



Governance and Priorities Committee Report

For the May 22, 2014 Meeting

To: Council **Date:** May 16, 2014
From: Trina Harrison, Director of Human Resources
Tom Zworski, City Solicitor
Subject: Indemnification of Employees for Criminal Defence Costs

Purpose

The purpose of this report is to respond to Council's request to develop policy regarding indemnifying City employees for their legal defence costs when criminal charges have been laid against them arising from the performance of their duties as City of Victoria employees.

Background and Analysis

Under the *Local Government Act*, the City may provide indemnity for legal defence costs of employees, including in relation to criminal prosecution, either through bylaw or, on a case by case basis, through resolution, if the legal proceeding relates to the performance of the employee's duties. Council adopted the *Indemnification Bylaw* which provides for automatic indemnification of City employees in relation to civil claims arising out of execution of their duties. In majority of cases, the conduct of the defence is assumed by the City, or the City's insurer, however, the indemnity extends to cover cost of legal defence of the employee if the City Solicitor determines that the employee requires separate legal representation (typically due to a potential conflict of interest). There is no provision in the bylaw for indemnification of the employee for defence in criminal proceedings but such indemnification can be, and in the past has been, granted through specific resolutions on a case by case basis. The City does not have an established policy to guide the exercise of Council's discretion when dealing with indemnification in relation to criminal charges and, on September 13, 2012, Council instructed staff to draft such a policy (see Appendix A). A policy, rather than a bylaw amendment, was recommended as it provides Council with greater flexibility for dealing with each situation on the basis of its particular circumstances.

Criminal charges against City employees in relation to conduct while performing their duties have been very rare. More importantly, activities that are likely to result in criminal charges are not usually part of typical City employee's duties. While an employee acting in good faith performance of his or her duties may make a mistake that leads to a civil claim for damages, it is unlikely that good faith performance of the duties will result in criminal charges. The exception is the Bylaw Officers who, in a good faith performance of their duties, may be involved in physical confrontation and, therefore, may face criminal charges (typically, assault or false imprisonment allegations). However, even then

the likelihood is very low since the Bylaw Officers are instructed to avoid confrontations and, when faced with a possibility of violence, to call the police.

In civil cases, as part of the indemnity under the Bylaw, the City (or its insurer) assumes control over the conduct of the defence and has control over the cost of the defence, including the ability to settle the matter. Furthermore, in a typical civil claim, the City is a defendant in addition to any employees that may be named as defendants. However, in a criminal prosecution, the City cannot assume conduct of the defence because the charges and the potential consequence are specific to the charged employee. The employee, who remains the person at risk in a criminal case, must have control over selection of defence lawyer and control over the conduct of the defence, making it very difficult for the City to control potential defence costs.

While the majority of civil claims, even those where liability is found against an employee or the City, relate to good faith conduct, criminal cases by their very nature are based on allegations of inappropriate and morally blameworthy conduct. City employees are never directed or authorized, as part of their duties, to commit crimes. Extending automatic indemnity for legal costs to all criminal charges, simply because the conduct occurred in the performance of the employee's duties, therefore, may not be appropriate as it would deprive Council of the ability to assess the particulars of the circumstances and to determine whether or not indemnification is warranted. In fact, it could lead to the absurd result of the City paying legal defence costs of an employee charged with defrauding the City or stealing from the City, since the alleged crime would arise out of the performance of the employee's duties.

The current system of automatically indemnifying employees in relation to civil claims and on a case by case approach to the rare instances of criminal charges arising out of performance of duties, balances the need for the protection of employees with the need to protect public interest in avoiding expenditure of public funds in inappropriate cases. It provides the flexibility and allows Council to decide, on a case by case basis, whether to provide indemnity for defence in relation to criminal charges. However, adoption of a policy to guide Council's discretion would provide for greater predictability and, therefore, comfort to employees and taxpayers.

