Agenda – Council – September 28, 2011

Report – Executive Policy Committee – September 21, 2011

Item No. 6 Winnipeg Police Service Regulation By-law Amendment – Police Officer Disciplinary Records

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On September 21, 2011, the Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and submits the following to Council:

1. That the amendments to the Winnipeg Police Service Regulation By-law No. 7610/2000 (Appendix A) be enacted, which will:

   A. Provide for formal expungement of police officer disciplinary records if 5 years have elapsed with no further infractions by the officer; and

   B. Require informal resolution of disciplinary offences to be considered before formal penalties are imposed.

2. That the Proper Officers of the City do all things necessary to implement the intent of the foregoing.

Report – Executive Policy Committee – September 21, 2011

DECISION MAKING HISTORY:

EXECUTIVE POLICY COMMITTEE RECOMMENDATION:

On September 21, 2011, the Executive Policy Committee concurred in the recommendation of the Winnipeg Public Service and submitted the matter to Council.

ADMINISTRATIVE REPORT

ISSUE: Proposed amendments to the *Winnipeg Police Service Regulation By-law* will clarify that police officer disciplinary records may be expunged if 5 years elapse with no further infraction by the officer and will also provide for consideration of informal resolution of disciplinary infractions

Critical Path: Executive Policy Committee - Council

AUTHORIZATION

Author	Department Head	CFO	COO
Patrol Sergeant T. Macyk	Chief K. McCaskill	n/a	D. Joshi, COO

RECOMMENDATIONS

1. That Council enact the proposed amendments to the *Winnipeg Police Service Regulation By-law* (draft by-law attached as Appendix A) which will
   - provide for formal expungement of police officer disciplinary records if 5 years have elapsed with no further infractions by the officer; and
   - require informal resolution of disciplinary offences to be considered before formal penalties are imposed.

2. That the proper officers of the City do all things necessary to implement the intent of the foregoing.

REASON FOR THE REPORT

Winnipeg Police Service Regulation By-law currently sets out that past disciplinary offences can no longer be used for subsequent disciplinary purposes if 5 years have elapsed without the WPS officer re-offending. However, the By-law does not currently provide for a formal expungement process for disciplinary offences. Clarifying when expungement occurs and what it implies is important, in part because the courts have held that expunged records do not need to be disclosed to the Crown as part of a police service's obligation under *McNeil*.

Unlike *The Law Enforcement Review Act*, the *Winnipeg Police Service Regulation By-law* does not contemplate the use of informal resolution, such as mediation, to resolve disciplinary situations.

IMPLICATIONS OF THE RECOMMENDATIONS

Expungement of disciplinary records

The *Winnipeg Police Service Regulation By-law* provides that, if no further penalties are imposed in the meantime, discipline imposed more than 5 years previously cannot be taken into account in imposing subsequent penalties. The only exception to this rule is that the member's entire service file can be taken into account when suspension or dismissal is being considered. The By-law also provides that commendations will be retained on a member's service record for a 5 year period.

Unfortunately, the *Winnipeg Police Service Regulation By-law* does not currently specify a formal expungement process for past records of discipline imposed under the By-law. This is out of step with *The Law Enforcement Review Act* as well as provincial laws in British Columbia, Alberta, Saskatchewan, Ontario, Prince Edward Island and Nova Scotia (see Appendix B for more detail).

The result is that it is not entirely clear when, by whom, and for what purposes records of internal WPS discipline can be accessed and used.

This lack of clarity concerning expungement of service records has become especially problematic since the Supreme Court of Canada in 2009 required the disclosure of relevant police disciplinary records to the Crown and, eventually, to the accused person in criminal trials. Since the Supreme Court ruling in the case of *R.* v. *McNeil* (2009), two Alberta Queen's Bench judges (*R.* v. *Perreault* (2010), 4 W.W.R. 502 and *R.* v. *Steele* (2010), 24 Alta. L.R. (5th) 22) have concluded that the *McNeil* obligation is met if unexpunged disciplinary records are disclosed to the Crown. However, both ruled that expunged records are not required to be disclosed under *McNeil*. Although these judgments are not binding in Manitoba, they are persuasive as they represent the highest courts in Canada to have pronounced on the relationship between expunged disciplinary records and *McNeil* disclosure.

Most police forces across the country are following this approach as their policy (see Appendix B). That is, they are not disclosing any expunged disciplinary records under *McNeil*.

