City of Hamilton’s Whistleblower By-law

Questions and Answers

Q: Where can I access the Whistleblower By-law?
A: City By-laws are posted, under the year they were passed, on the external City of Hamilton website at City Departments >> Corporate Services >> Clerks >> By-laws. The Whistleblower By-law was passed on November 11, 2009 and can be found at: http://www.hamilton.ca/NR/rdonlyres/9FEF167C-018B-4A21-B13B-DA0F3EF67491/0/09227.pdf. It is also available on the City’s internal eNet, under Human Resources Policies.

Q: When is the By-law into effect?
A: The Whistleblower By-law was approved by City of Hamilton Mayor and Council on November 11, 2009 and went into effect six months after being passed, on May 11, 2010.

Q: Why does the City need a Whistleblower By-law?
A: The By-law protects employees who report serious wrongdoing from job-related reprisals, namely: dismissal, suspension, demotion, discipline, harassment; denial of a benefit of employment; and any other disadvantaging. The reprisal protection for employees is key to encouraging staff to report serious wrongdoing when they become aware of it. Accordingly, the By-law is intended to help uncover serious wrongdoing at the City, by bringing it to the attention of management, and to ensure it is addressed appropriately, including by means of an investigation where required.

Other regions and municipalities such as Waterloo, Toronto, York, and Windsor offer similar protection from job-related reprisals under a whistleblower policy or whistleblower provisions in their employee codes of conduct.

Q: Is the By-law intended to protect members of the public or employees who blow the whistle?
A: The By-law is intended to protect employee whistleblowers who, unlike members of the public, could be subject to job-related reprisals. Members of the public may continue to report wrongdoing to staff or members of Council as is currently the case.

Q: What is a serious wrongdoing?
A: A serious wrongdoing is one of the following acts or omissions committed by an employee or a member of Council:
   (a) a contravention of the Criminal Code, federal or provincial statute or regulation, or City By-law;
   (b) an act or omission that results or is likely to result in the misappropriation or misuse of City funds or assets;
   (c) a contravention of the City’s Code of Conduct for Employees that results or is likely to result in profit, payment or compensation to the employee(s);
   (d) an act or omission that creates or is likely to create a substantial and specific danger or harm to the life, health or safety of any person; or
   (e) an act or omission that creates or is likely to create a substantial and specific danger or harm to the environment; or
   (f) a reprisal.
Q: To whom can employees disclose serious wrongdoing?
A: Employees are to disclose serious wrongdoing to their supervisor/manager, the head of their Department (including the head’s designate), or the Director of Audit Services. This is one of the requirements to be met before an employee is entitled to reprisal protection. If the disclosure is made to the supervisor/manager or the head of the Department, then he/she must submit it immediately to the Director of Audit Services. The employee will be given written notice from the Director of Audit Services that his/her disclosure has been received. It is important that the process is accessible to all employees, there is an onus on the supervisor/manager to forward any received whistleblower complaints to the Director of Audit Services.

Q: What is the protection against reprisal?
A: The By-law prohibits any employee or a member of Council from dismissing, suspending, demoting, disciplining, harassing, denying a benefit of employment or otherwise disadvantaging an employee, or threatening any of these things, when an employee has a made a disclosure of serious wrongdoing that, as determined by the Director of Audit Services, is a qualifying disclosure.

In addition, the By-law obligates all employees or members of Council with supervisory or management responsibilities to ensure that an employee is not subject to reprisal and that employees under their direction are made aware of the By-law.

Q: What is the role of the Director of Audit Services after he/she receives disclosure of serious wrongdoing?
A: Once the Director of Audit Services receives a disclosure of serious wrongdoing he/she determines (1) whether or not it is a qualifying disclosure and (2) whether or not it is appropriate to undertake an investigation or alternative action.

