Agenda – Executive Policy Committee - November 15, 2006

REPORTS

Item No. 5 The Public Interest Disclosure (Whistleblower Protection) Act
File GL-5

ADMINISTRATIVE RECOMMENDATION:

That the report be received as information.

Agenda – Executive Policy Committee - November 15, 2006

DECISION MAKING HISTORY:

COUNCIL DECISIONS:

On February 22, 2006, Council concurred in the recommendation of the Executive Policy Committee and adopted the following:

1. That the January 25, 2006 Council Motion pertaining to "Whistle-Blower" Legislation be filed, and the Administration be requested to prepare a report briefing Council on the provincial draft bill dealing with this matter once the same is available.

On January 25, 2006, Council ruled automatic referral of the following motion to the Executive Policy Committee, namely:

Moved by Councillor Lazarenko,
Seconded by Councillor Smith,

WHEREAS the integrity and transparency of our administrative processes are fundamental to our democratic system;

AND WHEREAS activities at other levels of government have resulted in numerous questions;

AND WHEREAS there is a need to ensure that the City of Winnipeg carries forward its municipal operations with the highest degree of transparency, integrity and professionalism;

AND WHEREAS "whistle-blower" legislation would ensure continued transparency, integrity and professionalism, while encouraging and supporting City staff;

AND WHEREAS, on January 18, 2006, the provincial government announced its intention to introduce the first provincial Bill of its kind in Canada to protect whistle-blowers in the civil service, crown corporations and other public sector agencies;

THEREFORE BE IT RESOLVED that Council request that the provincial government consider extending the proposed legislation to the operations of the City of Winnipeg;

AND BE IT FURTHER RESOLVED that Council receive a report on the progress of this matter within 60 days.

RE: The Public Interest Disclosure (Whistleblower Protection) Act

FOR SUBMISSION TO: Executive Policy Committee

ORIGINAL REPORT SIGNED BY: City Solicitor/Manager of Legal Services

REPORT DATE: October 13, 2006

RECOMMENDATION: That this report be received as information.

Report Summary

Key Issues:

- Bill 34, *The Public Interest Disclosure (Whistleblower Protection) Act*, was tabled in the Provincial Legislature and received 1st and 2nd readings on May 8, 2006 and June 7/06. It was reported on by Committee and Amended in Committee on June 13/06. The Bill did not receive 3rd reading before the Legislature adjourned. The Office of the Clerk of the Legislature advises that this Bill, as amended, is to be reinstated during the 5th Session of the 38th Legislature.

- If enacted, Bill 34 would apply to the Provincial Government, Regional Health Authorities and Child and Family Service Agencies and Authorities. It would not apply to municipalities but the Lieutenant Government in Council could bring the City's operations within the ambit of the Act by regulation.

- If enacted, Bill 34 would allow disclosure of certain wrongdoings in the public service to superiors and designated officials within the administrative unit and to the Provincial Ombudsman. In emergencies and subject to prior disclosure to the police or the chief medical officer of health, it would permit disclosure to the public. The Bill would protect an employee who makes a disclosure under the Act from reprisal; complaints about reprisals taken against such an employee could be made to the Manitoba Labour Board.

- In light of protections currently available to City employees who disclose wrongdoings, such as:
  - The City of Winnipeg's Employee Code of Conduct;
  - The City of Winnipeg's Fraud, Theft or Related Irregularities Directive;
  - *The Ombudsman Act*;
  - *The Criminal Code*;
  - *The Labour Relations Act*; and
  - collective agreements;

  it is not clear that extending Bill 34 to include the City's operations would significantly improve protections for whistleblowers.

Implications of the Recommendation(s):

General Implications

(X) None

( ) For the organization overall and/or for other departments

( ) For the community and/or organizations external to the City

( ) Involves a multi-year contract

Comment(s):

Policy Implications

(X) No

( ) Yes

Comment(s): There are no policy implications associated with the recommendation. However, Council has been asked to consider requesting the Province to extend the provisions of Bill 34 to the City of Winnipeg and that discussion may raise policy issues.

Regulatory Implications

(X) None

( ) Eliminates or reduces regulatory impact

( ) Proposes regulatory impact

Comment(s): There are no regulatory implications associated with the recommendation. However, the application of Bill 34 to the City would provide another regulation relating to “Whistleblowing”.

Environmental Implications

(X) No

( ) Yes

Comment(s):

Human Resources Implications

(X) No

( ) Yes

Comment(s): There are no HR implications associated with the recommendation. In general, “Whistleblowing” legislation is designed to protect employees.