Clarity on the question of expungement under Winnipeg's By-law would give the WPS a firmer foundation in following the same policy. In short, if the proposed by-law amendments are enacted, the Winnipeg Police Service will be better positioned to adopt a policy similar to that of many other police forces that will provide disclosure of relevant unexpunged disciplinary records but will not provide first party disclosure of expunged disciplinary records, as per the requirements of *McNeil*.

The attached proposed amending by-law would clarify that an officer is entitled to formal expungement of his or her service record upon application if 5 years have elapsed without a further penalty being imposed. The amendments would further clarify that expungement involves the removal from the file and the secure storage of a record of discipline, any reference to the discipline, the documents supporting that discipline, and any commendations that preceded the discipline. It also specifies that these documents and the fact of the previous discipline may not be used for any disciplinary proceedings in the future. Indeed, it provides that these documents cannot be used for any other purpose.

<u>Consideration of informal resolution prior to imposition of penalties</u>

The proposed amending By-law would also add a provision to the *Winnipeg Police Service Regulations By-law* that would require that, before imposing a penalty for a disciplinary matter, consideration should be given to the possibility that informal resolution of the incident, including mediation, may be appropriate. Such a provision currently exists in *The Law Enforcement Review Act* but does not exist in the By-law. Accordingly, complaints about an officer are currently required to be formally resolved even when an informal resolution would make more sense.

HISTORY

The *Winnipeg Police Service Regulation By-law* was enacted in 2000. It provides that one of the following penalties can be imposed for a service default:

a. admonition
b. written reprimand,
c. loss of weekly leave,
By-law No. 7610/2000 21
d. a fine,
e. probation for a specified term,
f. reduction in rank, classification and/or pay but retention of all seniority and pension rights previously held by the Member,
g. ineligibility for promotion for a period of up to two (2) years,
h. suspension without pay for a specified period of time,
i. permitting the Member to resign forthwith, or
j. dismissal

Financial Impact Statement

Date: July 25, 2011

Project Name: Retention Policy

First Year of Program **2011**

	2011	2012	2013	2014	2015
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: No financial impact. Some savings may occur as less storage space will be required but there are other space requirements in the service that will utilize this space.

original signed by Ron Smolik July 25, 2011
Controller/Manager of Finance

CONSULTATION

In preparing this Report there was consultation with:

Legal Services, City of Winnipeg
D. Kroeker Winnipeg City Archives & Records Control
Sergeant C. Murdock, Vancouver Police Department
Inspector M. Cumberworth P.S.S. Vancouver Police Department
D. Vinje P.S.S. Calgary Police Service
Inspector D. Haye P.S. D. Saskatoon Police Service
N. Roberston Q.C. Regina Police Service
Sergeant M. Senchyshak Hamilton Police Service
Sergeant R. Gray Toronto Police Service
J. Hynes Halifax Regional Police

SUBMITTED BY

Department:	Winnipeg Police Service
Divisions:	30
Prepared by:	P/Sgt. Terry Macyk
Date:	September 1, 2011
File No.	

APPENDIX A

THE CITY OF WINNIPEG

BY-LAW NO.

A By-law of THE CITY OF WINNIPEG to amend Schedule A of the Winnipeg Police Service Regulations By-law.

THE CITY OF WINNIPEG, in Council assembled, enacts as follows:

Schedule A of the Winnipeg Police Service Regulations By-law No. 7610/2000 amended

1 *Schedule A of the Winnipeg Police Service Regulations By-law No. 7610/2000 is amended by this By-law.*

Section 19 amended

2(1) *Subsection 19.01 is renumbered as subsection 19.02, and subsection 19.02 is renumbered as subsection 19.03.*

2(2) *The following is added immediately prior to subsection 19.02:*

19.01 Before imposing a penalty for a Minor Service Default, consideration must be given as to whether the matter could appropriately be resolved informally, including by mediation. If the matter is resolved informally, no penalty may be imposed under subsection 19.02 and no record of the informal resolution may be entered upon a Member's Service Record.

Section 23 amended

3 *Subsection 23.01 is renumbered as subsection 23.02 and the following is added immediately prior to it:*

23.01 Before imposing a penalty for a Minor Service Default or a Service Default, consideration must be given as to whether the matter could appropriately be resolved informally, including by mediation. If the matter is resolved informally, no penalty may be imposed under subsection 23.02 and no record of the informal resolution may be entered upon a Member's Service Record.

Section 24 replaced

4 *Section 24 is replaced with the following:*

24. EXPUNGEMENT OF MEMBER'S SERVICE RECORD

24.01 After five years have elapsed since the most recent date that a penalty has been imposed under sections 19 or 21 without any further impositions of discipline under these

Regulations, upon application by a Member, the Chief must expunge from the Member's Service Record any records of Minor Service Defaults and Service Defaults.

