



STAFF REPORT ACTION REQUIRED

Feasibility of Establishing a Fund to Reimburse Candidate Compliance Audits Expenses

Date:	October 4, 2007
To:	Executive Committee
From:	City Clerk
Wards:	All
Reference Number:	

SUMMARY

At its July 16, 17, 18 and 19, 2007 meeting, Council requested that the City Clerk, in consultation with the Auditor General and the City Solicitor, report on the feasibility of establishing a mechanism that would reimburse all candidates for legitimate expenses associated with an application for an audit of the candidate's election campaign finances.

Municipal election campaign financing is governed by the *Municipal Elections Act, 1996* (the *Act*) which is provincial legislation. Any request for amendments to the *Act* must be made to the province.

Given the provisions of the *Municipal Elections Act, 1996* and the *City of Toronto Act, 2006* (the *COTA*) it is not feasible to establish a fund to reimburse candidate compliance audit expenses at this time. A legislative amendment would be required to alter the municipal election campaign period and contribution provisions.

RECOMMENDATIONS

The City Clerk recommends that Toronto City Council:

1. request that the Province enact Toronto-specific election legislation that meets Toronto's unique needs to establish a fund to reimburse candidate compliance audit expenses.

FINANCIAL IMPACT

There are no financial impacts arising from this report.

The Deputy City Manager and Chief Financial Officer has reviewed this report and agrees with the financial impact information.

DECISION HISTORY

City Council on July 16, 17, 18 and 19, 2007, adopted the following motion:

1. Toronto City Council agree, in principle, to establish a mechanism that will reimburse all candidates for legitimate expenses associated with an application for an audit of the candidate's election campaign finances.
2. The City Clerk, in consultation with the Auditor General and the City Solicitor, be requested to report to the Executive Committee on September 4, 2007, on a mechanism that will permit candidates access to funds to cover election-related legal and accounting costs incurred after the close of their campaign account.
3. In so doing, staff explore the feasibility of:
 - a. permitting the re-opening of campaign accounts to cover these costs;
 - b. permitting candidates to "hold back" election funds for a period following the campaign as a contingency to cover these expenses;
 - c. amending our by-law to permit the raising of funds to cover these expenses after the close of the campaign period;
 - d. establishing a pool of funds that can be made available for election-related accounting and legal fees; and
 - e. financing this fund through surpluses returned to the City by candidates or from election budget under-expenditures in the Clerk's budget resulting from the fact that several candidates chose not to provide tax credits to contributors.
4. Staff recommend the terms of reference for access to this funding, on the clear understanding that it will be retroactive to cover costs incurred during the 2006 Election campaign.

COMMENTS

Municipal election campaign financing is governed by the *Municipal Elections Act, 1996* which is provincial legislation. The *Act* sets out the requirements for candidates when preparing and filing their financial statements and defines the campaign period. It also explains the types of campaign contributions and expenses that are both allowed and prohibited.

To enhance transparency and provide a check and balance to the candidates' financial filing requirements, Section 81 of the *Municipal Elections Act, 1996* allows any eligible elector who

believes that a candidate has contravened a provision of the *Act* relating to election campaign finances to file a request with the Compliance Audit Committee for the candidate's financial statements to be subject to a compliance audit.

The application for a compliance audit can be made within 90 days of:

- the filing date
- candidate's last supplementary filing date, if any
- the end of the candidate's extension for filing, if any

Given the legislative structure that governs the compliance audit process, Legal Services has advised the City Clerk's Office that there are two broad reasons why Council cannot establish a compliance audit expense fund without provincial legislative amendments, they are:

- the compliance audit period falls outside of the campaign period, and
- the Courts have ruled that municipal governments cannot establish grants to pay for members of Council's legal fees for matters which predate their election to office.

Compliance Audit Falls Outside the Campaign Period

Since an eligible elector has 90 days after the filing of the candidate's financial statements to request a compliance audit, the *Municipal Elections Act, 1996* effectively dictates that the compliance audit period occurs after a candidate's campaign period has closed. Section 68(1) of the *Act* defines the campaign period as the day a candidate files their nomination papers to December 31 of the election year, unless the candidate has a deficit and needs to extend the campaign period to raise funds to cover the deficit.

