

Authority: Item 6, Audit and Administration
Committee
Report 19-010 (AUD19011)
CM: July 12, 2009

Bill No.

CITY OF HAMILTON

BY-LAW NO. 19-

WHISTLEBLOWER BY-LAW

WHEREAS Council of the City of Hamilton desires to put into place a mechanism whereby, under appropriate circumstances, employees who disclose serious wrongdoing regarding City operations are protected from reprisal and whereby, under appropriate circumstances, investigations or alternative actions are undertaken in response to such disclosures;

AND WHEREAS sections 8, 9 and 10 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, authorize the City of Hamilton to pass by-laws necessary or desirable for municipal purposes and, in particular, paragraphs 2, 3, 4, 5 and 8 of subsection 10(2) authorize by-laws respecting the accountability and transparency of the City and its operations, the financial management of the City, the public assets of the City, the economic, the social and environmental well-being of the City, and the protection of persons and property;

NOW THEREFORE the Council of the City of Hamilton enacts as follows:

PURPOSE AND SCOPE

1. This By-law recognizes that it is in the public interest to maintain and enhance public confidence in the City and its employees, by providing for:
 - (a) the disclosure of serious wrongdoing with respect to the City's operations by its employees;
 - (b) the protection from reprisals of employees for making disclosures of serious wrongdoing when such disclosures are qualifying disclosures, including prescribing the conduct of employees with supervisory or management responsibilities and members of Council with respect to the provision of protection from reprisals; and

- (c) the appropriate investigation or alternative action in response to disclosures of serious wrongdoing is undertaken including prescribing the conduct of employees and members of Council with respect to the investigation of such disclosures.
2. The City Auditor is responsible for determining if disclosures of serious wrongdoing are qualifying disclosures and for ensuring that the appropriate investigation or alternative action in response to disclosures of serious wrongdoing is undertaken in accordance with this By-law.
3. All employees with supervisory or management responsibilities and who know of reprisals are responsible for ensuring that employees are protected from reprisals in accordance with this By-law.
4. This By-law is deemed to be a procedure, rule or policy governing the ethical behaviour of members of Council for the purposes of the Integrity Commissioner By-law.

DEFINITIONS

5. In this By-law:

“City” means the municipality of the City of Hamilton;

“City Manager” means the City’s City Manager;

“Council” means the Council of the City;

“City Auditor” means the City’s City Auditor or his/her designate;

“employee” means an employee of the City and excludes the Mayor and Members of Council;

“good faith” means an act which is not done trivially, frivolously or for a vexatious purpose, and this definition shall be considered in determining what is bad faith under this By-law;

“reprisal” means any of the following measures taken against an employee because the employee has made a qualifying disclosure:

- (a) the dismissal, suspension, demotion, discipline, harassment of an employee;
- (b) the denial of a benefit of employment to an employee;

- (c) any other disadvantaging of an employee;
- (d) or the threat to take any of the measure in paragraphs (a) to (c) inclusive;

“serious wrongdoing” means:

- (a) a contravention of the Criminal Code, federal or provincial statute or regulation, or City by-law;
- (b) an act or omission that results or is likely to result in the misappropriation or misuse of City funds or assets;
- (c) a contravention of the City’s Code of Conduct for Employees that results or is likely to result in profit, payment or compensation to the employee(s);
- (d) an act or omission that creates or is likely to create a substantial and specific danger or harm to the life, health or safety of any person; or
- (e) an act or omission that creates or is likely to create a substantial and specific danger or harm to the environment; or
- (f) a reprisal; and

“supervisor/manager” means:

- (a) the supervisor or manager to whom an employee normally reports; or
- (b) in the case of a disclosure of serious wrongdoing involving the supervisor or manager to whom an employee normally reports, the next-above supervisor or manager in the employee’s chain of command.