24.02 Where one or more Minor Service Defaults or Service Defaults have been expunged from a Member's Service Record:

(a) the following records must be removed from the Member's Service Record and stored in a secure location:

(i) any record of expunged Minor Service Defaults or Service Defaults,
(ii) any reference to expunged Minor Service Defaults or Service Defaults,
(iii) any supporting documents associated with expunged Minor Service Defaults or Service Defaults, and
(iv) any Commendations awarded prior to the date of the imposition of a penalty for the most recent expunged Minor Service Default or Service Default.

(b) the expunged records set out in clause (a) must not be referred to in any subsequent proceeding under these Regulations and may not be used for any other purpose.

DONE AND PASSED, this day of , 2011.

_____
Mayor

_____
City Clerk

Approved as to content:

_____
Chief of the Winnipeg Police Service

Approved as to form:

_____
For Director of Legal Services/City Solicitor

APPENDIX B

RESEARCH:

Research was conducted on various Canadian police agencies to determine:
(1) Length of their Records Retention Period and expungement Process (if applicable)
(2) Who governs the Records Retention Period and expungement Process

British Columbia

Vancouver (1) 5 year records expungement period where no other complaint has been made.
(2) *B.C. Police Act* [RSBC 1996] CHAPTER 367 at paragraph 180(8).

Alberta

Edmonton
Calgary (1) period of 5 years has elapsed from the date that punishment is imposed under sec. 5 if during that time no other entries have been made be removed from the police officer's record and destroyed or 3 years has elapsed from the date that punishment is imposed under sec. 19(1).
(2) *Alberta Police Act* Revised Statutes of Alberta 2000 Chapter P-17, sec. 45(4)**, and** Alberta Regulation 356/1990 with amendments up to and including Alberta Regulation 136/2008 at sec. 22.

Saskatchewan

Saskatoon
Regina (1) Major offences are expunged after 5 years and minor offences are expunged after 2 years, unless there is another intervening disciplinary matter.
(2) *Saskatchewan Municipal Police Discipline Regulations*, 1991, R.R.S. c. P-15.01 Reg. 4 at paragraph 27, passed pursuant to section of 95 of the *Saskatchewan Police Act*, 1990, S.S. 1990-91, c. P-15.0

Ontario

Hamilton
Toronto (1) Informal Disposition/Discipline records will be retained in officer's personnel file for a period of 2 discipline-free years and then purged. Formal records will be held in officer's personnel file indefinitely. Officer may apply to the Chief of Police to have the disciplinary record purged after 5 discipline-free years.
(2) Ontario *Police Services Act*, R.S.O. 1990, c. P.15 at paragraphs 66(12); 69(14); 76(13) and 77(10).

Nova Scotia

Halifax (1) When disciplinary default deemed expunged if a penalty has been imposed on a member for a disciplinary default, and if there is no entry in the member's service record of a further disciplinary default after the date the penalty was imposed, the disciplinary

default is deemed to be expunged from the member's record in the following applicable circumstance:

(a) if the penalty was a reduction in rank, when 3 years have expired since the date of the reduction in rank;
(b) if the penalty was a fine or a suspension, when 2 years have expired from the date the fine was paid or the suspension completed;
(c) if the penalty was a period of close supervision, when 2 years have expired since the completion of the period of close supervision;
(d) if the penalty was an order to undergo counseling, treatment or training, when 1 year has expired from the completion of the counseling, treatment or training;
(e) if the penalty was a reprimand, when 1 year has expired since the date of reprimand;
(f) if the penalty was any order made by the disciplinary authority other than as specified in clauses (a) to (e), when 1 year has expired from the date the order was made, fulfilled or completed.

(2) *Nova Scotia Police Act* Police Regulations made under subsection 97(1) of the *Police Act* at sec. 58.

PEI

(1) If an entry is made in the record of discipline of a police officer or security police officer concerning the imposition on the officer of a disciplinary or corrective measure referred to in section 17, the discipline authority shall cause the entry to be removed from the record of discipline two years after it was made.
Once expunged, the entry and the information pertaining to the entry shall not be used against the police officer or security police officer in any manner or form in any matter or proceeding.
The record of discipline of a police officer or security police officer of a police agency shall be maintained by the police agency in a secure location separate from the personnel file of the police officer or security police officer for as long as the police agency determines necessary.
(2) *Code of Professional Conduct and Discipline Regulations,* EC142/10 at paragraph 19