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**Item No. 10.1.6**  
**Board of Police Commissioners**  
**April 19, 2021**

**TO:** Chair and Members of Board of Police Commissioners

**SUBMITTED BY:**



**- Original Signed -**

John Traves, Q.C., Executive Director of Legal Services

**DATE:** March 4, 2021

**SUBJECT:** Independent Legal Counsel for Board of Police Commissioners

**ORIGIN**

Motion on July 20, 2020:

**THAT** the Halifax Board of Police Commissioners seek an independent opinion to determine if the Board of Police Commissioners should or shouldn't have its own legal counsel separate from HRM and HRP. The opinion should include:

1. If the Police Act or the Board of Police Commission's Policy Manual allows the Board to seek independent legal counsel;
2. If the current legal counsel arrangement provided by HRM could present as a conflict of interest; and,
3. How the board could receive on-going counsel for Commission meetings and any other responsibilities of the Board.

**LEGISLATIVE AUTHORITY**

*Police Act*, S.N.S. 2004, c. 31, ss. 48 & 55(1)

48 A board may contract and may sue and be sued in its own name, and the members of the board are not personally liable under any contract made by the board. 2004, c. 31, s. 48.

55 (1) The function of a board is to provide  
(a) civilian governance on behalf of the council in relation to the enforcement of law, the maintenance of law and order and the prevention of crime in the municipality; and  
(b) the administrative direction, organization and policy required to maintain an adequate, effective and efficient police department,

## **BACKGROUND**

Currently, when the Chair or members of the Board of Police Commissioners require legal advice, Halifax Regional Municipality Legal Services provide that advice to the Board. Legal Services also serve as the solicitor at meetings of the Board, and provide advice on procedural and legal issues that may arise in the course of meetings.

HRM Legal Services also provides advice to all other departments of HRM, including Halifax Regional Police.

This report will consider the question of whether HRM Legal Services providing advice to both HRM, HRP and the Board presents as a potential conflict of interest, and if as a result the Board of Police Commissioners should have access to independent legal counsel, separate from Legal Services.

## **DISCUSSION**

The Board of Police Commissioners is a unique body in HRM, and as compared to other Boards within Canada. The model of a civilian board to oversee policing is the preferred method of police governance in Canada, however the legislative framework for those Boards commonly differs from Province to Province.

Certain elements are in common in almost all police boards, including that in HRM. One of the central elements is that Police Boards are intended to be independent from both municipal government and the police service they govern. However, the extent of that independence varies between jurisdictions.

In Nova Scotia, the Board is an emanation of Council, albeit one with its own legislated functions and powers. The Municipality is the entity made responsible for providing policing services (s. 35(1)) and to appoint its Chief Officer (s. 38(1)). The Municipality establishes the Board (s. 44(1)), sets its rules and regulations (s. 55(2)(b)) and most members of the Board sit at the will of council (s. 44(7)). The Board governs on behalf of the Council (s. 55(1)). Although the Board is responsible for the creation of the police budget, it has no power to raise revenue on its own behalf, and the budget must be approved by Council (s. 53).

In other jurisdictions, such as Ontario and British Columbia, Police Boards act more independently and are the entity which is directly tasked with providing police services and appointing the Chief Officer. The Nova Scotian framework creates a broader role for the municipality and its council in policing. The mere fact that s. 55(2) allows the municipality to delegate additional roles and responsibilities to its board demonstrates that unless so delegated, the municipality retains some powers over policing.

This difference in frameworks explains why in certain jurisdictions, such as Ontario, Boards have full staffs of their own, including legal counsel that is not employed by either the municipality or the police service. As the Board in HRM is more closely tied to the municipality, it makes use of municipal resources, including HRM staff in order to fulfill its function.

However, as in other jurisdictions, the Board is clearly more than a mere committee of Council advising on the provision of policing. The Board has statutory duties and powers set out in s. 55 that cannot be removed or reduced by Council. It may contract, sue or be sued in its own name (s. 48). Once additional powers have been delegated to it by Council, it then exercises sole discretion over them (s. 55(2)). This independence is central to its legitimacy as the civilian governing body for police.

The current practice is for HRM Legal Services staff to provide all legal advice to the Board, including sitting at meetings, providing procedural advice in collaboration with the Municipal Clerk, and providing any advice required during or between meetings. The question posed is whether this practice gives rise to any conflict of interest, and in addition, whether the Board is legislatively able to access independent legal advice, and how it might go about doing so.

### **Conflict of Interest**

There are two potential types of conflict that may arise in the context of legal advice given to the Board – first, an actual legal conflict of interest, or secondly, a perceived or apprehended conflict.