Financial Implications

(X) Within approved current and/or capital budget

( ) Current and/or capital budget adjustment required

Comment(s):

Report

REASON FOR THE REPORT:

On February 28, 2006, Council filed a motion requesting the Province to extend the "whistleblowing" legislation then under consideration by the Province to the operations of the City of Winnipeg but directed the Administration to report on the Provincial draft Bill once it became available.

HISTORY:

On March 24, 2004 Councillors Angus and O'Shaughnessey moved a Motion at Council that Secretariat Committee develop a whistleblowing policy. A Report was prepared by Legal Services and submitted to Secretariat Committee. On January 25, 2005 Legal Services' Report was considered at Secretariat Committee.

On February 23, 2005, Council considered and adopted a recommendation from Secretariat Committee that the March 24, 2004 Council Motion be filed "inasmuch as recent amendments to the Criminal Code provide for protection of the employee rendering further amendments to the City of Winnipeg Employee Code of Conduct redundant."

On January 25, 2006, Councillors Lazarenko and Smith moved another Motion "that Council request that the provincial government consider extending the proposed "whistle-blower" legislation to the operations of the City of Winnipeg." That Motion was automatically referred to EPC.

On February 28, 2006, Council considered and concurred in a recommendation from Executive Policy Committee that "the January 25, 2006 Council Motion pertaining to "Whistle-Blower" Legislation be filed, and that the Administration be requested to prepare a report briefing Council on the provincial draft bill dealing with this matter once the same is available."

Bill 34, *The Public Interest Disclosure (Whistleblower Protection) Act*, received 1st and 2nd readings in the Manitoba Legislature on May 8, 2006 and June 7/06. It was reported on by Committee and Amended in Committee on June 13/06. The Bill did not receive 3rd reading before the Legislature adjourned. The Clerk of the Legislature advises that this Bill, as amended, will be reinstated during the 5th Session of the 38th Legislature.

DISCUSSION:

Bill 34, *The Public Interest Disclosure (Whistleblower Protection) Act*

Bill 34, *The Public Interest Disclosure (Whistleblower Protection) Act*, has not yet been enacted. If enacted, it would contain the following key provisions:

- It would apply to the Provincial Government and the following "government bodies":
  - Government agencies defined in *The Financial Administration Act*;
  - Regional Health Authorities;
  - Child and Family Service Agencies;
  - Child and Family Service Authorities;
  - Other bodies designated as a government body by regulation.

  Therefore, it would not apply to municipalities, including the City of Winnipeg, unless designated by the Lieutenant Governor in Council by regulation.

- It would apply to the following acts of wrongdoing:
  - An offence under Federal or Provincial legislation;
  - An act or omission that creates a "substantial and specific danger to the life, health or safety of persons, or to the environment" but not a danger that is "inherent in the performance of the duties or functions of an employee";
  - Gross mismanagement, including of public funds or a public asset;
  - Knowingly directing or counseling someone to commit one of the above.

- It would require "chief executive officers" of the departments and government bodies to which it applies to establish internal procedures for receiving, investigating and acting on disclosures of wrongdoing;

- It would permit employees to make disclosures without reprisal to:
  - The employee's supervisor;
  - A designated officer within the administrative unit; or
  - The Provincial Ombudsman.

- Where there is an "imminent risk of a substantial and specific danger to the life, health or safety of persons, or to the environment" and there is no time to make a disclosure in the normal way, Bill 34 would permit disclosure to the public after having disclosed the wrongdoing to the appropriate law enforcement agency, or, in the case of a health-related matter, to the Chief Medical Officer of Health.

- Limitations on disclosure would be maintained for:
  - cabinet confidences protected by *The Freedom of Information and Protection of Privacy Act*;
  - information protected by solicitor-client privilege;
  - restrictions on public disclosure imposed under Federal or Provincial law; and
  - personal or confidential information.

- Bill 34 would assign responsibility to the Ombudsman to investigate disclosures about wrongdoing he or she receives.

- Bill 34 would prohibit the following reprisals against employees who make disclosures in accordance with the Act, who seek advice about a disclosure, or who cooperate with an investigation of wrongdoing:
    - Disciplinary measures;
    - Demotions;
    - Terminations of employment;
    - Measures that adversely affect employment or working conditions; or
    - A threat to impose any of the above.