PROTECTION FROM REPRISAL

Requirements with respect to a Qualifying Disclosure

6. The City Auditor shall in his/her sole discretion determine whether or not a disclosure of serious wrongdoing made by an employee satisfies subsections (a) to (d) inclusive and when he/she determines that the subsections have been satisfied, the disclosure of serious wrongdoing is deemed a “qualifying disclosure” for the purposes of this By-law:
 - (a) the employee making the disclosure of serious wrongdoing identifies himself/herself and his/her position with the City or his/her work title;

- (b) the employee making the disclosure of serious wrongdoing has reasonable grounds to believe there has been or is about to occur serious wrongdoing by one or more employees or members of Council;
- (c) the employee making the disclosure of serious wrongdoing does so in good faith;
- (d) the employee's disclosure of serious wrongdoing is made to one of the following:
 - his/her supervisor/manager;
 - the head of his/her Department including the head's designate; or
 - the City Auditor,
 - the City of Hamilton's Fraud and Waste Hotline,

provided that, if the supervisor/manager or the head of Department including the head's designate receives the disclosure of serious wrongdoing then such supervisor/manager or head of Department including designate shall submit the disclosure of serious wrongdoing immediately to the City Auditor.

7. The City Auditor shall send a written notice of his/her receipt of a disclosure of serious wrongdoing to the employee who made such disclosure.

Obligations with respect to a Reprisal

8. Every employee or member of Council with supervisory or management responsibilities has a positive obligation to ensure that:
 - (a) an employee is not subjected to a reprisal; and
 - (b) employees under his/her direction are made aware of this By-law.
9. An employee who believes he/she has been subjected to a reprisal may make a disclosure of serious wrongdoing section 6.
10. Nothing in this By-law impairs any right of an employee either at law or under any term or condition of employment or any applicable collective agreement(s).
11. The provisions of this By-law for the protection of employees are in addition to whistleblower or non-reprisal protection in any federal or provincial statute or regulation, and the provisions of this By-law shall not be construed as limiting such protections.

INVESTIGATION OR ALTERNATIVE ACTION IN RESPONSE TO A DISCLOSURE OF SERIOUS WRONGDOING

- 12.(1) At any time after a disclosure of serious wrongdoing is made, the City Auditor shall in his/her sole discretion determine whether or not it is appropriate for him/her to undertake an investigation or alternative action with respect to such disclosure.
- (2) In making his/her determination under subsection (1), the City Auditor shall consider, among other things:
- (a) the length of time that has elapsed since date when the subject-matter of the disclosure of serious wrongdoing is such that undertaking an investigation or alternative action would serve no useful purpose;
 - (b) whether or not undertaking an investigation or alternative action is appropriate given the extent to which any investigation or alternative action can be or has been undertaken by other duly authorized individuals or entities, for example by:
 - the police under the Criminal Code;
 - the Integrity Commissioner under the Integrity Commissioner By-law;
or
 - supervisory or management staff under City policies or procedures.
13. At any time when the City Auditor is of the opinion that an investigation or alternative action addressing a disclosure of serious wrongdoing can be or has been undertaken by other duly authorized individuals or entities, he/she shall immediately take such steps as are within his/her authority and practicable to:
- (a) refer the disclosure of serious wrongdoing to the individual or entity responsible for such an investigation or alternative action;
 - (b) conduct his/her investigation or alternative action, if any, so as not to interfere with an investigation or alternative action undertaken by the other individual or entity.
- 14.(1) When the City Auditor determines under subsection 12(1) that it is appropriate for him/her to undertake an investigation, the City Auditor may conduct the investigation or may:
- (a) appoint another employee; or

