



STAFF REPORT ACTION REQUIRED

Indemnification Policy for Members of Council and Defamation

Date:	July 30, 2009
To:	City Council
From:	City Solicitor
Wards:	All
Reference Number:	

SUMMARY

The purpose of this report is to respond to the Executive Committee’s request to the City Solicitor and the City Manager to report to Council on a number of matters arising out of the proposed amendments to the Indemnification Policy for Members of Council set out in Appendix B (the “defamation amendments”) to the City Manager’s May 11, 2009 report.

RECOMMENDATIONS

The City Solicitor recommends that:

1. if City Council determines that amendments are required to the Indemnification Policy for Members of Council in order to expedite the determination of eligibility for reimbursement of legal expenses relating to defamation claims, Council adopt the further amendments set out in Appendix 1 to this report;
2. Council adopt the amendment set out in Appendix 2 to this report;
3. the City Solicitor be directed to report annually on the use of the independent external lawyer, including the number of referrals and the funds expended in the prior year;
and

4. the City Solicitor be authorized to submit any bills required to give effect to the amendments to the Indemnification Policy, including all necessary amendments to City of Toronto Municipal Code, Chapter 27, Council Procedures.

Financial Impact

The estimated costs for a lawyer representing a Member initiating a defamation action at various stages of the proceedings are as follows (GST and disbursements are in addition):

- Up to \$10,000 for the initial review, including an interview, review of the file and preparation of the notice letter.
- Approximately \$3500 to draft the statement of claim. Many claims of this nature settle at the early stages, before fees go beyond the \$10,000 to \$15,000 range.
- Review of the defence, generating an affidavit of documents, further investigation and review of the defendant's documents would cost approximately \$15,000 to \$30,000.
- Discoveries and any associated motions would cost approximately \$15,000 to \$20,000.
- Mediation briefs and settlement conferences, approximately \$12,000.
- Addressing client inquiries and meetings to the point of deciding to proceed to trial, including considering offers to settle, approximately \$7500.
- Preparation and attendance at trial, approximately \$50,000.

Overall, the approximate cost is in the order of \$150,000, however, many defamation actions become more complex and costs can go much higher. Appeal proceedings would add further expense.

As well, there may be further costs if the case were lost or if the defendant offered to settle and the result at trial was no better than the offer.

The costs for the independent external lawyer reviewing the claiming Member's file under the policy to determine eligibility under the screening criteria would be in the order of \$3000 to \$4000, plus GST and disbursements.

The reimbursement costs, as well as the costs of the independent external lawyer, will be paid out of the Council General Expense Budget.

DECISION HISTORY

City Council, at its meeting of July 16, 17 and 18, 2008 (EX.22.8), requested the City Manager and City Solicitor to submit a report to Executive Committee "on indemnifying Councillors for legal advice/support on defamation actions."

<http://www.toronto.ca/legdocs/mmis/2008/cc/decisions/2008-07-15-cc23-dd.pdf>

Executive Committee, at its June 2, 2009 meeting (EX33.6) recommended that Council determine that the defamation amendments are necessary. The Committee sought advice and information from the City Solicitor and City Manager on a number of matters, including further amendments to expedite the review of reimbursement claims given the short limitation periods for some defamation actions.

<http://www.toronto.ca/legdocs/mmis/2009/ex/decisions/2009-06-02-ex33-dd.htm>

The City Manager has been consulted and concurs with the contents of this report.

ISSUE BACKGROUND

At its meeting of November 24, 2005, Council adopted, as amended, clause 40a of Report 9 of the Policy and Finance Committee, headed *Indemnification Policy for Members of Council and Management and Excluded Staff*. In doing so, Council adopted policies for the indemnification of legal expenses for both Members of Council and Management/Excluded staff.

<http://www.toronto.ca/legdocs/2005/agendas/council/cc051124/pofcl040a.pdf>

City Council, at its meeting of July 15, 16 and 17, 2008 (EX. 22.8), adopted the recommendations of the City Manager and City Solicitor to amend the Councillor policy to facilitate the payment of legal expenses of Councillors. At the July, 2008 meeting, Council further directed the City Manager and City Solicitor to submit a report to the Executive Committee “on indemnifying Councillors for legal advice/support on defamation actions.”

Executive Committee, at its June 2, 2009 meeting (EX33.6), made the following recommendations to Council:

1. City Council determine that amendments to the Indemnification Policy for Members of Council regarding defamation are necessary, and approve the amendments set out in Appendix B of the report (May 11, 2009) from the City Manager.
2. City Council request the Integrity Commissioner to report (May 11, 2009) from the City Manager [sic] any related amendments to the Code of Conduct Complaint Protocol for Members of Council.
3. City Council not extend the amendments set out in Appendix B of the report (May 11, 2009) from the City Manager to directors of agencies, boards, commissions, corporations and special purpose bodies.

