



SUBJECT: Legal analysis of epinephrine auto-injectors in City facilities and restaurants

TO: Committee of the Whole

FROM: Legal Department

Report Number: L-7-17

Wards Affected: All

File Numbers: 100-02

Date to Committee: May 1, 2017

Date to Council: May 15, 2017

Closed Session (Optional):

This report is a companion report to parks and recreation department report PR-04-17 and in part provides confidential legal advice in respect to liability issues arising from providing epinephrine auto-injectors in City recreation facilities and restaurants. Appendix "A" contains confidential legal advice and is subject to solicitor-client privilege. Should Committee wish to go in-camera to discuss the advice then it should do so in accordance with the following:

Subject matter relates to the following provision under the *Municipal Act, 2001*:

"advice that is subject to solicitor-client privilege, including communications necessary for that purpose".

Recommendation:

Receive and file legal department report L-7-17 regarding epinephrine auto-injectors in city facilities and restaurants.

Purpose:

A Healthy and Greener City

- Healthy Lifestyles

Background and Discussion:

This report responds to the following two staff directions:

- Direct the Director of Legal Services & City Solicitor to provide information on risks of having or not having EpiPens available in city facilities as per the City's responsibility under Duty of Care, the Good Samaritans Act and any other legislation; and
- Direct the Director of Legal Services & City Solicitor to provide a recommendation on requiring all restaurants within the City of Burlington to have EpiPens onsite.

Part I – Auto-Injectors in City Facilities - Liability Risks

Information related to liability risks associated with having or not having stock auto-injectors available in City facilities is included in confidential Appendix "A" to Report L-7-17.

The subject matter of confidential Appendix "A" relates to the following provision under the *Municipal Act*:

"advice that is subject to solicitor-client privilege, including communications necessary for that purpose"

The introduction of a program that would place epinephrine auto-injectors in City recreation facilities is not without risk. However, if the City were to implement a program that would require staff to administer an epinephrine auto-injector, the City's policy of insurance would respond to auto-injector related claims against employees and the corporation.

Managing risk is less clear if the auto-injectors were made available to the public-at-large in city facilities administering third party treatment as they would not be covered by the city's policy of insurance. Legal considerations with respect to this option, including considerations with respect to protections under the Good Samaritan Act, are addressed in confidential Appendix "A".

Staff is advised that insurance industry standards are currently under development and when available will guide the City on appropriate protocols with respect to insurance. We understand that those protocols are expected to be available sometime within the next 12 months. While it would be open to the City to proceed with an auto injector program in advance of those protocols being released, a more prudent approach may be to defer a decision until such time as industry protocols are available. This

alternative approach would allow for the development of City protocols that are consistent with insurance industry protocols.

Part II - Auto-Injectors in Restaurants

Best Practices Survey

There are no known Ontario municipalities that require the stocking of auto injectors in restaurants as a mandatory measure. At least one other Ontario municipality, the City of Hamilton, has explored auto injectors in restaurants through a recently concluded pilot program.

This pilot program was initiated in 2014 in conjunction with McMaster University and was conducted over an approximately 16 month period. As a single tier municipality, the City of Hamilton pilot was administered under the oversight of its Board of Health. The pilot was conducted at a local mall (Jackson Square) and included two stand alone locations (fast food restaurant and a sit-down restaurant).

In an August 2016 report Hamilton's Associate Medical Officer of Health highlighted a range of considerations should there be a desire to partially or fully fund continuation or expansion of the pilot program. These included conditions to receive funding (e.g. training), financial limits, fees/cost recovery if a by-law were pursued, implementation model (voluntary vs. mandatory), departmental support and legal considerations.

At its August 2016 meeting, the Board of Health directed Hamilton staff to report on an implementation plan for the next steps in the pilot by providing cost and processes involved in establishing a volunteer program for up to 500 restaurants in Hamilton to allow for an onsite auto injector.

Likelihood

Epidemiological Data from Halton Region

The likelihood of need for on-site auto-injectors was canvassed in PR-04-17 and won't be repeated here. The conclusion however of the Region's Senior Epidemiologist advises that there is a probability of one death occurring every 150 years in a foodservice establishment in Burlington.

Hamilton Pilot Program

The August 2016 report of Hamilton's Associate Medical Officer of Health provides a summary of the outcome of that City's pilot program. The report notes that during the 16 month pilot stock auto injectors were not used on any occasion. During that 16 month pilot there was one reported critical incident of anaphylaxis at a pilot program location. According to the Hamilton report, in that critical incident the individual

responded by using their own personal auto injector. The use of a stock auto injector was not required.

Legal Considerations

In addition to the foregoing considerations, legal staff have considered certain legal implications arising out of a proposal to require auto injectors in City restaurants. Information related to those legal considerations is addressed in confidential Appendix “A” to legal department report L-7-17.

Strategy/Process

Legal staff have engaged in ongoing discussions with a range of internal and external departments, including staff in the Parks and Recreation, Fire, Human Resources, and Halton Region Public Health. Staff also consulted a representative of the City’s insurance broker to address questions related to insurance. Staff has not consulted directly with the restaurant industry at this time. It is recommended that if Council wishes to continue to explore the development and implementation of a program for local restaurants further, extensive consultation with that industry will be required before any proposed parameters for the program could be developed. At a minimum, we would expect that the industry would raise concerns respecting the costs and funding for such a program, staff training and over-sight, possible liability issues, over-regulation, competitiveness with restaurants located outside the city, and franchise consistency.

Legal staff surveyed relevant legislation and case law and also considered approaches and best practices from other municipalities, including the City of Hamilton.

Financial Matters:

Financial matters related to this staff direction are addressed in parks and recreation department report PR-04-17.

Conclusion:

Legal staff are not taking a position on whether or not a program of this nature is required, as that decision more appropriately belongs in one of the City’s operational departments. A program like this would have implications (staffing, financial resources, training) elsewhere in the organization and those implications would have to be fully canvassed should Council choose to proceed further. This report responds to the staff

direction by bringing forward information on the matter.

Respectfully submitted,

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Appendices:

A. Confidential Legal Considerations

Report Approval:

All reports are reviewed and/or approved by Department Director, Director of Finance and Director of Legal. Final approval is by the City Manager.