

DATE OF MEETING JUNE 26, 2023

AUTHORED BY KAREN ROBERTSON, DEPUTY CITY CLERK

SUBJECT ETHICS COMMISSIONER OPTIONS AND PROPOSED SELECTION CRITERIA

OVERVIEW

Purpose of Report

To outline options for establishing an appointed Ethics Commissioner and a proposed selection criteria for recruiting an Ethics Commissioner.

Recommendation

That the Governance and Priorities Committee select one of the following options:

Option 1

That the Governance and Priorities Committee recommend that Council:

1. Retain the status quo of utilizing an ad-hoc Commissioner to investigate any informal and formal complaints; and
2. Direct staff to establish an Ethics Commissioner line item within the 2024 – 2028 Financial Plan for \$107,000 to cover the costs associated with complaint and investigation processing and four one-hour digital seminars on governance matters with Council.

Option 2

That the Governance and Priorities Committee recommend that Council:

1. Direct staff to establish a selection criteria as outlined in the 2023-JUN-26 report by the Deputy City Clerk for the purposes of establishing a “limited” Ethics Commissioner role;
2. Solicit the selection criteria to law firms with local government law experience; and
3. Direct staff to establish an Ethics Commissioner line item within the 2024 – 2028 Financial Plan for \$115,000 to cover the costs associated with complaint and investigation processing, four one-hour digital seminars on governance matters with Council, and three phone calls per month to the Ethics Commissioner at ½ hour each.

Option 3

That the Governance and Priorities Committee recommend that Council:

1. Direct staff to establish a selection criteria as outlined in the 2023-JUN-26 report by the Deputy City Clerk for the purposes of establishing a “month to month” Ethics Commissioner role;
2. Solicit the selection criteria to law firms with local government law experience; and
3. Direct staff to establish an Ethics Commissioner line item within the 2024 – 2028 Financial Plan for \$122,000 to cover the costs associated with complaint and investigation processing, four one-hour in-person seminars on governance matters with Council, and five phone calls per month to the Ethics Commissioner at ½ hour each.

Option 4
Committee direction is sought.

BACKGROUND

On 2022-MAY-16, Council adopted “Ethics Commissioner Establishment Bylaw 2022, No. 7349” which came into force on 2022-OCT-15 (see Attachment 1). This Bylaw is a companion bylaw to the Code of Conduct Bylaw (see Attachment 2) which also was adopted at that same meeting. As outlined in Bylaw 7329, the Ethics Commissioner is responsible for overseeing any complaints made by a Council Member, Committee Member, or Staff Member against a Council Member or Committee Member (either informally or formally) for conduct violations against Section 3 of the Code of Conduct Bylaw. The process that the Ethics Commissioner would follow to investigate those complaints is outlined in Section 4.1 of the Bylaw.

Committee Members must also adhere to the conduct provisions outlined in Section 3 of the Bylaw; however, as Council appoints Committee Members, any code of conduct complaints made against Committee Members would be forwarded to Council to adjudicate. Conduct violations by staff are governed through the Code of Conduct Administrative Policy No. ADM-044.

Unless an Ethics Commissioner is formally appointed by Council resolution to fulfill the duties and responsibilities assigned to that position as set out in the Bylaw, the default individual to investigate any complaints that may arise would be an ad hoc Commissioner, also known as a Third-Party Investigator, hired by the Chief Administrative Officer on an as-needed basis. These individuals are either lawyers or senior investigators that have the necessary municipal, legal and judicial experience to investigate complaints.

At the time the bylaws were adopted, Council chose not to pursue formally appointing an Ethics Commissioner so the default is the ad hoc Commissioner model. However, when Council reviewed the Code of Conduct Bylaw on 2023-MAR-06 to see if it still met Council’s conduct principles, as required under Section 113.1 of the *Community Charter*, Council passed a motion requesting that staff prepare a report on costs, and a proposed recruitment process, or selection criteria, should Council wish to consider formally appointing an Ethics Commissioner.

DISCUSSION

Whether Council chooses to formally appoint an Ethics Commissioner or continue to utilize the services of an independent ad-hoc Commissioner/Third-Party Investigator, there is a higher level of accountability with the Code of Conduct Bylaw. However, with a focus on education through quarterly or bi-annual governance workshops by the City’s legal counsel, or consultants with subject matter expertise on topics such as Council Procedure Bylaw review, conflict of interest, or meeting conduct, the hope is that Council would actively participate in working towards ensuring that the foundational principles outlined in the Code of Conduct Bylaw are followed.

To provide options for Council’s consideration, Staff reached out to Reece Harding, the City of Surrey’s previous Ethics Commissioner, and the City of Vancouver’s Legislative Services Department who oversaw the process for hiring their Integrity Commissioner, as they are the two municipalities in B.C. who have implemented the Ethics Commissioner model and have experience working with it. They were able to provide comments on costs based on the various

levels of service outlined in the report and a process for selecting a formally appointed Ethics Commissioner should Council wish to pursue that option.

