



Corporate Report

NO: C010

COUNCIL DATE: June 12, 2006

COUNCIL-IN-COMMITTEE

TO: Mayor & Council DATE: June 6, 2006

FROM: City Solicitor
General Manager, Finance,
Technology & HR FILE: 0340-00 (WB)

SUBJECT: Serious Complaints Policy

RECOMMENDATION

That Council approve the Serious Complaints Policy ("the Policy") attached as Appendix "A" to this report.

INTENT

The implementation of the subject policy (also known as a "whistle-blower" policy) will bring the City into conformity with generally accepted corporate governance, accounting and auditing standards. This Policy is recommended by the City's auditors.

BACKGROUND

Complaints policies and procedures are designed to prohibit unlawful retaliation against employees who bring forward concerns and/or complaints about conduct that the employee reasonably believes violates the financial integrity of the City's finances, the Code of Conduct, questionable accounting, applicable government laws, rules and regulations, or in assisting in an investigation of these types of violations. Employees will be encouraged to discuss any suspected violations with their supervisor, the General Manager, Finance & Technology, General Manager, Human Resources or the City Solicitor. Employees will be informed that they will not be discharged, demoted, suspended, threatened, harassed or be discriminated against in the terms and conditions of employment or otherwise because of any lawful act done by an employee in the provision of information to superiors, or to appropriate government agencies, regarding conduct that the employee reasonably believes violates the Code of Conduct or any applicable governmental laws, rules and regulations, or in assisting in an investigation of these types of violations.

Although such whistle-blower policies are not mandatory for Canadian municipalities, they have been strongly recommended by the City's auditors to bring the City into conformity with private sector best practices. Mandatory whistle-blower laws in connection with financial irregularities began in the private sector with the enactment in

2002 of the *Sarbanes-Oxley Act* ("SOX") in the U.S. in response to the corporate scandals epitomized by the Enron debacle, in which publicly traded companies jeopardized the assets of shareholders by, among other things, permitting unchecked internal abuse of accounting procedures.

The SOX whistle-blower provisions (*Corporate and Criminal Fraud Accounting Act* of 2002.[2], Section 806) provides a cause of action to employees of public companies who allege that they were retaliated against for disclosing any conduct that the employee reasonably believes violates "any provision of federal law relating to fraud against shareholders".

Any employee who makes such disclosure to any supervisor or any other person working for the employer who has "authority to investigate, discover, or terminate misconduct" is protected. Also protected is disclosure of allegedly fraudulent conduct of a federal regulatory or law enforcement agency, a member of Congress, or any committee thereof.

Thus, SOX's whistler-blower provisions provide extremely broad protection to employees of public companies for internal complaints of allegedly fraudulent conduct.

In 2005, in the *Merk* decision, the Supreme Court of Canada endorsed the critical importance of laws protecting employees making good-faith disclosures of wrongdoing by their employers. Although the facts of the case were about an employee's disclosure of wrongdoing by her private sector employer, the Court's comments about the purpose of "whistleblower" legislation apply to public sector employees as well:

Whistleblower laws create an exception to the usual duty of loyalty owed by employees to their employer. When applied in government, of course, the purpose is to avoid the waste of public funds or other abuse of state-conferred privileges or authority. In relation to the private sector (as here), the purpose still has a public interest focus because it aims to prevent wrongdoing "that is or is likely to result in an offence." (It is the "offence" requirement that gives the whistleblower law a public aspect and filters out more general workplace complaints). The underlying idea is to recruit employees to assist the state in the suppression of unlawful conduct. This is done by providing employees with a measure of immunity against employer retaliation.

Canadian and U.S. regulators have established rules requiring public companies to establish procedures for: (a) the receipt, retention and treatment of complaints received by the company regarding accounting, internal accounting controls, or auditing matters; and (b) the confidential anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters. The Canadian Securities Administrators' Multilateral Instrument 52-110 requires an anonymous reporting procedure to be established.

At the Canadian federal level whistle-blower protection is an important part of the new *Federal Accountability Act* dealing with ethics and financial accountability in the federal public service. At the municipal level only the Yukon has enacted whistle-blower provisions for local government.

In British Columbia provincial whistle-blower legislation has been enacted only under the *Foresters Act* and *Personal Information Protection and Electronic Documents Act*. There are no general legislative whistle-blower provisions like the *Federal Accountability Act*. However, there is whistle-blower protection under the B.C. Government and Service Employees Union Master Agreement. The *Personal Information Protection and Electronic Documents Act* gives protection to employees who disclose contraventions or who refuse to contravene the *Privacy Act*. Under this legislation the employer is prohibited from dismissing, suspending, demoting, disciplining or harassing or generally disadvantaging any employee.

