New Fire Paramedic Stations Construction Project

Implementation of Audit Recommendations Report

2021 – Quarter 1

For more information visit: Winnipeg.ca/audit

History – New Fire Paramedic Stations Construction Project

September 24, 2012:
Upon receiving a recommendation from the City Auditor, Mayor Sam Katz announced a comprehensive review of the processes followed for constructing four new Fire Paramedic Stations will be performed.

November 15, 2012:
An award of contract was made to Ernst & Young to conduct an independent review of the Project and processes followed to construct the four new Fire Paramedic Stations for the City of Winnipeg.

October 21, 2013:
Ernst & Young reported to Audit Committee and Executive Policy Committee (EPC) and made 14 recommendations. On October 22, 2013, City Council adopted these recommendations and requested a quarterly update on the status of recommendations.

2013/NewFireParamedicStationsConstructionProject.pdf

On January 22, 2014:
The Public Service provided the first status report on the implementation of recommendations from the *Report on the New Fire Paramedic Stations Construction Project* to EPC.

January 7, 2015:
EPC requested the City Auditor provide a written report to its January 21, 2015 meeting, detailing the status of recommendations contained in the audits on the *New Fire Paramedic Stations Construction Project*, the *Winnipeg Police Service Headquarters Construction Project* and the *Real Estate Management Review*, which recommendations have been implemented and which are yet to be implemented.

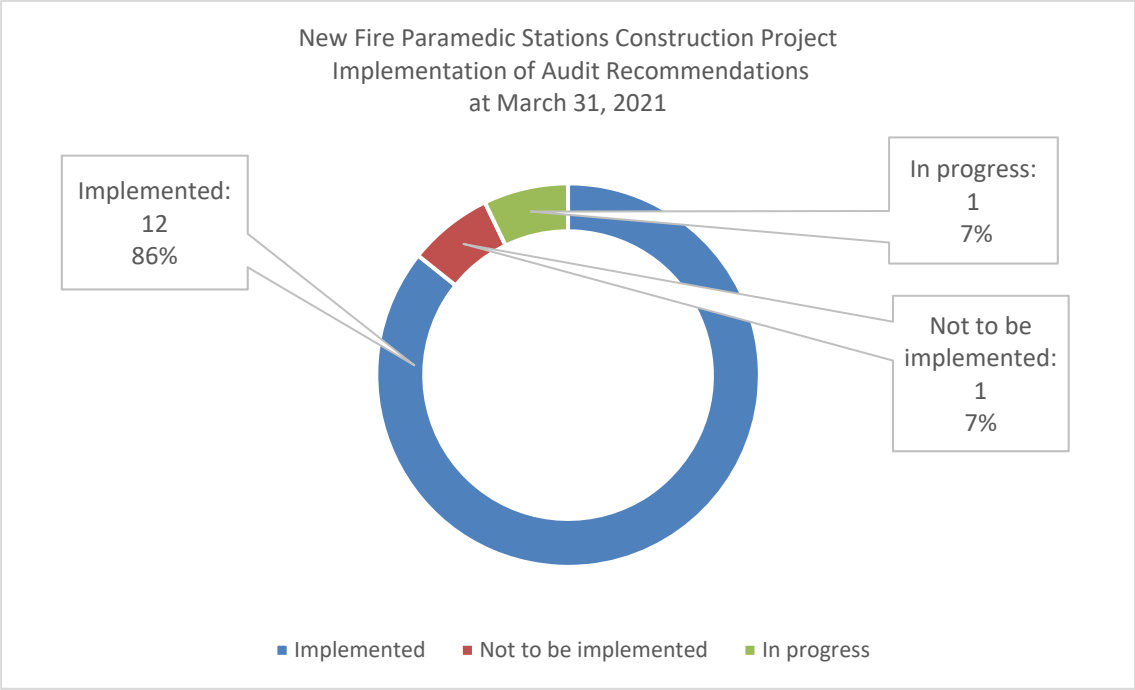
View all previous quarterly reports at: winnipeg.ca/audit/reports-Quarterly Reports

April 2021: Quarterly Report on the Implementation of Audit Recommendations for the period ending March 31, 2021

Implementation of Audit Recommendations Status

Once an Audit is complete, the next step is implementation of the recommendations. The Audit Department provides a list of the audit recommendations to the Public Service Director of the department that was audited. The Public Service prepares an action plan and target for completion date. The implementation of the audit recommendations is the responsibility of the Public Service.