It should be noted that both the City of Surrey and Vancouver have full-time Ethics Commissioners. This is due to their size and because the scope of their Code of Conduct Bylaws includes members of the public. Given the narrower scope of Nanaimo' Bylaw, Staff only explored options and costs based on either appointing a part-time Ethics Commissioner or retaining the current ad-hoc Commissioner model wherein services are utilized on an as-needed basis.

Option 1 - Ad-Hoc Commissioner Model – complaint based only (status quo)

As noted above, unless Council has formally appointed an Ethics Commissioner by resolution, an ad-hoc Commissioner/Third Party Investigator would be utilized to oversee any informal or formal complaints. Since Code of Conduct Bylaw's adoption, no complaints have been filed and no costs have been incurred other than general enquiries made to the City's Solicitor regarding conflict of interest enquires. Having said that, Staff consulted with Reece Harding to seek his advice based on his experience as the first appointed Ethics Commissioner in B.C. He conveyed that regardless of whether the City continues with the ad-hoc Commissioner model, or formally appoints an Ethics Commissioner, the City should still look to budget approximately \$100,000 to \$150,000 to cover off complaint and investigation processing should the need arise. He noted that investigation costs are not possible to estimate as one does not know how many, or the extent of involvement and seriousness of the complaint.

Another thing to consider in helping to ensure the success of any Code of Conduct is to focus on up front education and training. When the Bylaw was being considered in 2022, Mr. Harding conveyed that governance and ethical behaviour workshops and seminars are key to mitigating misunderstandings that could lead to complaints. These sessions also assist in reinforcing the Bylaw's foundational principles of integrity, accountability, respect, leadership, and collaboration. He recommended that two to four workshops on governance and ethical behaviour be conducted each year with Council. Costs for holding four educational workshops would be approximately \$7,100.00.

An advantage to the ad-hoc Commissioner model is that there is more flexibility as to who would conduct the training sessions as it could be either the City Solicitor, or consultants with subject matter expertise. Advice on conflict of interest would continue to be provided by the City Solicitor and governed under the Council Spending and Amenities Policy wherein Council members would bring forward issues on an as-needed basis. The City Solicitor could also provide recommendations on Third Party Investigators should a complaint arise.

One potential disadvantage is that unless the same Third Party Investigator is used in all instances, even with criteria established, application may vary. This is the least expensive option.

Approximate costs are as follows:

- \$100,000 - \$150,000 for complaint and investigations processing; and
- \$7,000 for four one-hour digital seminars with Council.

Total Cost for budgeting purposes: \$107,000 - \$157,000

Option 2 – Limited Ethics Commissioner Role

Under this option, Council would formally appoint an Ethics Commissioner and the costs for complaint and investigations processing would be the same as in Option 1. Advantages to this model are that all aspects of the Code of Conduct Bylaw would be vetted by one individual who would oversee any informal or formal complaints that may arise. This would provide consistency with application of the Bylaw as opposed to potentially having different ad hoc/Third-Party Investigators conducting any investigations. The Ethics Commissioner would also deliver the training to Council members on any aspects of ethical conduct governance matters and Council would be provided the opportunity to seek confidential advice on minor conflict of interest questions/ethical concerns without having to go to Council for approval. This fosters a more trusting relationship between Council and the Ethics Commissioner. For budgeting purposes, this option would provide for three phone calls per month at ½ hour each. More in-depth conflict of interest matters requiring legal advice would still be governed through the Council Spending and Amenities Policy.

A potential disadvantage to this option is that should a complaint arise, and the Ethics Commissioner finds that there has been a violation, a report would be required and depending on the severity of the violation, there may be recommendations within the report that may not be popular. This could make the relationship between that Council member and the Ethics Commissioner more challenging in the future versus the ad-hoc Commissioner model wherein the relationship is more impersonal.

Approximate costs for this option are as follows:

- \$100,000 - \$150,000 for complaint and investigations processing;
- \$7,000 for four one hour digital seminars with Council; and
- \$8,000 for three phone calls per month at ½ hour each.

Total Cost for budgeting purposes: \$115,000 - \$165,000

Option 3 – Month to Month Ethics Commissioner Role

This option would still include appointing a formal Ethics Commissioner but the role would be more enhanced. The costs for complaint and investigations processing would be the same as Option 1 and 2 but the seminars would be conducted in-person instead of digitally, so travel costs would need to be factored into the budget. In addition, the number of phone calls permitted would increase from three to five per month.

Approximate costs for this option would be as follows:

- \$100,000 - \$150,000 for complaint and investigations processing;
- \$9,000 for 4 one hour “in person” Council seminars (\$7,000 plus \$2,000 for travelling); and
- \$13,350.00 for five phone calls per month at ½ hour each.

Total Cost for budgeting purposes: \$122,000 - \$172,000

Process for Hiring a Formally Appointed Ethics Commissioner

Should Council wish to pursue Option 2 or 3 and appoint a formal Ethics Commissioner a few options exist.