DISCUSSION

The attached Policy, which has been reviewed by the City's auditors, CUPE, Local 402 and IAFF, Local 1271 generally reflects standard private sector provisions for reporting and investigating complaints of financial, health and safety and Code of Conduct violations made by staff. Schedule "A" of the Policy lists examples of such complaints, which include:

- (a) illegal or unethical use of City funds, assets or corporate information, bribes, kickbacks or influence payments;
- (b) manipulating or destroying, except as otherwise permitted by the City's Records Retention Policy, accounting or audit related documents;
- (c) fraud or deliberate errors in connection with the preparation, audit or recording of the City's financial records;
- (d) non-compliance with the City's internal financial controls or misrepresentation or falsification of financial matters;
- (e) efforts to deceive internal or external accountants or auditors;
- (f) health, safety and environmental violations;
- (g) any violation of applicable laws and regulations; and
- (h) violations of the City's Code of Conduct.

Reporting of complaints is to be on a confidential basis and disclosed on a need to know basis as set out in Schedule "C" of the Policy.

Complaints may be referred to Designated Officers described in Schedule "B" of the Policy who will treat all disclosures in confidence. An employee may refer a complaint to the Chair of the Finance Committee if the employee is not satisfied that the complaint has been effectively addressed, after being raised internally with the Designated Officer, or if the complaint relates to the conduct of a Designated Officer.

Section 5 of the Policy provides protection for employees who have made "good-faith reports" of a complaint. However, the case law indicates that frivolous complaints, or those given maliciously, or for improper purposes may result in disciplinary action against the employee.

Schedule "E" of the Policy sets out the timing and procedures the City will follow regarding the manner of investigating complaints, monitoring the status of investigations and reporting to the Finance Committee.

Schedule "F" of the Policy outlines the documentation requirements for complaints. The retention of documents related to complaints and their availability to be inspected. The disclosure of any documentation will require prior approval of the City Solicitor to ensure that privilege and confidentiality is properly maintained.

Both CUPE, Local 402 and IAFF, Local 1271 have reviewed the Policy and support its adoption.

CONCLUSION

The adoption by Council of the new Policy will provide an appropriate complaint receipt and investigatory framework that provides protection for any employee who, in good-faith, reports a complaint. The Policy is consistent with the best corporate practices.

CRAIG MacFARLANE
City Solicitor

VIVIENNE WILKE
General Manager, Finance
Technology & HR

CM:mlg
Attach.

c.c. Acting City Manager

APPENDIX "A"

CITY OF SURREY

SERIOUS COMPLAINTS POLICY

1. Purpose of the Policy

Council has adopted various policies and by-laws that require employees to conduct themselves in a professional, ethical and honest way. The purpose of this policy is to provide a process for employees to report any conduct that is not consistent with City policies and by-laws without fear of retaliation or penalization.

Council is responsible for establishing policy for:

- (a) the receipt, retention and treatment of complaints received by the City of Surrey (the "City") regarding fraudulent and serious matters; and
- (b) the confidential, submission by employees of the City of concerns regarding questionable matters;

Council has adopted this Policy entitled " Serious Complaints Policy" (which, together with the attached Schedules "A - F", is collectively called the "Policy").

Such complaints and concerns are referred to as "Complaints" in this Policy. Examples of Complaints are set out in Schedule "A" to this Policy. Council has adopted this Policy to ensure that:

- (a) Complaints are received, investigated and retained on a confidential basis that is in compliance with all applicable laws; and
- (b) Retaliation against or penalization of employees (as defined below) for making a good-faith report of a Complaint is a serious matter and will be dealt with promptly (see Section 5 below).

2. Policy Oversight

Council has the responsibility of overseeing this Policy and compliance by all employees (as defined below). Council has delegated the day-to-day administration of this Policy to the City Solicitor, the General Manager, Finance & Technology, and the General Manager, Human Resources (the "Designated Officers"). Contact information for the Designated Officers is set out in Schedule "B" to this Policy.

3. Reporting of Complaints

All officers and employees of the City (who are referred to as the "Employees") are required to promptly report any Complaints.

Schedule "C" to this Policy sets out the procedures to be followed by the Employees to report Complaints. Complaints are to be reported to a Designated Officer. If the complainant feels that the Complaint was not adequately addressed by the Designated Officer, then they may report the complaint to the Chair of the Finance Committee.

