

Authority to Approve Indemnification of Members of Council and Committees

Recommendation

That the June 22, 2021, Office of the City Manager report OCM00479, be received for information.

Previous Council/Committee Action

At the March 4, 2021, City Council Non-Regular meeting the following motion passed:

That Administration provide a report to Committee:

1. summarizing how authority to approve indemnification and legal representation of members of Council and Council committees is assigned in other municipalities; and
2. outlining options for the assignment of the aforementioned authority.

Executive Summary

This report summarizes how the authority to approve indemnification and legal representation of members of Council is assigned in other municipalities.

The options for the City of Edmonton regarding the assignment of authority to approve indemnification and legal representation of members of Council are as follows:

1. The function is delegated to the City Solicitor (status quo) or another employee;
2. The City Manager is the approval authority with no ability to delegate further;
3. City Council retains the authority;
4. City Council delegates the authority to a designated officer.

The advantages and disadvantages of each option are set out along with steps that would be necessary if Council wished to change from the status quo of having the City Solicitor make the decision on indemnification and representation of City Councillors.

Administration proposes to bring forward a further report to Council seeking amendments to the Legal Representation and Indemnification of City Employees, Agents and Members of Council, City Policy C482, to address changes since 2002.

Report

Jurisdictional Scan

Attachment 1 summarizes the information obtained from a jurisdictional scan relating to how other municipalities in Canada assign the authority to approve indemnification and legal representation of members of Council. As Council Committees are not separate legal entities from the City of Edmonton and any legal challenge of a Committee decision should name the “City of Edmonton”, the scope was focused on addressing when City Councillors may have been named personally in a legal proceeding.

The jurisdictional scan involved both searches of websites and sending emails to most of the capital cities across Canada, and some other municipalities in Alberta, to obtain information on how they assign the indemnification decision for City Councillors.

The information obtained indicates there are a variety of ways this authority can be assigned. Some jurisdictions leave the decision at the Council/Committee level while others delegate the authority down to either the City Manager or the City Solicitor level. One notable exception is the approach taken in Saskatoon where three individuals appointed by the Dean of the Law School form a committee to make the decision upon receiving a report from the City Solicitor on whether the Councillor was acting in good faith in their role as member of Council.

Background Information

As the City can only take action through individuals, the decision by the City to indemnify an employee, councillor or agent of the City means that the City will pay for both the reasonable legal defence and/or any loss or damage that is legally obligated to pay as a result of the exercise of authority in good faith on behalf of the City of Edmonton.

However, as criminal, quasi-criminal, and some regulatory matters are generally brought in the name of the employee, councillor or agent personally, the indemnity usually only applies to legal fees and not for any penalty associated with a conviction.

City Councillors have strong protection from liability through section 535(2) of the *Municipal Government Act* (“MGA”) as it limits the liability of councillors (except for defamation) by providing that they “are not liable for loss or damage caused by anything said or done or omitted to be done in good faith in the performance or intended performance of their functions, duties or powers under this Act or any other enactment.” This section does not affect the liability of the City as a municipality for those actions.

As most claims made in civil lawsuits name the City of Edmonton as a party and are insured by the City's insurance program, the Legal Services Branch lawyers handle the defence of virtually all civil litigation on a cost-effective basis. As the City is generally responsible for actions taken on its behalf, the City, and its employees, councillors and agents', interests would be aligned so it makes sense to have one lawyer act for all parties.

Options

There are several options available for assignment of the responsibility to approve indemnification and legal representation of members of Council.

Option 1 - The function is delegated from the City Manager to the City Solicitor (status quo)

The current model is based on the governance structure of delegating most powers, duties and functions to the Chief Administrative Officer ("the City Manager") as set out in the MGA. The authority to make decisions to indemnify Councillors is delegated to the City Manager under the City Administration Bylaw ("CAB") and, in turn, the authority has been delegated to the City Solicitor as the most appropriate position to understand the issues and apply the appropriate legal factors when making a decision.

The indemnification decision is consistent with the City Solicitor's other delegated responsibilities to: retain external legal counsel and experts, defend legal proceedings, purchase City insurance policies, settle insured and uninsured claims, and make strategic decisions within legal proceedings, including relating to privilege.

The parameters under which the City Solicitor must make the decision to indemnify a member of Council is outlined in the Legal Representation and Indemnification of City Employees, Agents and Members of Council Policy C482 (the "Policy") approved by City Council in 2002. The Policy requires updates which are identified below and will be brought forward after this report is received for information and if any resulting motions are carried.