Status updates are provided to the Audit Department on a quarterly basis; after presentation to Council these are posted at: winnipeg.ca/audit/-Quarterly Reports. An explanation is provided for any recommendations that will not be implemented; a targeted completion date is noted for implementation in progress. Documentation supporting implementation is reviewed by the Audit Department for confirmation.



Implementation of Recommendations in Progress Status– 2021 Quarter 1 Updates

No.	Recommendation	Update – 2021 Qtr 1
9	Legal Services should establish clear policies regarding: ► Land acquisition agreements; ► Construction contracts related to land acquisition; and ► Authorities to be sought for LOI or similar documents	Work is continuing on the development of policies as part of a larger review of processes and procedures involving property and development matters, as well as operational changes being considered as part of the review of Legal Services internal procedures. Timing is somewhat dependent on the progress made in these projects. Target date for Implementation of Recommendation: 2021

Recommendation that is not to be implemented

No.	Recommendation	Update – 2021 Qtr 1
10	We do not believe that Legal Services acted in a manner to sufficiently protect the interests of the City. Additionally, we believe at least part of this was caused by the reporting structure at the City. The Legal Services "gatekeeper" function would be enhanced if Legal Services reported to City Council rather than the City Administration, via the CAO. This is the structure in place for at least one major city in Canada.	The City Auditor has reviewed the memo: Implementation of Ernst & Young Firehall Audit Report Recommendation #10 – City Solicitor Reporting to City Council dated 21.03.04) submitted by the Director of Legal Services-City Solicitor in reference to Audit Recommendation #10. (Appendix 1) There are two assertations in Audit report recommendation #10 noted as follows: 1." We do not believe that Legal Services acted in a manner to sufficiently protect the interests of the City." The Director of Legal Services -City Solicitor has identified a number of standard's provisions included within in the Manitoba Law Society of Manitoba Code of Professional Conduct. These provisions guide the conduct of legal professionals and provide an avenue for an individual to pursue if they believe a lawyer has not met those standards. 2."The Legal Services "gatekeeper" function would be enhanced if Legal Services reported to City Council rather than the City Administration, via the CAO." The Director of Legal Services -City Solicitor highlights potential challenges/barriers to altering the reporting structure of the Legal Services Department. The conclusion of the Director of Legal Services - City Solicitor is that no further action to implement the recommendation is required. The City Auditor did not author the Audit Report recommendation and the current Director of Legal Services City Solicitor was not employed by the City of Winnipeg at the time of the audit. As such, some degree of independence is afforded with the current review. Based on the information presented by the Director of Legal Services City Solicitor, the City Auditor is in agreement that no further action on the recommendation is required.

Recommendations implemented in 2016

No.	Recommendation	Implemented
4	The competitive nature of the original RFP was considerably limited by the City's desire to try and identify properties to be used for construction of new stations. We recommend that the City, via PP&D, conduct a detailed assessment of City owned properties potentially available and/or conduct land only acquisitions in advance of similar future RFP's. The use of design/build or build only RFP's rather than ones that include the provision of land will create a more competitive environment that should help ensure good value to the City.	2016 Qtr 4
8	PP&D needs to develop, for Council approval, a policy regarding land exchange transactions that will speak to the timing and basis under which land valuations are to be done and the means under which any value gaps determined are to be dealt with.	2016 Qtr 4
11	Prior to issuing building permits on City projects, PP&D should be required to obtain from MM signed statements that appropriately awarded contracts are in place and from Legal Services that all ownership rights in the subject property are unconditionally held by the City.	2016 Qtr 4
12	We recommend that City policies regarding real estate transactions, including the declaration of surplus properties, be clarified as to identify at what stage of a proposed transaction Council Approval is to be sought.	2016 Qtr 4
7	Clear policies must be established which document expected disclosure to Council, when transactions have not occurred in a manner that is established by City Policies. For example, disclosure to Council should be required when the following situations occur: the commencement of construction in advance of contract award, splitting of contracts due to lack of approved funding, real estate transactions not having been led by PP&D, and Legal agreements not having been approved by Legal Services.	2016 Qtr 1