(1) In making his/her determination as to whether or not it is qualifying disclosure, the Director of Audit Services considers if the disclosure meets following requirements:

(a) the employee identifies himself/herself and his/her position with City or his/her work title;
(b) the employee has reasonable grounds to believe there has been or is about to occur serious wrongdoing by one or more employees or members of Council;
(c) the employee makes the disclosure in good faith which means not trivially, frivolously or for a vexatious purpose; and
(d) the employee makes the disclosure to his/her supervisor/manager, the head of his/her Department (including the head’s designate) or to the Director of Audit Services.

If the disclosure is a qualifying disclosure, then the employee is protected from reprisal.

(2) In making his/her determination as to whether or not it is appropriate to undertake an investigation or alternative action, the Director of Audit Services must consider if the length of time that has elapsed since the serious wrongdoing occurred is such that an investigation or alternative action would serve no useful purpose. The Director of Audit Services - in making his/her determination, and, subsequently, in the course of any investigation or alternative action - must also consider other possible investigations or alternative actions, such as those which have been or may be undertaken by the police, the Integrity Commissioner or supervisory/management staff, and their effect, if any, on an investigation or alternative action under the By-law.

When the Director of Audit Services decides an investigation is necessary, he/she may appoint another employee to conduct it or, in consultation with the City Manager, an outside individual or
Upon completion of an investigation, the Director of Audit Services decides whether or not a report is necessary and, if it is, who should receive it.

Q: If an employee reports a wrongdoing will his or her identity remain confidential?
A: In order to be a qualifying disclosure, the employee must provide his/her name, position and work title. This information will be treated as confidential whenever possible. However, it is within the Director of Audit Services' authority to disclose the information at any time when it is necessary to protect the City’s interests and to avoid or limit harm to the City, the public or the employee. In addition, all relevant access to information and protection of privacy legislation applies.

Q: Are there other requirements in the By-law?
A: There are other requirements that apply to staff and/or members of Council:
- The By-law requires all persons, including employees or members of Council, to co-operate with any investigations or alternative actions and not to obstruct the Director of Audit Services or his/her delegate in carrying out their responsibilities under the By-law. Failure to comply may result in discipline, up to and including dismissal for an employee or a complaint, inquiry and penalty under the Integrity Commissioner By-law for a member of Council.
- No person, including an employee or member of Council, who is advised of an investigation under the By-law, is to destroy, conceal, mutilate, falsify or otherwise alter a relevant document or thing either themselves or though another person.

Q: Is an employee protected by the By-law if he/she does not follow the procedure outlined in the By-Law to report a serious wrongdoing? For instance, if the employee makes a disclosure directly to the media, is he/she protected from a reprisal?

A: An employee is protected from reprisal only if he/she satisfies the requirements with respect to a qualifying disclosure as determined by the Director of Audit Services. Specifically, this means that the employee must: identify his/her name and position with the City; have reasonable grounds for believing there has been or is about to occur a serious wrongdoing by one or more employees or members of Council; make the disclosure in good faith; and, make the disclosure to one of his/her supervisor/manager, the head of his/her Department (including the head's designate), or the Director of Audit Services.

An employee could disclose a serious wrongdoing to the media and also disclose it to the Director of Audit Services and, depending on the circumstances, be protected from reprisal. In making such a disclosure to the media, the employee would continue to be subject to applicable policies (such as the Code of Conduct for Employees with respect to confidentiality) and statutes (such as the Municipal Freedom of Information and Protection of Privacy Act and the Personal Health Information Protection Act) and any consequences resulting from breaching such policies and statutes.

Q: What if the wrongdoing involves the employee’s supervisor/manager, the head of his/her Department or the Director of Audit Services?
A: Supervisors/managers and heads of departments only submit a disclosure to the Director of Audit Services and do not have any further role under the By-law, such as determining whether or not it is a qualifying disclosure. The Director of Audit Services’ obligation to send a written notice of his/her receipt of a disclosure to the employee ensures that this submission occurs. The Director of Audit Services must declare any conflict of interest to the City Manager who will assign another individual to carry out his/her responsibilities under the By-law.
Q: What limits are there on the application of the By-law?
A: The By-law recognizes and does not change the fact that other laws and policies may apply depending on the circumstances. Nothing in the By-law limits the responsibilities of employees to carry out their job duties, including responsibilities to make reports or take action with respect to wrongdoing. Correspondingly, it does not limit the actions which may be taken by the City as a consequence of employees not carrying out their job duties. Access to information and protection of privacy legislation continues to apply, including the City’s accountability and transparency responsibilities under the Municipal Act, 2001.

