.

The public service by-law will be based on the key elements outlined below and summarized in Appendix A.

The By-law Will Be Rooted in Public Service Principles and Values

A public service by-law will include core public service principles and values such as neutrality, professionalism, integrity, accountability and service excellence. The development of a public service by-law provides an opportunity to review and modernize the City's public service principles and values in consultation with agencies and staff. The principles and values will then reflect a broader application of public service that this by-law contemplates.

The By-law Will Clarify the Framework for Human Resource Management for the City Manager and City agencies

A public service by-law will clearly set out the roles, responsibilities and authorities for public service leadership and human resource management for the City Manager and City agencies particularly in key areas including for example, human resource strategic direction, labour relations, and executive compensation structures.

The City Manager's role, responsibilities and authority for human resource management is established in Toronto Municipal Code Chapter 169, City Officials. Council's delegation of authority to City agencies for human resource management is currently established through Council approved Relationship Frameworks where in place. City Council under section 145 and 146 of the COTA also has authority to provide policy direction to most City agencies, with some limitations for the police, libraries and health.

Applicable legislation, agreements and policies will need to be carefully considered in the development of a human resource management framework for City agencies including the enabling legislation for police, libraries and health.

The By-law Will Consolidate the Ethical Framework for Public Servants

A public service by-law will consolidate the ethical rights and responsibilities for divisional and agency staff and establish mechanisms that support ethical decision making in the public service. The ethical framework may include such matters as code of conduct, conflict of interest, lobbying, political activity and human rights and harassment.

The City has a robust ethical framework in place implemented through a range of policies, procedures, guidelines and information and advice mechanisms related to conduct, ethics, equity, conflict of interest, human rights and harassment, and hate activity. City Council over the years has directed the application of many of the City's ethical related policies, with necessary modification, to City agencies.

The City Manager will ensure that ethical related policies are included in the review of City agency human resource policies and practices and will consider any necessary changes as part of the development of the public service by-law.

The By-law Will Set Out Provisions for Wrongdoing and Protections

A public service by-law will set out the requirements for the disclosure and investigation of wrong doing for City divisional and agency staff; and set out protections with respect to reprisals.

City Council recently approved a *Whistle Blower Protection Policy* for City divisions and requested that the City Manager review the Policy with the City's agencies and report back on those agencies that have agreed to implement it. The City Manager has not yet reported back on this matter but will consider and report back on the application of the *Whistle Blower Protection Policy* to City agencies in the development of the public service by-law.

The By-law Will Establish Reporting and Accountability Requirements

A public service by-law will establish formal reporting requirements as appropriate on key human resource matters and will ensure that delegation of authority for human resource management is balanced with increased public transparency and accountability.

The City Manager will also need to consider oversight and accountability mechanisms required to operationalize the by-law including possible amendments to the role(s) of some of the City's accountability officers or the establishment of new mechanisms.

7. Stakeholder Engagement

The development of a public service by-law for Toronto will need to be done in close consultation with key stakeholders including agency heads and chairs, unions and associations, the accountability officers, and divisional and agency staff. The City Manager may also seek advice as required from other governments, academics and experts in the development of a public service by-law for Toronto to ensure it reflects emerging public policy and leading practices.

The City Manager will work closely with Agency heads and chairs, particularly related to Agency responsibilities and authorities for human resource management, to ensure their unique legal and governance frameworks are fully considered. Unions and associations will also be consulted to elicit input into key areas and ensure there is no conflict with collective agreements.

The development of a public service by-law provides an important opportunity to review and modernize the City's current public service principles and values to reflect the broader application of public service that this by-law contemplates. The City Manager will therefore, in close collaboration with agency heads, undertake a campaign to inform division and agency staff about the public service by-law in order to support staff discussion and engagement. A variety of channels and mechanisms will also be established to elicit staff input on the public service principles and values and the ethical framework.

CONCLUSION

The City Manager will report back by the end of 2013 with detailed recommendations on the content of a public service by-law that will be codified in a chapter in the Toronto Municipal Code. Similar to *Public Service Acts* common in most provincial and federal governments, a public service by-law will establish the ethical framework for public servants and set out the roles, responsibilities and authorities for human resource management for the City Manager and City agencies.

A public service by-law will move the City of Toronto forward as a mature order of government committed to transparency and accountability, including for the management of government human resources.

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SIGNATURE

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Attachments

Appendix A – Key Elements of a Public Service By-law for Toronto