Recommendations implemented in 2015

1 3	Corporate Finance should determine a standardized protocol for the challenging of capital budget submissions and project reporting.	2015 Qtr 3
	The City needs to examine the basis under which they allow single source contracting. We believe that Council needs to consider at what threshold single source negotiation decisions are brought to their attention. Council also should consider the contract award delegation limits as it relates to single source contracts.	2015 Qtr 1
14	Corporate Finance should develop a means under which non cash transactions, such as a land exchange, are captured so that the true costs of projects can be reported against the approved capital budget.	2015 Qtr 1

Recommendations implemented in 2014

No.	Recommendation	Implemented
2	Currently City procurement policies allow for proponents to propose substitutes for City RFP specifications during the procurement process. We concur that proponents should be encouraged to offer suggestions or substitutes to be considered by the City. We however, suggest that the City change its current approach of not informing other proponents during the bidding process, of the City's acceptance of a substitute. A truly open and transparent process requires such.	2014 Qtr 4

3	Shindico was provided information not available to other proponents in respect to both RFP's. Prior to issuance of a RFP, MM should obtain the details of all discussions that have taken place with proponents from the user departments in order to develop a strategy to inform all proponents of information that may not be known and not disclosed in the RFP. Such action is required to ensure all proponents are bidding from a level playing field.	2014 Qtr 4
5	Project management of real estate construction projects and the lead in all real estate transactions should reside with PP&D. If capacity constraints exist, a plan to address such needs should be developed.	2014 Qtr 4
6	We are concerned that certain policies such as the establishment of a Major Capital Steering Committee and delegations established by Council, including the authority to enter into contracts above $10 million can be by passed if a project is split into a number of smaller contracts. Council should make a clear statement to the Public Service in respect to their expectations in this regard.	2014 Qtr 4

Additional Recommendations Adopted by Council

No.	Recommendation	Status	
15	That the report be revisited by Ernst and Young (EY) (Auditor) and all members of Council be interviewed and the results incorporated into the report.	Complete	EY reported to Audit Committee and EPC on July 2, 2014. Report was tabled in Council on July 9, 2014.
16	Whereas that the report recommendations affect at least four departments throughout the City of Winnipeg, that regular, quarterly reports cards be provided to Council about the implementation of the recommendations including regular Council seminars over the next year.	On-going	The City Auditor has incorporated quarterly reporting as part of the QRC process.

Appendix 1:

Winnipeg

Legal Services Department • Services Juridiques

INTER-OFFICE MEMORANDUM

TO:	**Bryan Mansky** City Auditor Audit Department 3rd Floor – 185 King Street	**FROM:**	**Doug Brown** City Solicitor Legal Services Department 3rd Floor – 185 King Street
		DATE:	March 4, 2021

RE: Implementation of Ernst & Young Firehall Audit Report Recommendation #10 – City Solicitor Reporting to City Council

Executive Summary

As Director of Legal Services, I reviewed the Ernst & Young report dated October 7, 2013 entitled "Confidential Report to Winnipeg City Council Re: New Fire Paramedic Stations Construction Project" (the "E&Y Report"). The report made 14 recommendations including the following:

"10. We do not believe that Legal Services acted in a manner to sufficiently protect the interests of the City. Additionally, we

believe at least part of this was caused by the reporting structure at the City. The Legal Services "gatekeeper" function would be enhanced if Legal Services reported to City Council rather than the City Administration, via the CAO. This is the structure for at least one major city in Canada."

On October 23, 2013 Council adopted all 14 recommendations contained in the E&Y Report.

In reviewing the report and the basis for the recommendation, it is clear there are gaps in the analysis, as well as subsequent changes in legislation and Administrative Standards that have now addressed the objective that was intended to be achieved by the recommendation. The purpose and intent of the recommendation has been effectively implemented without the need to make changes to the Legal Services reporting structure.

Of additional concern is the E&Y report provides no operational cost-benefit analysis to examine the significant consequences (both financial and operational) that would result from a change in Legal Services reporting structure. Without such an analysis, there is no basis to conclude that the change will enhance the gatekeeper function. Without a proper analysis, there is also a serious risk that making the changes required to implement the recommendation will result in operational inefficiencies and additional costs to the City. It is important to note the E&Y retainer did not include this critical work. The recommendation to make the structural change was essentially an add-on that is not necessary to implement the core recommendation to enhance the gatekeeper function of Legal Services.