Staff do not see that there is any legal conflict of interest that prevents them from providing legal advice to both the Board and HRM staff or HRP. Given that the Board acts as a check on the powers of the Chief and HRP, there may be times where their interests diverge. However, while HRM Legal Services provides advice to HRP and the Chief, ultimately, HRP or any individual HRM employee is not the client that HRM Legal Services serves. That client is HRM itself as an entity. The advice provided is based on that broader corporate interest, rather than an individual business unit or staff member, and advice to HRP considers its powers vis a vis HRM and the Board.

Because of that fact, a situation where a true conflict of interest would present itself would be rare, as it would require diverging interests between the Board and HRM itself. Ultimately, it is in both the Board's and HRM's interests that the Board operate according to its powers, and that HRP be subject to the appropriate level of civilian governance. HRM Legal Services is no more in a conflict of interest than are the members of Council who serve on the Board and should a conflict arise it would in most cases apply to both Councillors and Legal Services staff.

It is also not uncommon for HRM Legal Services to provide advice to HRM staff members who have legal powers independent of HRM. For example, the FOIPOP Responsible Officer has statutory powers and duties with respect to complying with the FOIPOP provisions of the Municipal Government Act. There may be times where their duties and powers under the MGA will cause them to take actions that may be contrary to the wishes of other HRM staff members or may have a negative impact for HRM. Giving advice to both these groups does not cause a conflict however because ultimately, it is in the best interests of both HRM and the Responsible Officer that they act according to their powers and duties.

There may be a rare situation where a true legal conflict could arise between the Board, for example, in the case of a legal dispute between the Board and HRM itself. Legal Services lawyers have professional obligations to avoid a conflict of interest of this type, and would be required to avoid the conflict by only acting for one of the parties.

However, even in cases where no true legal conflict, there may be situations where from the public's perspective, there may be a perception of a conflict of interest that could negatively affect the Board's legitimacy and the public perception of its independence.

This is unlikely to be the case when it comes to day to day procedural advice. Procedural questions are not likely to be controversial and less likely to give any perception of a conflict from the public. HRM Legal Services solicitors have extensive experience with applying Administrative Order One, which provides the procedures for both Council and the Board. There is unlikely to be any benefit to the Board in hiring outside legal counsel to serve this role, as a non-HRM lawyer is likely to have less experience with the procedures. HRM Legal Services also collaborates with the Clerk's office in a way that would be challenging for outside legal counsel, and has the knowledge and experience of how procedural questions have been handled previously.

However, a perception of a conflict could arise in the case of more contentious issues, such as where there are tensions between the goals of the Board and HRP or HRM, or disagreements with regards to authority. In those cases, the Board may have a legitimate concern that it will not be viewed as independent if it obtains advice from the same lawyers providing advice on that issue to HRP. The Board may also sometimes want a second opinion on some legal issues in cases where the law is not clear.

Where there is a concern regarding a perceived conflict of interest, or a desire for a second opinion, HRM Legal Services has policies and practices in place to facilitate the retainers of outside legal advice should the need arise.

**Does the Police Act or Board Policy Manual allow the Board to seek independent legal counsel, and how may it do so?**

The Policy manual is silent on the question of whether the Board may seek independent legal counsel. The *Police Act* likewise does not specifically address this question, however it is overall consistent with the powers of the Board that it would be able to do so. The Board has a duty to provide civilian governance and must have access to the necessary resources to be able to do so effectively. The Board also has a specific power in the *Police Act* to contract in its own name:

48 A board may contract and may sue and be sued in its own name, and the members of the board are not personally liable under any contract made by the board. 2004, c. 31, s. 48.

This would in theory allow the Board to enter into a contract to obtain legal counsel.

However, in order to do so, the Board would require a budget in order to access the necessary funds to pay their independent counsel. Currently, the Board has a very limited budget that is used only for items such as refreshments for meetings, professional memberships or travel for conferences and similar items. It would not be sufficient to cover the cost of independent legal advice.

There are two models which the Board may adopt. First is having the Board access occasional ad hoc legal advice as required, by way of a motion at a meeting where the need arises. This may be requested of either the Municipal Solicitor, CAO or Municipal Council depending on the need for funding and/or budget approval. This is the model recommended by staff.

The second possible model is having continuously available and retained non-HRM counsel present at all meetings. This is not recommended for the reasons described above. It is likely to be much more costly and would require budget approval as an item in the policing budget. It would also result in likely significant financial waste, as most meetings would not require the participation of independent counsel.

**FINANCIAL IMPLICATIONS**

The costs of legal advice can vary widely depending on the lawyer or firm consulted, generally starting at \$150 an hour up to \$500 an hour or more. The cost to answer a particular legal question would depend greatly on the complexity of the issue.

**COMMUNITY ENGAGEMENT**

None.

**ATTACHMENTS**

None.

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A copy of this report can be obtained online at [halifax.ca](http://halifax.ca) or by contacting the Office of the Municipal Clerk at 902.490.4210.

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