



**STAFF REPORT
ACTION REQUIRED
with Confidential Attachment**

**EX33.6 Indemnification Policy for Members of Council
and Defamation**

Date:	July 30, 2009
To:	City Council
From:	City Solicitor
Wards:	
Reason for Confidential Information:	<p>This report is about litigation or potential litigation that affects the City or one of its agencies, boards, and commissions. [Litigation includes matters before administrative tribunals.</p> <p>This report contains advice or communications that are subject to solicitor-client privilege.</p>
Reference Number:	

SUMMARY

To report on Executive Committee’s request to examine the particular situation faced by Councillor Bussin in respect of a potential defamation.

In view of the timelines involved in potential defamation actions, independent counsel was retained to provide advice to the City Solicitor whether Councillor Bussin’s potential defamation action satisfies the criteria set out in the May 11, 2009 report of the City Manager which is being considered concurrently by City Council.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council review the report provided by Robert Bell dated July 9, 2009 and determine whether to indemnify Councillor Bussin's legal expenses with respect to a potential defamation action; and
2. that the confidential attachment to Robert Bell's report remain confidential in its entirety due to solicitor client privilege.

Financial Impact

The cost of independent outside counsel to advise whether Councillor Bussin's potential defamation action satisfies the criteria set out in the draft policy in the May 11, 2009 City Manager's report is estimated to be less than \$4,000.00 plus GST and disbursements.

In the event that City Council resolves to indemnify Councillor Bussin for her legal expenses, the cost estimated is set out in my companion report to Council dated July 30, 2009. Funding up to a maximum of \$25,000.00 can be absorbed within the 2009 Approved Operating Budget for City Council (Council General Expense Budget). Should the estimated costs exceed \$25,000.00, a further report will be submitted to Executive Committee identifying the source of funds.

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

ISSUE BACKGROUND

In considering the City Manager's report on the Indemnification Policy for Members of Council and Defamation.

<http://www.toronto.ca/legdocs/mmis/2009/ex/bgrd/backgroundfile-21491.pdf> Executive Committee requested a report directly to City Council:

“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.”

COMMENTS

In view of the timelines involved with a potential defamation action (Notice Letter must be served within six weeks and set out with precision the words complained of, the details of the defamatory meaning of the words and any extended meaning or innuendo), the City Solicitor retained Robert Bell of the firm Borden Ladner Gervais to provide an independent opinion whether Councillor Bussin's potential defamation satisfies the criteria set out in the City Manager's report.

Mr. Bell's opinion dated July 9, 2009 that Councillor Bussin's claim satisfies the criteria is attached. A portion of Mr. Bell's opinion contains confidential advice.

Mr. Bell's involvement in this matter is now at an end.

Councillor Bussin has been advised of Mr. Bell's conclusions.

CONCLUSION

This matter has been expedited in view of the relevant time lines. Independent outside counsel is of the opinion that Councillor Bussin's potential defamation action satisfies the criteria set out in the draft policy. Nevertheless, it is for Council to make the determination on the matter of eligibility and if this is an appropriate case for indemnification.

CONTACT

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SIGNATURE

Anna Kinastowski
City Solicitor

ATTACHMENT

Opinion from Robert Bell, Borden Ladner Gervais dated July 9, 2009



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July 9, 2009

PRIVILEGED AND CONFIDENTIAL

Anna Kinastowski
City Solicitor
City of Toronto
100 Queen Street West
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Dear Ms. Kinastowski:

Re: Councillor Bussin: Request for Reimbursement of Legal Expense of Civil Action for Defamation

We acknowledge and return, duly executed, our retainer agreement as external legal counsel to the City of Toronto to consider and advise in respect of this request in the context of the Staff Report dated May 11, 2009 with proposed amendments to the Indemnification Policy for Members of Council and Defamation (hereinafter referred to as "Proposed Policy"). The amendments provide a process for reimbursement of legal expenses where a Member of Council initiates a civil action for defamation.

Background

By way of background, we met with Councillor Bussin, with Executive Assistant David McCully in attendance, on Tuesday June 16, 2009. At that time we were given a binder of materials in respect of the alleged defamatory publication in something called Ward 32 News which publication came to Councillor Bussin's attention at the end of May, 2009. We have reviewed these materials; the Ward 32 News publication; and an internet publication being a YouTube video of May 27, 2009 with similar statements to the Ward 32 News publication.

We stated to Councillor Bussin that we were not in a position to and were not retained to provide her with any legal advice in respect of the potential defamation claim, cautioned her not to provide us with any confidences and in particular no solicitor client confidences. Although we did not review any confidential communications, our retainer from the City contains a component of common interest with Councillor Bussin in consideration of the potential claim. As such, we would assert a common interest privilege in respect of the discussions of June 16, 2009.