Reason For The Report

Recommendation #10 in the E&Y Report was intended to enhance the ability of Legal Services to perform a "gatekeeper" role in situations where there was evidence of irregularities and possibly misconduct. This recommendation has been implemented.

The portion of the recommendation referring to a change in the reporting structure of Legal Services directly to Council was essentially an add-on that is not required to implement the recommendation.

Implications of the Recommendations

If there is agreement with the conclusions in this report, Recommendation #10 can be considered completed and further steps to implement changes to the reporting structure of Legal Services are not required.

History/Discussion

The Role of Legal Services in the City of Winnipeg

Legal Services operates as a department of the Public Service within the administrative function of the City of Winnipeg. The Director of Legal Services is not a statutory officer under the City Charter. With respect to day to day operations, the Director reports to the Chief Administrative Officer. Resolutions passed by Council can require the Director to report to Council, a committee of Council or subgroup of Councillors in a variety of situations. Examples include seeking authorization to commence legal proceedings and specific budget requests.

Legal Services essentially operates as a law office supporting legal work required by the City. Legal work is done for the City generally and the various departments and agencies of the City, including legal support arising from the operations of Council. Legal Services does not provide services for legal matters involving individual Councillors, but rather provides legal services for Council as a whole.

Requests for legal services are generated by the City department, office or agency that determines legal assistance is required. A variety of City policies and procedures also require Legal Services to be consulted.

Lawyers employed by the City are required to be members of the Manitoba Law Society entitled to practice law in Manitoba. In addition, where there is specific legal expertise required that is not available within Legal Services, or when demands for services exceed the ability of Legal Services to meet the needs of the city, private practice lawyers are retained. These external private practice lawyers provide services and receive instructions from the relevant City department involved in the matter, under the oversight of the Director of Legal Services.

The client of Legal Services is the City itself, not exclusively any individual or department within the City. This is similar to the role of a General Counsel of a corporation who is required to act in the best interests of the corporation and not any one part of the corporate structure (being the shareholders, board of directors, president, etc.).

Professional Responsibilities

The professional responsibilities that a lawyer is required to meet already provide a “gatekeeper” mechanism to raise concerns in situations where there appears to have been irregularities and possible misconduct.

As professionals, lawyers are required to follow a set of professional standards established by the Law Society of Manitoba. These standards include a Code of Professional Conduct which has provisions which address the recommendation made in the E&Y Report.

In very general terms, professional standards require a lawyer to:

- Provide professional services in the interest of the corporation, even when instructions are received from an officer, agent or representative of the corporation;[1]
- Maintain confidentiality of communications made between lawyer and client which were made for the purpose of seeking or receiving legal advice;[2]
- Be honest and candid and inform the client of all information known to the lawyer that may affect the interests of the client. This includes consideration of the applicable facts, law and the experience of the lawyer.[3]

The Code of Professional Conduct also specifically addresses a situation where there is possible misconduct identified by a lawyer in an organization:[4]

> *"3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally must do the following, in addition to his or her obligations under rule 3.2-7 [Dishonesty, Fraud by Clients or Others]:*
>
> *(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;*
>
> *(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed wrongful conduct to be stopped, advise progressively the next highest persons or groups including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and*
>
> *(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7 [Withdrawal from Representation]."*

As a result, these professional obligations already require a lawyer in Legal Services to report irregularities to each level of the organization, including Council. This professional obligation is in place without the need to change the reporting structure of Legal Services.

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[1] 3.2-3 Code of Professional Conduct

[2] 3.3 Code of Profession Conduct

[3] 3.2-2 Code of Professional Conduct

[4] 3.2-8 Code of Professional Conduct

Challenges to changing the Reporting Structure of Legal Services

There are also barriers in the current system which effectively prevent changing the reporting structure to have Legal Services report to Council instead of the Chief Administrative Officer.

As set out above, the ability of a lawyer to effectively provide legal services requires a confidential relationship between the lawyer and client where all information the lawyer determines is required can be shared. The ability to provide effective legal representation requires a lawyer to provide opinions which set out a variety of options, as well as a full and frank discussion with respect to the potential benefits and risks of each option. Public disclosure of this information is not appropriate, and is potentially damaging to the interests of the City, both in the context of the negotiation of business arrangements with outside parties, as well as when the City is involved in litigation.