The Executive Committee sought advice and information on the following matters:

1. In view of the short time lines to give notice of defamation actions, amendments to the proposed policy in order to expedite Member versus Third Party Claims, including possible delegation to staff or officials of parts of the proposed process.

2. In view of the short time lines, an examination of the particular situation faced by Councillor Bussin in respect of the potential defamation and suggest a course of action to address approval and reimbursement of her legal expenses.
3. The motion by Councillor Mammoliti, that if a Council Member feels that he or she needs immediate legal advice to proceed with any legal matter, the Member be able to access the cost of legal fees up to \$10,000 prior to approval under the proposed policy.
4. The motion by Councillor Moscoe, that:
 - a. The Members of Council shall be entitled to select their own legal representation subject to their legal bills being reviewed by the City Solicitor.
 - b. This policy also apply to Members of Council when they are serving as a Council Appointee on any ABC or any other body to which they have been appointed by Council.
 - c. This matter be forwarded to all ABC's with a request that they review their own policies.
 - d. The external lawyer who makes the recommendations in connection with the process for (i) Member versus Third Party, and (ii) Member versus Member, or anyone connected to them, shall be prohibited from acting for any of the parties to the matter.

COMMENTS

Matters Raised by Executive Committee

The matters raised by Executive Committee are addressed immediately below:

1. Amendments to Expedite Process

The Indemnification Policy for Members of Council is structured as a reimbursement policy. As such, Council must determine whether the Member is eligible before the quantum of the legal expenses for which reimbursement is sought can be considered. For most matters, eligibility will depend on whether the matter arises out of the exercise of the Member's official duties. For defamation actions, the application of the proposed screening criteria (merits, official duties, public interest etc.) will be determinative.

The amendments offered in Appendix 1 (and described below) are designed to expedite the process of determining eligibility for defamation claims. The amendments are premised on the notion that the question of eligibility is a matter appropriately determined by Council, not staff.

The amendment offered in Appendix 2 (and described below) is intended to ensure the efficient processing of legal expense invoices submitted once eligibility has been determined.

Determining Eligibility

Pursuant to the *Libel and Slander Act*, R.S.O. 1990, c. L. 12, (the “Act”), notice in writing must be given within six weeks after an alleged libel has come to the plaintiff’s knowledge. As well, an action for libel must be formally commenced within three months after the alleged libel has come to the knowledge of the person defamed.

In view of the short timelines, Appendix 1 to this report offers amendments to ensure that eligibility is determined where there is insufficient time for consideration by Council before the expiration of the statutory time periods.

Where the City Solicitor determines that there is insufficient time for Council to determine eligibility, the recommendation of the external lawyer will be considered by Executive Committee only.

Where the City Solicitor determines that there is insufficient time even for Executive Committee to determine eligibility (for example, summer recess), the recommendation of the external lawyer will be provided to the Member for review. Where, upon review of the external report, the Member decides to initiate an action for defamation, the external lawyer’s report will be provided to Executive Committee for recommendation to Council at its next meeting.

Where the external report recommends that the Member is ineligible, Members are not precluded from initiating an action at their own expense. The City Solicitor will not recommend reimbursement in such circumstances, but will provide the external report to Executive Committee for recommendation to Council.

Processing Legal Accounts

Once Council has determined that the Member is eligible and legal expenses are incurred, reimbursement will occur under an amended process.

In Appendix 2 to this report, an amendment to the policy is recommended to give the City Solicitor, in place of Executive Committee, the authority to authorize the reimbursement of reasonable legal expenses to a maximum of \$25,000, once Council has determined eligibility for reimbursement. Giving the City Solicitor this authority will help to ensure efficiency in processing the legal expense accounts for all matters, including defamation claims. Any claim for reimbursement beyond \$25,000 will be referred by the City Solicitor to Executive Committee for recommendation to Council.

2. Councillor Bussin's Claim

This matter was referred to an independent external lawyer to screen the claim on the criteria set out in the defamation amendments. The City Solicitor is reporting separately on this matter to Council.

3. Councillor Mammoliti's Motion to Access \$10,000 for Legal Fees

The City Solicitor recommends against making funds available to initiate a defamation action prior to the determination of eligibility. As set out in the City Manager's May 11, 2009 report, it is important that such claims be screened to ensure that they have merit and that public funds are being expended in a manner that takes into account the impact of the impugned statements on the public interest.

4. Councillor Moscoe's Motion

a. *Members Selecting Own Legal Representation*

While Members are free to select their own legal representation, the City Solicitor is pleased to provide names of lawyers if Members so request. In anticipation of queries by Members, the City Solicitor will be preparing a roster of lawyers for consideration.