- An employee who alleges that he or she has suffered a reprisal would be entitled to make a complaint to the Manitoba Labour Board, which would be empowered to order that specific measures be taken to rectify the situation.

Current Whistleblower Protection Measures for City Employees

There are currently a number of legal protections that may be applicable to a City employee who makes a disclosure about wrongdoing within the City structure. These include:

- The City of Winnipeg's Employee Code of Conduct. The Code permits anyone who believes that the Code of Conduct is being violated to file a complaint with a department head. (If the complaint is against a department head, the complaint may be filed with the CAO and if the complaint is against a statutory officer, the complaint may be filed with the Clerk of EPC.) The Code of Conduct protects a complainant who has complained in good faith about the violation of the Code of Conduct from reprisal, threat of reprisal or discipline as a result of filing the complaint.

- The City of Winnipeg's Fraud, Theft or Related Irregularities Directive. This administrative directive requires employees to report any suspected acts of fraud, theft, misappropriation or other irregularities to their Supervisors, Human Resource Managers and or their Departmental Controllers for investigation; and subsequent referral to the Chief of Human Resources to determine the appropriate course of action. (If the complaint is against one of these individuals, the employee will notify the next level in the organization). The Fraud, Theft or Related Irregularities Directive protects an individual who has reported, in good faith, a violation of the directive from reprisal, threat of reprisal or discipline as a result of reporting improprieties in the workplace. The directive supplements the Employee Code of Conduct.

- *The Ombudsman Act*. *The Ombudsman Act* permits the Provincial Ombudsman to investigate "any decision or recommendation made, including any recommendation made to a council, or any act done or omitted, relating to a matter of administration in or by any municipality or by any officer or employee of a municipality, whereby any person is or may be aggrieved." This power would authorize the Ombudsman to investigate complaints made by a "whistle-blower" who suffers a reprisal as a consequence of his or her actions. If a complaint is found to be valid, the Ombudsman can report this fact to City Council, the Legislature or the press.

- *The Criminal Code*. The *Criminal Code* was amended in September, 2004 to prohibit an employer from "taking a disciplinary measure against, demoting, terminating or otherwise adversely affect[ing] the employment" with the intention of discouraging the employee from or retaliating against the employee for providing information to law enforcement personnel concerning an offence that the employee believes has been or is being committed by the employer. Violation of this prohibition is punishable by up to five years in prison.

- *The Labour Relations Act*. *The Labour Relations Act* identifies an employer as engaging in an "unfair labour practice" if the employer refuses to employ, discharges from employment, refuses to continue to employ, or discriminates in regard to employment against, any person who has

    - made a complaint under Provincial or Federal legislation;
    - testified or may testify in a proceeding under Provincial or Federal legislation;
    - made, or may make, a disclosure that may be required of him in a proceeding under Provincial or Federal legislation
    - exercised or is exercising his rights under this or any Act of the Legislature or of Parliament.

- Collective Agreements. Besides these statutory protections, employees who are members of a union can grieve adverse employment actions and seek redress through mechanisms established in the collective agreement to which they are subject.

Financial Impact Statement

Date: September 26, 2006

Project Name: **First Year of Program** **2006**

Public Interest Disclosure (Whistleblower Protection) Act

	2006	2007	2008	2009	2010
Capital					
Capital Expenditures Required					
Less: Existing Budgeted Costs					
Additional Capital Budget Required	$ -	$ -	$ -	$ -	$ -
Funding Sources:					
Debt - Internal					
Debt - External					
Grants (Enter Description Here)					
Reserves, Equity, Surplus					
Other - Enter Description Here					
Total Funding	$ -	$ -	$ -	$ -	$ -
Total Additional Capital Budget Required	$ -				
Total Additional Debt Required	$ -				
Current Expenditures/Revenues					
Direct Costs					
Less: Incremental Revenue/Recovery					
Net Cost/(Benefit)	$ -	$ -	$ -	$ -	$ -
Less: Existing Budget Amounts					
Net Budget Adjustment Required	$ -	$ -	$ -	$ -	$ -

Additional Comments:

There are no financial implications related to the recommendations of this report.

(Original signed by R. Abeysekera)
Radhika Abeysekera
Manager of Finance & Administration
Corporate Services Dept.

IN PREPARING THIS REPORT THERE WAS:

Internal Consultation With and Concurrence By:

Acting Chief of Human Resources and Corporate Services

External Consultation With:

n/a

THIS REPORT SUBMITTED BY:

Department: Corporate Services
Division: Legal Services
Prepared by: Harold Dick
File No.