Q: Does the Whistleblower By-law apply to Council members, and if not why?
A: The proposed By-law does not provide for disclosures of serious wrongdoing made by Council members, nor does it give Council members protection from reprisal.

The collective role of Council is set out in s. 224 of the Municipal Act, 2001 and includes representing the public, considering the well-being and interests of the municipality, ensuring the accountability and transparency of the operations of the municipality and maintaining the financial integrity of the municipality. Individually, members of Council must act in good faith, carrying out their duties in the public interest, an obligation which is set out in detail in the Council Code of Conduct. Accordingly, provision has already been made for a Council member's responsibility to address wrongdoing. Further, as elected officials, members of Council are not subject to reprisal as employees may be. Reprimand or suspension of pay can only be imposed by the Integrity Commissioner acting in accordance with the Integrity Commissioner By-law and dismissal, only for the violation of certain statutes or by the voters at election time.

The proposed By-law does provide for disclosures of serious wrongdoing made by employees about Council members. This ensures that all operations of the municipality are included. The By-law recognizes that such disclosures should be referred to the Integrity Commissioner for possible investigation under the Integrity Commissioner By-law, without precluding investigation or alternative action under the By-law, for example to protect the City's funds or assets.

Q: Isn’t there already protection for whistleblowers?
A: Yes. Provincial law provides whistle blowing protection for several types of disclosure including reports concerning occupational health and safety and environmental wrongdoing. The Criminal Code makes it an offence to carry out a reprisal because an employee reports breaches of federal or provincial law to enforcement authorities, or for threatening a reprisal to prevent employees from making such a report. The By-law recognizes these protections.

Q: What are the consequences for an employee who is found to have committed a serious wrongdoing following an investigation?
A: An employee who is found to have committed a serious wrongdoing may be subject to disciplinary action, up to and including termination of employment. An employee who is found to be guilty of theft or fraud is likely to be terminated.

Q: Will an employee under investigation be given written notice of the essential particulars of the allegations after the investigation has concluded but before any disciplinary action is taken? Will he or she be given an opportunity to respond?
A: The employee under investigation (e.g. accused of the serious wrongdoing) will be given an opportunity to respond as part of the investigation process for a serious wrongdoing. If a decision is made following the investigation to take disciplinary action, the documented details and evidence
contained in the investigation report will not be shared with the employee. This is to protect the City if the accused employee decides to take legal action.

Q: What occurs for an employee reporting or complaining that he or she believes a reprisal has occurred? To whom will this be reported? Who will do the investigation?
A: A reprisal is defined as retaliatory measures taken against an employee because the employee has made a qualifying disclosure. A reprisal is a serious wrongdoing and may be reported to the employee’s supervisor or manager; the head of his/her Department (including designate); or the Director of Audit Services. As with any report of serious wrongdoing, it is up to the Director of Audit Services to decide whether or not it is appropriate to undertake an investigation or alternative action with respect to a reprisal. An investigation may be conducted by the Director of Audit Services, another employee or an outside individual or entity appointed by the Director of Audit Services. To be protected from further retaliatory measures for reporting a reprisal, an employee must meet the requirements of the By-law’s section 6, including making the report in good faith. If the report of a reprisal is not made in good faith, the employee may be disciplined, up to and including dismissal.

Q: Is there a time limit to reporting a wrongdoing?
A: There is no time limit outlined in the By-law for reporting a serious wrongdoing; however, if a substantial length of time has gone by since the wrongdoing occurred, the Director of Audit Services may determine that an investigation or alternative action would serve no useful purpose.

Need help? Have Questions?
For further information, please call Aine Leadbetter at 905-546-2424 x 6667 in Human Resources at the City of Hamilton, or email at Aine.Leadbetter@hamilton.ca

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