Attachment 2 outlines the test and the procedure as set out in the Policy that the City Solicitor must follow to approve a request from a member of Council for indemnity.

The following parts of the test in Attachment 2 require an understanding of the legal principles that apply:

- Was the member of Council acting in good faith in the course and scope of their duties?
- Was the conduct that gave rise to the action/prosecution in their role as a member of Council?
- Was there a reasonable belief that their conduct was lawful? (in the case of criminal or quasi criminal prosecution)

- Is it in the interests of the City to assist in the defence of the Councillor?

Advantages	Disadvantages
<ul style="list-style-type: none"> • City Solicitor excludes privileged information from forming part of the decision to preserve the City’s right to privilege. 	<ul style="list-style-type: none"> • City Solicitor is still a direct report to the City Manager. A Councillor may have concerns that the City Manager may seek to influence the decision.
<ul style="list-style-type: none"> • The City Solicitor can share information with external legal counsel under a “common interest” privilege. 	<ul style="list-style-type: none"> • City Solicitor’s client is the City of Edmonton as represented by City Council at the highest level. There is some inherent discomfort in denying indemnification to a Councillor.
<ul style="list-style-type: none"> • The City Solicitor, as a lawyer, is bound by ethical obligations to act in the best interests of the client, the City of Edmonton, and with utmost professionalism for the administration of the law. 	<ul style="list-style-type: none"> • City Council does not control the decision for itself.
<ul style="list-style-type: none"> • The City Solicitor has an understanding of the legal principles involved in the test. 	
<ul style="list-style-type: none"> • City Manager is one step removed and insulated from the decision making as the most direct report to Council. 	
<ul style="list-style-type: none"> • City Solicitor has the other related delegations of authority to make and implement the decision cost effectively. 	

The general legal rule is that if authority is delegated, once the decision has been made by the proper delegated authority and within the parameters required for that decision, the decision cannot be subsequently reversed or changed by the person who granted the delegation (“Delegator”). The Delegator does have the ability to put parameters on the decision making of the person to whom they have delegated the

authority (the “Delegatee”) when granting the authority and before the decision is made. In this case, the parameters of the authority given to the City Solicitor are set by the Policy.

City Council has two safeguards for input over the decision made by the City Solicitor regarding indemnity and legal representation of City Councillors:

1. They can amend the Policy with additional direction to the City Solicitor before the decision is made, or
2. They can take back their authority and make the decision themselves in any specific situation as long as they do so before the decision is made.

Option 1 (b) - The function is delegated from the City Manager to a different position in Administration

Another option would be for Council to direct the City Manager to delegate the indemnification authority for Councillors to a different position within Administration other than the City Solicitor. The disadvantages of doing so would be similar to those under Option 2: legal input would still likely be required from the City Solicitor.

If City Council wanted to proceed with this option, the only step required would be an amendment to the Policy to reflect this change in delegated authority.

Option 2 - The City Manager is the approval authority with no ability to delegate further

City Council could amend CAB to remove the ability of the City Manager to delegate this authority regarding indemnification of Councillors thereby requiring the City Manager to make the decision. This would also require amendments to the Policy in order to outline the parameters in which Council wishes the City Manager to make the decision.

Assuming the parameters would remain essentially the same, the City Manager would likely need legal advice or input into the elements of the test identified above that require an understanding of the legal principles involved.

Advantages	Disadvantages
<ul style="list-style-type: none"> ● City Council may feel more comfortable with the City Manager making the decision. 	<ul style="list-style-type: none"> ● As City Council’s primary administrative employee there is likely some inherent discomfort to the City Manager in denying indemnification to a Councillor.
	<ul style="list-style-type: none"> ● City Council does not control the decision for itself.

	<ul style="list-style-type: none"> ● If the desire is to limit the information to the City Solicitor, this intent is unlikely to be met as legal input on the test and privilege would still likely be necessary.
--	--

If City Council wanted to proceed with this option, the following steps would be required:

1. Amendment to CAB in order to make it clear that the City Manager cannot further delegate the authority to determine indemnification for Councillors, and
2. Amendments to the Policy to reflect this change in delegated authority.

Option 3 - City Council is the approval authority

Under this option Council keeps the authority to determine indemnity for City Councillors. This authority best rests with City Council as a whole rather than being delegated to a Council Committee as not all members of Council are members of the respective Committees.