4. Confidentiality

The City is fully committed to maintaining procedures for the confidential reporting of Complaints by Employees. All reports of Complaints will be treated on a confidential basis. Generally, a report of a Complaint will only be disclosed to those persons who have a need to know in order to properly carry out an investigation of such Complaint in accordance with the procedures referred to in Section 7 and Schedule "E" of this Policy.

5. Prohibition on Retaliation

Retaliation or other action taken against any Employee who, in good-faith, reports a Complaint will be not be tolerated and will be taken seriously. Anyone engaging in retaliatory conduct will be subject to disciplinary action by the City, which may include termination. Engaging in retaliatory conduct may be considered an offence under various Canadian laws.

6. Publicizing the Process for Reporting Complaints

Schedule "D" to this Policy sets out the procedures the City will follow to make known to the Employees the reporting process for Complaints and to communicate reminders of the process to the Employees.

7. Investigation of Complaints and Reporting Results

Schedule "E" to this Policy sets out the timing and procedures the City will follow regarding the manner of investigating Complaints, monitoring the status of investigations of Complaints and reporting to the Finance Committee.

8. Retention of Complaints Received and Investigations Conducted

Schedule "F" to this Policy sets out the procedures the City will follow regarding the retention of Complaints received, including the type of documentation to be retained in respect of each Complaint and its investigation and the timing and procedures for retaining such documentation.

9. Policy Review

This Policy and its effectiveness will be reviewed by Council at least once every three years, with recommendations regarding updates or amendments, if any. Amendments, if any, to the Policy will be made known in accordance with Schedule "D".

10. Inquires

Any questions with respect to the general application of this Policy should be made to the City Solicitor, the General Manager, Finance & Technology or the General Manager, Human Resources.

**SCHEDULE "A" TO THE CITY
SERIOUS COMPLAINTS POLICY**

EXAMPLES OF COMPLAINTS

The following are examples of, Complaints which should be reported pursuant to this Policy:

- (a) use of City funds or property for any illegal, improper or unethical purpose (for example, fraud, theft of corporate property or embezzling funds, misappropriating funds, assets or corporate information, bribes, kickbacks or influence payments or misdirecting funds to related parties);
- (b) manipulating any City accounting or audit-related records or documents (in any format, including electronic records such as emails) or destroying any City accounting or audit-related records or documents except as otherwise permitted or required by the City's Records Retention Policy;
- (c) fraud or deliberate error in the preparation, evaluation, review or audit of any of the City's financial statements;
- (d) fraud or deliberate error in the recording and maintaining of the City's financial records (for example, overstating expense reports, falsifying time sheets, preparing erroneous invoices, misstating inventory records or describing an expenditure for one purpose when, in fact, it is being made for something else);
- (e) deficiencies in or non-compliance with the City's internal accounting controls (for example, circumventing review and approval procedures);
- (f) misrepresentations or false statements to or by a senior officer or accountant regarding a matter contained in the City's financial records, financial reports or audit reports;
- (g) deviation from full and fair reporting of the City's financial condition, results of operations or cash flows;
- (h) any effort to mislead, deceive, manipulate, coerce or fraudulently influence any internal or external accountant or auditor in connection with the preparation, examination, audit or review of any financial statement or records of the City, or
- (i) Any action that contravenes City policies, by-laws, applicable government laws, rules or regulations, including but not limited to health and safety violations.

**SCHEDULE "B" TO THE CITY
SERIOUS COMPLAINTS POLICY**

CONTACT INFORMATION FOR THE DESIGNATED OFFICERS

Employees can reach the Designated Officers at the following contact information:

Vivienne Wilke
General Manager, Finance & Technology

Craig MacFarlane
City Solicitor

Tel: (604) 591-4817
Fax: (604) 591-3654
Email: VNWilke@surrey.ca
Address: City of Surrey
Finance & Technology
14245 – 56 Avenue
Surrey, BC V3X 3A2

Tel: (604) 591-4255
Fax: (604) 599-1613
Email: CMacFarlane@surrey.ca
Address: City of Surrey
Law Dept.
14245 – 56 Avenue
Surrey, BC V3X 3A2

Vivienne Wilke
Acting General Manager,
Human Resources

Tel: (604) 591-4846
Fax: (604) 591-4517
Email: VNWilke@surrey.ca
Address: City of Surrey
Human Resources
14245 – 56 Avenue
Surrey, BC V3X 3A2

Any updates to the contact information related to the above Designated Officers will be promptly communicated to staff through email.

**SCHEDULE "C" TO THE CITY
SERIOUS COMPLAINTS POLICY**

PROCEDURES FOR REPORTING COMPLAINTS

Employees may report Complaints by following the procedures set out below. The process is confidential.