The City of Surrey developed an Ethics Commissioner Selection Committee consisting of three members of the public, two City Council members, and one (non-voting) legal professional to recruit for an Ethics Commissioner. The Committee's recommendation on who they selected was forwarded to Council in a closed meeting for formal endorsement.

The City of Vancouver utilized the services of an Executive Search team to assist with recruitment and staff participated in the first and second round of interviews. Staff shortlisted the finalists and provided a recommendation for Council to decide in a closed meeting.

Upon reviewing the recruitment process for both Surrey and Vancouver, it appears establishing a Selection Committee or utilizing the services of an Executive Search team is more conducive if looking to hire a full-time Ethics Commissioner as both municipalities were establishing a formal Ethics Commissioner function within the Municipality. Given the City of Nanaimo would be looking towards only a part-time function, and paying for only the services outlined in option 2 or 3, Council would likely benefit from soliciting various municipal law firms with local government law expertise to bid on providing this service. Selection would then be based on experience and the best hourly rate. Should Council be interested in pursuing this method, the successful bidder would establish an Ethics Commissioner function within their law firm wherein the lawyer selected to perform the duties of the Ethics Commissioner would not provide advice to the City of Nanaimo on any other legal matters. That way, their function remains independent. In the event the preferred law firm selected is also the firm that provides general legal advice to the City, extra checks and balances would be put in place within their firm to ensure the integrity of the Ethics Commissioner function.

The following selection criteria, which was used by Surrey and Vancouver, could be used:

- Proven impartiality, neutrality and high ethical standards;
- Senior-level management, municipal, legal, judicial or quasi-judicial experience;
- Knowledge of municipal or other administrative law;
- Knowledge of municipal governance;
- Ability to interpret and apply the provisions of various statutes, regulations, policies and other enabling frameworks;
- Knowledge of investigatory procedures and applicable legal principles, particularly as they relate to evidence, legal interpretation and natural justice; and
- An ability to provide services on an as-needed basis.

The core functions for the position would be as follows:

- providing advice to Council Members on behaviour that would be consistent with the Council Members' ethical obligations under the Code of Conduct;
- delivering training four times per year on any aspects of ethical conduct that the Commissioner determines may be valuable for Council Members;
- Receiving, reviewing, investigating and adjudicating complaints related to the conduct of a Council member and violations of the Code of Conduct;
- Deciding whether the matter is within the jurisdiction of the Commissioner;

- Adopting procedures, policies and protocols designed to ensure that formal complaints are fully and fairly investigated;
- Determining whether to proceed to investigate a formal complaint or dispose of the formal complaint in a summary manner;
- Subject the requirements of the Code of Conduct respecting procedural fairness, identifying records and documentation received and reviewed during an investigation as confidential; and
- Providing advice and recommendations to Council regarding amendments to the Code of Conduct and any other policies, procedures or protocols governing Council Members' ethical behaviour.

Financial Implications:

Although no specific funds were earmarked for an Ethics Commissioner in 2023, the Director of Finance confirmed at the time the Bylaw was adopted any potential complaint and investigation processing that occurred in 2023 could be funded through the existing legal budget, or if necessary, through contingency or the General Financial Stability Reserve Fund.

While a budget range for complaint and investigation processing has been provided in each option, Staff recommend budgeting on the low side to start and then assess each year based on the prior year's expenditures. Also, to more accurately reflect the true costs associated with the Ethics Commissioner function, Staff recommend that a specific line item be established within the 2024 – 2028 Financial Plan wherein any expenditures related to the Ethics Commissioner be charged to that specific budget.

OPTIONS

Options for the Committee's consideration have been provided in the recommendation section of the staff report and the rationale for each option, including advantages and disadvantages, is outlined in the discussion section of the report.

SUMMARY POINTS

- On 2022-MAY-16, Council adopted "Code of Conduct Bylaw No. 7348" and "Ethics Commissioner Establishment Bylaw No. 7349" which came into force on 2022-OCT-15.
- The Ethics Commissioner is responsible for overseeing any complaints made by a Council Member, Committee member, or Staff Member against a Council or Committee Member (either informally or formally) for conduct violations.
- Unless an Ethics Commissioner is formally appointed by Council resolution to fulfill the duties and responsibilities assigned to that position as set out in the Bylaw, the default individual to investigate any complaints would be a Third Party Investigator.
- On 2023-MAR-06, Council passed a motion directing staff to prepare a report on costs and a proposed recruitment process, or selection criteria, should Council wish to consider formally appointing an Ethics Commissioner.

ATTACHMENTS:

Attachment 1 - Bylaw 7349 – Ethics Commissioner Establishment Bylaw

Attachment 2- Bylaw 7348 – Code of Conduct Bylaw

Submitted by:

Karen Robertson, Deputy City Clerk

Concurrence by:

Sheila Gurrie, Director of Legislative Services

Laura Mercer, Director of Finance

Jake Rudolph, CAO