The independent external lawyer, however, will be chosen by the City Solicitor from an approved roster.

b. *Application to Members When Serving on ABCs*

The external lawyer's recommendation for reimbursement will depend on the application of the screening criteria, which include "Whether the matter arises out of the exercise of the Member's official duties as defined on Ontario law and jurisprudence." The fact that a legal issue may arise out of a Member's service as an appointee to an ABC will not preclude

reimbursement for legal expenses incurred in bringing a defamation action.

c. *Request that ABC's Review Policies*

In the May 11, 2009 report, the City Manager recommended that the defamation amendments not be extended to ABC's and other bodies. It is similarly recommended that Council should not request ABC's to review their policies in respect of defamation coverage. The rationale for adopting the defamation amendments for elected officials does not extend to citizen appointees. Private citizens appointed to serve on public bodies do not have the same public profile and are not subject to the same scrutiny as elected officials.

d. *External Lawyer Shall be Prohibited from Acting for the Parties*

Section 9 of the proposed defamation amendments in Appendix B to the City Manager's May 11, 2009 report provides that the City Solicitor shall refer the claim to an "*independent external lawyer*" [emphasis added], which means that the external lawyer cannot act for any of the parties to the dispute.

Where Offer to Settle Made

A procedure is recommended in Appendix 1 to ensure that unnecessary costs are not incurred where reasonable offers to settle are made in defamation actions. As such, where the Member receives an offer to settle that the Member has not yet accepted, the suggested amendments state that the offer must be provided to the City Solicitor. Reimbursement will be conditional on such disclosure. The City Solicitor will then provide the offer to the independent external lawyer who originally reviewed the matter for a written opinion and recommendation on the reasonableness of the offer. The external opinion will be provided to Council for its consideration. If Council determines that the offer is reasonable, then the Member will not be eligible for any further reimbursement beyond costs incurred to review the offer and conclude the litigation in accordance with the offer.

Annual Report on Use of External Lawyer in Defamation Claims

In order to promote transparency and to permit oversight of the process for reimbursement of defamation claims, it is recommended that the City Solicitor provide to Council an annual report on the use of the independent external lawyer, including the number of referrals and the amount of funds expended.

CONCLUSION

This report responds to the Executive Committee's request for advice and information respecting the defamation amendments and offers further amendments to expedite reimbursement for defamation claims.

CONTACT

Ian Solomon, Solicitor
Legal Services Division
Metro Hall, 55 John St., 25th floor
Phone: (416) 392-8789
Fax: (416) 392-3848

SIGNATURE

Anna Kinastowski, City Solicitor

ATTACHMENTS

Appendix 1, Amendments to Appendix B to the May 11, 2009 Report
Appendix 2, Amendment to Indemnification Policy for Members of
Council

Appendix 1

Amendments to Appendix B to the May 11, 2009 Report

1. Amend Appendix B to the May 11, 2009 Report by renumbering section 10 as subsection "10(1)".
2. Amend Appendix B to the May 11, 2009 Report by adding subsections 10(2) and (3), which will read:

“(2) The following shall apply where, after a consideration of the applicable limitation periods, the City Solicitor determines that there is insufficient time for Council to consider the recommendation as to eligibility in the external report:

- (i) Where, in the City Solicitor’s opinion, there is sufficient time, Executive Committee alone shall consider the recommendation in the external report.
- (ii) Where, in the City Solicitor’s opinion, there is insufficient time for Executive Committee to consider the recommendation in the external report, a copy of the recommendation shall be provided to the claiming Member.
- (iii) Where subsection (2)(ii) applies, and the Member initiates an action for defamation, the external report shall be provided to Executive Committee for recommendation to Council at its next meeting.

(3) Where the external report recommends that the Member is not eligible for reimbursement, the external report shall be provided to Executive Committee for recommendation to Council.”

3. Amend Appendix B to the May 11, 2009 Report by deleting section 11 and replacing it with the following:

“If, upon consideration of the external report, Council determines that the Member is eligible for reimbursement, the reasonableness of the legal account shall be determined in accordance with sections 3 and 6.”

4. Amend Appendix B to the May 11, 2009 Report by adding new subsections 14(1) through (4), as follows:

“(1) As a condition of reimbursement, where the Member receives an offer to settle in respect of a defamation action that the Member has not yet accepted, the offer shall be provided to the City Solicitor.

- (2) The City Solicitor shall provide the offer to the independent external lawyer who originally reviewed the matter for a written opinion and recommendation on the reasonableness of the offer.
- (3) The external lawyer's opinion and recommendation shall be reported to Executive Committee for recommendation to Council.
- (4) Should Council determine that the offer is reasonable, the claiming Member shall not be eligible for any reimbursement beyond costs incurred in reviewing the offer and concluding the litigation in accordance with the offer."

5. Amend Appendix B to the May 11, 2009 Report by renumbering paragraph 14 as paragraph 15.

Appendix 2

Further Amendment to Indemnification Policy for Members of Council

Amend the Indemnification Policy for Members of Council by deleting section (3) and replacing it with a new section 3 as follows:

“(3) Upon Council determining eligibility for reimbursement, the City Solicitor may authorize the reimbursement of reasonable legal expenses to a maximum of \$25,000. Any claim for reimbursement beyond \$25,000 shall be referred to Executive Committee for recommendation to Council.”