- (a) An Employee wishing to report a Complaint using internal means may communicate the Complaint in writing to any of the Designated Officers, who will treat all disclosures in confidence and will involve only those individuals who need to be involved in order to investigate such Complaint.

- (b) An Employee may refer a Complaint to the Chair of the Finance Committee, if they believe that it has not been effectively addressed after being raised internally with the Designated Officers or if the Complaint relates to the conduct of a Designated Officer. An Employee wishing to refer a Complaint to the Chair of the Finance Committee shall do so in writing. The Complaint should be specified in detail in a letter, which should be delivered to the City Solicitor in a sealed envelope marked "Confidential – For the Chair of the Finance Committee". The City Solicitor will forward the sealed envelope to the Chair of the Finance Committee.

**SCHEDULE "D" TO THE CITY
SERIOUS COMPLAINS POLICY**

**PROCEDURES FOR PUBLIZING THE PROCESS
FOR REPORTING COMPLAINTS**

1. Publicizing the Process for Reporting Complaints

A copy of this Policy will be posted on the City's website. The City will also make known to Employees the process for reporting Complaints on a confidential basis on an ongoing basis. This information will make it clear that no Employee will be penalized for making a good-faith report of a Complaint, nor will the City tolerate retaliation against an Employee who makes a good-faith report of the Complaint.

2. Communicating Reminders of the Process

The City will also periodically (at least annually) communicate reminders to Employees of the process for reporting Complaints. This may be accomplished by electronic or other means, including, for example: email, written memos and City newsletters.

**SCHEDULE "E" TO THE CITY
SERIOUS COMPLAINTS POLICY**

**PROCEDURES FOR INVESTIGATING COMPLAINTS AND
REPORTING RESULTS**

1. Manner of Investigation

- (a) The Designated Officers will review and assess the seriousness of all Complaints promptly and determine, in consultation with others, if necessary, the manner in which Complaints will be investigated, using internal and/or external resources, and will determine who will lead such investigation. In most instances, investigation of a Complaint under this Policy will be led by the City Solicitor, the General Manager, Finance & Technology or the General Manager, Human Resources. Such person will report directly to all the Designated Officers. If upon initial assessment of the Complaint it appears that the Complaint could materially affect the financial statements of the City or the integrity of the City's system of internal controls, the Designated Officers will advise Council. It is anticipated that in the ordinary course, the Designated Officers will complete their assessment of each Complaint and assign the investigation of such Complaint generally within ten business days of receiving such Complaint.
- (b) Persons assigned the investigation of Complaints will:
 - (i) treat each report of a Complaint, as well as its investigation and disposition, on a confidential basis in accordance with the Policy;
 - (ii) involve in each investigation only those persons who need to be involved in order to properly carry out such investigation; and
 - (iii) conduct each investigation in a timely manner.

2. Monitoring the Status of the Investigation

- (a) The investigation of all Complaints will be monitored on an ongoing basis by the Designated Officers.
- (b) Depending on the nature of a Complaint and its materiality as determined in the first instance by the Designated Officers, and in particular, with respect to any Complaint or Complaints that could materially affect the financial statements of the City or the integrity of the City's system of internal controls, the Designated Officers will keep the Chair of the Finance Committee and the City Manager apprised of the status of the investigation for purposes of ensuring compliance with regulatory requirements, including the timely and continuous disclosure obligations of the City and the certification obligations of the City Manager.

**SCHEDULE "F" TO THE CITY
SERIOUS COMPLAINTS POLICY**

**PROCEDURES REGARDING RETENTION OF COMPLAINTS
RECEIVED AND INVESTIGATIONS CONDUCTED**

1. Documentation Requirements

All Complaints will be fully documented in writing by the person(s) assigned to investigate the Complaint. Such documentation will be marked as "Privileged and Confidential" and will include:

- (a) the original report of the Complaint;
- (b) the unique reference number assigned to the Complaint;
- (c) a summary/log of the investigation;
- (d) copies of any reports issued in connection with the Complaint;
- (e) a log of any communications with the Complainant; and
- (f) a summary of the disposition of the Complaint.

2. Retention Requirements

Such documentation will be maintained in accordance with the City's Records Retention Policy. Such documentation will be available for inspection by the Designated Officers, members of the Finance Committee, the external auditors and any external legal counsel or other advisors hired in connection with the Complaints. Disclosure of such documentation to any other person, and in particular any third party, will require the prior approval of the City Solicitor to ensure that privilege of such documentation is properly maintained.