- (b) in consultation with the City Manager, appoint an outside individual or entity, to conduct all or part of the investigation.
- (2) The City Auditor shall take all reasonable steps to ensure that:
- (a) an investigation under subsection (1) complies with City policies, procedures and other requirements;
 - (b) the City's financial interests are protected including that the costs and expenses of such an investigation are minimized without hampering the ability of the City Auditor or an appointee under subsection (1) from completing his/her investigation; and
 - (c) the City's internal resources, including but not limited to, the Office of the City Auditor, Legal Services and Risk Management, and Human Resources, are used.
- (3) The City Auditor is entitled to investigate, or authorize an investigation by an appointee under subsection (1) into:
- (a) any further serious wrongdoing as disclosed by an investigation under this By-law; or
 - (b) an act prohibited under subsection 15(3).
- 15.(1) Persons, including employees or members of Council, shall co-operate in any investigations or alternative actions under this By-law, and no person shall obstruct or interfere with the City Auditor or an appointee under subsection 14(1) or a person acting on behalf of or under the direction of him/her in his/her investigation or in the performance of any of his/her responsibilities under this By-law.
- (2) Notwithstanding section 6, an employee who has made a qualifying disclosure is not entitled to protection from discipline, up to and including dismissal, if he/she does not comply with subsection (1).
- (3) No person advised of an investigation under this By-law and knowing that a City document or thing is likely to be relevant to such an investigation shall:
- (a) destroy, conceal, mutilate, falsify or otherwise alter the document or thing; or
 - (b) advise, instruct, propose or direct in any manner, any person to do anything mentioned in paragraph (a).
- 16.(1) Upon the completion of an investigation under this By-law, the City Auditor shall

make a report to the appropriate individual or entity as determined in the sole discretion of the City Auditor and such report shall include what steps, if any, are to be undertaken in response to a report.

- (2) A report made under subsection (1) which is made to a Committee of Council or Council, shall be submitted in accordance with the *Municipal Act, 2001*, the *Municipal Freedom of Information and Protection of Privacy Act* and the City's Procedural By-law.

COMPLIANCE

- 17.(1) Any employee who fails to comply with this By-law may be disciplined, up to and including dismissal.
- (2) The failure of a member of Council to comply with this By-law may result in a complaint, inquiry and penalty under Integrity Commissioner By-law.

LIMITATIONS ON THE APPLICATION OF THIS BY-LAW

- 18.(1) Nothing in this By-law is intended to limit the responsibilities of employees to continue to carry out their job duties, including responsibilities to make reports to their appropriate supervisors or managers, or to take appropriate action within the scope of their job to prevent wrongdoing or the harm which may arise from such wrongdoing.
- (2) Nothing in this By-law is intended to limit the actions which may be taken by the City or the consequences for an employee when an employee has acted contrary to their job duties, in a negligent, dishonest, or vexatious manner, or contrary to this By-law.
- (3) Nothing in the By-law is intended to permit employees to disregard their obligations to comply with any other by-law, statute or regulation, including the *Municipal Freedom of Information and Protection of Privacy Act* or any other statute or regulation governing the access to or privacy of information;
- (4) Nothing in this By-law restricts the City from utilizing the rights and powers available to under the *Municipal Act, 2001* or other laws, or from conducting, participating in, or calling for such other investigations or inquiries as allowed by law and considered advisable by the City.

ADMINISTRATION

19. The City Auditor is responsible for:
 - (a) administering this By-law, including but not limited to, implementing such forms and procedures as required for the proper administration of this By-

law;

- (b) reporting to Council quarterly, in the aggregate, on the number, nature and outcome of disclosures of serious wrongdoing made under this By-law; and
 - (c) declaring any conflict of interest he/she has arising from a disclosure of serious wrongdoing or from any investigation or alternative action undertaken under this By-law, to the City Manager so that his/her obligations may be re-assigned by the City Manager.
20. The exercise of the City Auditor's authority and discretion under this By-law includes, but is not limited to, withholding, collecting, using, or disclosing information which may reveal the identity of the employee making a disclosure of serious wrongdoing as is necessary to protect the City's interests and to avoid or limit harm to the City, the public or the employee.

CONFLICT AND COMING INTO FORCE

21. In the event of a conflict between this By-law and any other by-law (except the Integrity Commissioner By-law), procedure, rule or policy, this By-law prevails.
22. This By-law comes into force on July 12, 2019.

PASSED this 12th day of July, 2019.

F. Eisenberger
Mayor

J. Pilon
Acting City Clerk