The fact that a candidate's campaign period has ended when the compliance audit period takes place is significant because Section 76(2) of the *Municipal Elections Act, 1996* states that candidates cannot incur expenses outside of the campaign period. The implication of this timing is that candidates cannot pay for any expenses that arise from the compliance audit process through a campaign surplus and they may not reopen their campaigns to fundraise to cover the additional expense.

While the *Act* (Section 81 paragraphs 9 – 11) does provide guidance as to how the City may recover its costs should the Compliance Audit Committee need to hire an auditor to determine whether a contravention occurred, it does not prescribe a mechanism through which a candidate (or the elector who requests the compliance audit) may recover their costs for any expenses incurred.

It appears from the timing of the compliance audit period and the provisions against incurring expenses outside of a campaign period that the *Municipal Elections Act, 1996* was designed with the thought that there should be no expenses to either the candidate or the eligible elector arising from the Compliance Audit Committee process.

However, in Toronto, there are cases where both the candidate and the eligible elector requesting compliance audits have incurred costs. Unfortunately, the *Municipal Elections Act, 1996* does not contemplate this situation and there is no method for either to recover their expenses. A legislative amendment would be required to permit the re-opening of campaign accounts or to permit candidates to raise funds outside of the campaign period. Therefore, Parts 2, 3a, 3b, 3c and 3e of the motion could only be implemented if the *Municipal Elections Act, 1996* was amended.

Court Limits to Grant Process

In terms of establishing a pool of funds that can be made available to all candidates to defray the costs of the election-related accounting and legal fees that could arise from a compliance audit, it is not possible because of constraints in the *City of Toronto Act, 2006*.

Parts 1 and 3d of the motion propose that the City reimburse candidates for legal and audit expenses of responding to compliance audit applications. City Legal has been consulted regarding these parts of the motion, has considered several options and has provided the following advice. The kind of assistance contemplated by parts 1 and 3d would be made outside of the candidates' campaign period and the expenses reimbursed would not be campaign expenses. For this reason it appears that the prohibition on a municipality making a campaign contribution outlined in the *Municipal Election Act, 1996* would not apply.

It is arguable that the power to make grants found in Section 83 of the *City of Toronto Act, 2006* would encompass the kind of financial assistance contemplated; however the courts have held that the power to make grants must be exercised in a manner reasonably connected to the municipality's permissible objectives. Furthermore, courts have held that payment of legal expenses incurred by a member of council regarding matters which predate or are outside the ambit of that person's office is not connected to municipal objectives. Courts have held that municipal councils lack the power to reimburse a member of council for legal expenses incurred outside of the office of councillor and in the member's personal capacity such as responding to a compliance audit application or in dealing with any other election-related matters.

While the general powers of council in the *COTA* are broad enough to cover this assistance, they cannot be used to make the grants because Section 12 of the *COTA* provides that if the City has the power to pass a kind of by-law both under its general powers and under a specific provision of the *COTA* (in this case Section 83), the exercise of the power to pass that kind of by-law is subject to any limits contained in the specific provision (Section 83). The courts have interpreted sections like Section 83 to include limits which would make any decision by Council to reimburse candidates for legal expenses incurred in the compliance audit process vulnerable.

Conclusion

There is a discrepancy in how the *Municipal Elections Act, 1996* works in theory and in practice. In theory, compliance audits are a matter between an eligible elector, a candidate and the Compliance Audit Committee where the only cost incurred is that of an auditor, if one is required. In practice, compliance audits can sometimes become protracted legal battles where both the eligible elector and the candidate are faced with expensive legal and accounting bills.

In order to rectify this discrepancy, a legislative amendment is required to allow for candidates to either reopen their campaigns to use any potential surplus to help defray the costs or to fundraise to cover any deficit that arises as a result of the compliance audit process.

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SIGNATURE

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