Advantages	Disadvantages
<ul style="list-style-type: none"> ● Council retains control over the decision themselves. 	<ul style="list-style-type: none"> ● Procedures would be more complex to ensure the fairness of the process. It would be similar to the procedures for Code of Conduct matters.
<ul style="list-style-type: none"> ● Removes any likelihood of perceived influence over Administration relating to the decision. 	<ul style="list-style-type: none"> ● Legal input from the City Solicitor on the test would still be required.
	<ul style="list-style-type: none"> ● Council members involved have less privacy over the circumstances and the decision.
	<ul style="list-style-type: none"> ● This may have the impact of making the decision “political”.

Option 4 - City Council delegates the authority to a designated officer

Under the MGA, Council can delegate authority to a designated officer other than the City Manager. The other current designated officers are as follows:

1. City Auditor: for the purpose of internal auditing (Bylaw 12424, City Auditor Bylaw);
2. Integrity Commissioner: to receive complaints and carry out investigations under the Council Code of Conduct Bylaw and provide advice and recommendations regarding ethical behavior of Councillors (Bylaw 18567, Integrity Commissioner Bylaw);
3. City Assessor: for the purpose of assessment and taxation (Bylaw 12046, City Assessor Bylaw);
4. Executive Director, Combative Sports: The City Manager is Executive Director but may delegate to administration. To manage and oversee combative sport events in support of the Commission.

We have reviewed the mandates of the current designated officers and do not recommend adding the authority to decide indemnification to any of them. Most of these positions, other than the Executive Director of Combative Sports, are intended to be arms-length from the City Manager. By adding the indemnification decision to their mandate creates two issues: potential for inherent conflict and provides superfluous information to their other mandate.

However, a new designated officer position could be created by Bylaw.

Advantages	Disadvantages
<ul style="list-style-type: none"> ● Arms-length from Administration if the Bylaw specifies that the designated officer is not accountable or subject to the supervision of the City Manager. 	<ul style="list-style-type: none"> ● Current Designated Officers: are in a conflict for any decisions relating to indemnification of matters within their jurisdiction to investigate.
	<ul style="list-style-type: none"> ● Current Designated Officers: it would not be good governance for the Designated Officers to be aware of other types of matters involving a particular Councillor that is outside their mandate or may also be subject to an investigation within their mandate.
	<ul style="list-style-type: none"> ● New Designated Officer:

	Increased costs and resourcing relating to this increased or new mandate.
--	---

If City Council wanted to proceed with this option, the following steps would be required:

1. Determine what designated officer would carry out this function and pass a Bylaw or an Amendment to create this mandate and delegate authority, including parameters for the decision;
2. Amend CAB to remove this authority relating to City Councillors from the City Manager;
3. Amend the Policy to remove reference to indemnification and representation of City Councillors;
4. Identify and approve budget for the designated officer to carry out these functions.

Future Proposed Amendments to the Policy

Even in the event that Council decides to keep the status quo (Option 1), the Policy requires updates to address changes since 2002. Administration proposes to bring forward a further report to Council seeking amendments to the Policy, after this report is received for information, that would include the following:

- Clarity on the decisions and process to indemnify a City Councillor relating to Code of Conduct complaints;
- Clarity on the decisions and process for harassment and discrimination complaints against a Member of Council, employees or agents of the City;
- Further clarity on the test for decisions and process to indemnify designated officers;
- Further clarification on definition of “an agent” of the City and processes for determination of indemnification and legal representation;
- Changes to reflect amendment to CAB by Bylaw 19613 involving clarifying the delegation of authority for indemnification and legal representation;
- Changing reference to the Director of Risk Management to the Director of Insurance and Claims Management due to name change.

Corporate Outcomes and Performance Management

Corporate Outcome(s): The City of Edmonton has a resilient financial position through effective and efficient service delivery.			
Outcome(s)	Measure(s)	Result(s)	Target(s)
Effective and efficient service delivery of decisions regarding indemnification and legal representation for City Councillors.	Integrity of process is achieved which properly weighs independence, costs and efficiency of process.	Decisions for indemnification for City Councillors is (and is seen to be) made fairly in an efficient and cost effective manner in the best interests of the City.	No or few concerns relating to indemnification and legal representation decisions.

Attachments

1. Jurisdictional Scan
2. Current Indemnification Test in the Legal Representation and Indemnification of Members of Council Policy

Others Reviewing this Report

- M. Persson, Chief Financial Officer and Deputy City Manager, Financial and Corporate Services
- C. Owen, Deputy City Manager, Communications and Engagement
- K. Armstrong, Deputy City Manager, Employee Services