Council has established policies and practices to provide a high level of public transparency to debates and proceedings considered by Council, allowing all citizens the opportunity to see the work of Council and its committees and more actively engage in the process. In cases where sensitive information is to be considered, the In-Camera By-law[5] permits those discussions to be held in-camera by some committees of Council (not Council itself) in private.

These competing professional and policy objectives create a barrier to implementing the E&Y Report recommendation to have Legal Services report directly to Council:

- The ability to move a legal discussion in camera is not available to Council;
- The ability to move a legal discussion in camera requires a vote of the committee involved.

The current structure requires a lawyer in Legal Services to first make a request to a Committee to go in-camera in order to protect the solicitor-client privilege of that information. The Committee, without knowing what information is involved, must then decide whether to go in-camera to receive the information and any legal opinion associated with that information.

When a committee vote determines a matter will not be heard in-camera, the professional confidentiality obligations of a lawyer do not change; the lawyer is still required to maintain confidentiality and the privilege associated with legal advice. This can result in a lawyer being prevented from sharing information and legal advice.

The same restrictions are not involved when Legal Services lawyers provide legal advice to the Chief Administrative Officer and/or Directors of other

[5] 21/2011

City departments. This information can be provided confidentially in the context of the solicitor-client relationship and is therefore privileged.

Also, requests for legal services are made to Legal Services by individual departments, officers and agencies of the City. A change in the reporting structure directly to Council would create a disincentive to consult with Legal Services, particularly in situations where there has been an inadvertent error or mistake made. Although the receipt of proper legal advice in these situations can often limit or eliminate any liability of the City, there is a higher risk the individuals involved will choose not to consult with Legal Services if Legal Services is then required to report the information to Council before corrective actions can be taken. The risk of a department or individual attempting to resolve the situation alone would result in an increased risk of liability to the City.

An additional consideration is the responsibility of individual Councillors once confidential information is received. The Code of Conduct applicable to Councillors appropriately requires confidential information not to be disclosed. In other words, the ability of individual Councillors to publicly discuss and debate a particular matter would be limited if Legal Services is required to provide all confidential information directly to Council.

The E&Y Report recommendation was in part based on their understanding of the Legal Services function in at least one Canadian city. The City of Toronto appears to be the city that was the basis for this comment. However, this statement in the recommendation is not correct as the Legal Services department in the City of Toronto is part of the Public Service and does not report directly to Council. Former Mayor David Miller did take steps to provide for the reporting of potential irregularities by Legal Services directly to Toronto Council (instead of through the existing administrative structure), however these measures were only for that purpose and did not go as far as suggested in the E&Y Report.

Current Legislative and Administrative Standards

Changes in provincial legislation and Administrative Standards made after the E&Y Report have gone beyond addressing the E&Y Report recommendation by making the same “gatekeeper” function and protections available to all city employees:

- *The Whistleblower Protection Act* came into effect for City employees effective January 1, 2016. This Manitoba legislation protects employees who choose to bring forward information of irregularities and potential wrongdoing.

- Administrative Standard HR-008 *City of Winnipeg Fraud, Theft, Misappropriation or Related Irregularities* provides protection to employees who in good faith report any occurrences of fraud, theft, misappropriation or related irregularities. The standard also protects the reporting employee from retaliation once a report is made.

- Administrative Standard HR-017 Whistleblower & Public Interest Disclosure is intended to enhance accountability and transparency by providing all city employees with the tools needed to make a “whistleblower” complaint as permitted by The Whistleblower Protection Act.

The E&Y Report

The objectives of the E&Y Report are clearly set out in the report. It is clear the scope of work conducted did not include any form of cost-benefit analysis comparing the current reporting structure of Legal Services within the public service to the recommendation to have Legal Services report directly to Council. The recommendation was also based on an incorrect assumption the proposed reporting structure was already in use in another city. There was also no analysis of existing professional responsibilities of a lawyer to a client.

The purpose of the recommendation to enhance the gatekeeper function has been implemented through the legislative and Administrative Standard changes outlined above. In fact, the City has gone further than the recommendation to provide all public services employees with protections which allow all employees to perform a gatekeeper function.

Conclusion

The recommendation in the E&Y Report to enhance the gatekeeper function of Legal Services has been implemented. No further action is required.

Thank you,



Director of Legal Services – City Solicitor

DB/kar