Caution

Out of caution, and not as advice, we pointed out to Councillor Bussin that if any claim were to be pursued, written notice may be required. We outlined the limitations provisions under the *Libel and Slander Act*. Councillor Bussin indicated that she had received some preliminary advice about timelines and the importance of moving quickly in the face of defamatory publications. It was recognized that the process of dealing with legal fees and the Policy for Members of Council would be unlikely to move as quickly as circumstances usually dictate in terms of moving ahead with a Libel Notice. Councillor Bussin has retained counsel without knowing the result of any indemnification request to protect against any applicable limitations provisions.

The Proposed Process Under the Indemnification Policy

The proposed policy provides that should a Member of Council claim reimbursement for legal expenses incurred when bringing a defamation action such as currently contemplated by Councillor Bussin, the process would be:

1. The City Solicitor refers the matter to an independent external lawyer for a written recommendation on eligibility having reviewed criteria set out in the Report of May 11, 2009. We confirm that BLG is independent and has no conflict in advising the City in respect of Councillor Bussin's matter.
2. BLG is to advise if the claim has merit.
3. Further, BLG is to review and make recommendations as to whether the matter arises out of the exercise of the Member's official duties as defined in Ontario law and jurisprudence; whether the alleged statements, if left unchallenged, will undermine public confidence in municipal government and government officials; and whether the alleged statements, if left unchallenged, may disrupt the efficient functioning of City Council.

The criteria are to be considered in light of public interest objectives including: encouraging the highest standards of professional and ethical behaviour among elected officials; avoiding litigation which may undermine free expression and political discourse; and protecting the reputation of City government and its public officials with a view to attracting citizens into public life.

Merit

Based upon information given to us, the article and the video published on the internet are, in our view, defamatory. Both publications refer to demolition of residences at 14 and 16 Wineva and severance and variance to permit construction of three storey townhomes on the site.



We believe that virtually all of the words in the article are defamatory of Councillor Bussin in their natural and ordinary meaning. We do not set out herein the words from the publication in question but do so separately on a strictly privileged and confidential basis. Any repetition of libel should be avoided. If there were to be republication in law by the City of the defamation statements, such could lead to further litigation with the City as a party. Any repetition of libel could itself become the subject of new publications. This could unnecessarily complicate potential litigation, in addition to implicating the City unnecessarily.

It is noteworthy that one of the Ward 32 residents e-mailed Councillor Bussin's office after the story was published expressing concern about the statement in the story. This is some evidence that the false and defamatory statements in the Ward 32 News article have been taken seriously.

There is no doubt that it is harmful to Councillor Bussin's personal reputation and reputation as Councillor to be subjected to the statements in question.

We discussed with Councillor Bussin evidence of malice which in law would vitiate the fair comment or privilege defences if such could be made out.

A similar analysis could be done in respect of the internet libel.

Recommendation on Merit Criteria: The potential claim by Councillor Bussin has sufficient merit to support a recommendation that the first criteria set out in the proposed Policy has been met.

Exercise of Member's Duties

The defamatory publication arises out of Councillor Bussin's response to concerns expressed by residents with respect to a proposed development. This is clearly known to be part of the Councillor's duties.

Do Statements Undermine public confidence in municipal government and government officials

Councillor Bussin states that the statements in question are false. To leave inaccurate and defamatory statements unchallenged would be inconsistent with encouraging the highest standards of ethical behaviour among elected officials. No one will wish to serve the public if they are unable financially to challenge false and defamatory publications. As noted above, a resident has already e-mailed the Councillor's office expressing concern based upon the story in question that Councillor Bussin may have been "influenced." This is an example of public confidence being undermined.

Will statements disrupt the efficient functioning of City Council

This criteria is more difficult to consider. Absent actual evidence that the story in question is used, for example, at a Council meeting, to attack the victim of the defamatory publication, the potential for disruption will exist in each case which may be



presented for consideration. To give this criteria meaning one could seek indications beyond mere potential to disrupt. On the other hand, it is unlikely that Council would seek to use defamatory publications against Councillor Bussin. It will, in considering this criteria, be improbable that indications beyond potential to disrupt will be found.

In Councillor Bussin's matter, she is Council Speaker. There is evidence that a resident has taken the article seriously. City Council, to function efficiently, should have its Councillors and its Council Speaker free to discharge their obligations without having to be concerned about poison circulating as a result of defamatory publications. Harm to reputation could disrupt efficient functioning of City Council in the sense that it will have unknown impact on the interrelationships of Councillors. Further, the victim of a smear campaign who cannot take steps to clear his or her reputation would arguably be tentative and less effective as Councillor.

In the proposed claim by Councillor Bussin, the nature of the defamatory publications are such that there is sufficient evidence to recommend to you that this criteria has been met in light of the public interest objectives of the proposed Policy.

Overall Recommendation

We would recommend that Councillor Bussin's claim be eligible for reimbursement of legal expenses incurred when bringing defamation action in respect of the publications referred to above and as set out in the privileged and confidential communication, attached.

Yours truly

BORDEN LADNER GERVAIS LLP

ROBERT B. BELL

Attch:
RBB:cd