In the alternative, Council could amend the *Indemnification Bylaw* to incorporate the existing system of providing indemnification for legal costs in defending criminal charges on a case by case basis. The bylaw amendment would represent a more formal statement of policy but offers no other advantage over the policy approach. The policy can be adopted immediately while the bylaw amendment will require additional work.

In making decisions on a case by case basis, Council could be governed by such factors as:

- 1) Nature of the alleged offence;
- 2) Conduct which gave rise to the charges and its relationship with the employee's assigned duties;
- 3) Was the employee performing his or her duties in a manner authorized by and consistent with the City's bylaws, collective agreement; policies and operating procedures;
- 4) Did the employee have the appropriate equipment and/or training to perform his or her normal duties;
- 5) Employee's past performance; and

6) Is it in the public interest for the City to pay for the defence of the criminal charges in the circumstances?

Recommendation:

That Council adopt the attached policy (Appendix B) to consider requests by employees for indemnification of an employee's legal costs incurred to defend a prosecution of criminal charges arising from an employee's performance of his or her normal duties.

Respectfully submitted



Tom Zworski, City Solicitor




Trina Harrison, Director of Human Resources

Report accepted and recommended by the City Manager:



Date:

May 16, 2014

	CORPORATE POLICY	
	No. xx	Page 1 of 2
CHAPTER:	HUMAN RESOURCES	
SECTION:	EMPLOYEE	
SUBJECT:	INDEMNIFICATION FOR DEFENCE OF CRIMINAL CHARGES	
AUTHORIZED BY:	COUNCIL	
EFFECTIVE DATE:	JANUARY 2014	REVISION DATE:

1. PURPOSE / OBJECTIVES

The City seeks to ensure that, in appropriate circumstances, employees are indemnified for legal defense costs related to criminal charges arising out of performance of their duties.

2. POLICY STATEMENT(S)

The City may indemnify an employee for legal defense costs when criminal charges have been laid against them arising from the performance of their duties subject to the following principles:

- 1) Council will consider each application on a case by case basis;
- 2) Council shall take in to account factors including:
 - a) Nature of the alleged offence;
 - b) Conduct which gave rise to the charges and its relationship with the employee's assigned duties;
 - c) Was the employee performing their duties in a manner authorized by and consistent with the City's bylaws / collective agreement, policies and operating procedures;
 - d) Did the employee have the appropriate equipment and/or training to perform their normal duties;
 - e) Employee's past performance; and
 - f) Is it in the public interest for the City to pay for the defence of the criminal charges under the circumstances.
- 3) Council may impose conditions as part of any agreement to indemnify an employee for legal defence costs related to criminal charges, including:
 - a) Requirement to enter into a retainer agreement with legal counsel in a form acceptable to the City Solicitor;
 - b) Requirement to co-operate with the City in verifying reasonableness of the fees, including co-operation in proceedings under the *Legal Profession Act*;
 - c) Limit on the amount of fees to be reimbursed by the City;
 - d) Requirement to repay legal fees if the employee is convicted of the offence; and
 - e) Other terms and conditions that Council considers appropriate in the circumstances.

3. APPLICATION AND RESPONSIBILITIES

This policy applies to all City employees.

4. PROCEDURES

- 1) Employees making application for indemnification for legal defense costs related to criminal charges arising out of performance of their duties, shall provide written notice to the City Manager within five (5) days of receiving formal notification of criminal charges against them.
- 2) The City Manager will bring forward a report to Council outlining the circumstances that give rise to the request for indemnification for an employee's legal defense costs when criminal charges have been laid against them arising from the performance of their duties.
- 3) The employee shall be advised in writing of Council's decision along with the terms and conditions for which any indemnification may be provided.
- 4) The employee must agree to the terms and conditions, if any, required by Council prior to the City indemnifying the employee for legal costs.
- 5) Nothing in this policy shall be interpreted to limit the City's ability to discipline any employee.

6. REFERENCES

7. REVISION HISTORY