



STAFF REPORT ACTION REQUIRED

Indemnification Policy for Members of Council and Defamation

Date:	May 11, 2009
To:	Executive Committee
From:	City Manager
Wards:	All
Reference Number:	

SUMMARY

The purpose of this report is to offer amendments to the Indemnification Policy for Members of Council (the “Councillor Policy”) that provide a process for the reimbursement of legal expenses where a Member of Council initiates a civil action for defamation.

RECOMMENDATIONS

- (1) If Council determines that amendments to the Indemnification Policy for Members of Council regarding defamation are necessary, that Council adopt the amendments set out in Appendix B.
- (2) If Council adopts the amendments in Appendix B, that Council authorize the Integrity Commissioner to report on any related amendments to the Code of Conduct Complaint Protocol for Members of Council.
- (3) If Council adopts the amendments in Appendix B, that the amendments not be extended to agencies, boards, commissions, corporations and special purpose bodies.

Financial Impact

There are no financial implications arising out of this report at this time.

DECISION HISTORY

City Council, at its meeting of July 15, 16 and 17, 2008 (EX. 22.8), requested the City Manager and City Solicitor to submit a report to the Executive Committee “on indemnifying Councillors for legal advice/support on defamation actions.”

The City Solicitor has been consulted and concurs with the contents of this report. The Interim Integrity Commissioner has also been consulted and has indicated that the role proposed for the Integrity Commissioner is consistent with the duties and responsibilities of that office.

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.

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 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.” For convenience, the Councillor Policy, as amended at Council’s July, 2008 meeting, is attached to this report in Appendix A.

COMMENTS

A. Brief Review of Defamation

Defamation is the act of harming the reputation of another person by making a false statement to a third party. The tort of defamation, by its nature, is directed toward protecting the private interest.

The typical form of a defamatory statement is an attack upon the moral character of a person, attributing to that person any form of disgraceful conduct. Examples include suggesting that someone has committed a crime or is untruthful. A defamatory statement

is a publication which tends to lower a person in the estimation of right-thinking members of society or to expose a person to hatred or contempt.

There are two distinct forms of defamation: libel and slander. Libel is the intentional publication of defamatory material in permanent form. This would include, for example, the publication of a news article, a story or a video. Slander is the publication of defamatory material in a transitory form. In other words, slander is defamation communicated by spoken words. Common to both libel and slander is the requirement that the publication or communication be made to a third party.

B. Current Councillor Policy

The existing Councillor Policy provides for the reimbursement of legal expenses for matters not covered by the City's insurance policies, for example, criminal and quasi-criminal charges and certain civil claims, e.g. civil assault or battery, arising out of an act done in the performance of the Member's official duties. Members of Council are responsible, in the first instance, for obtaining their own counsel. Where the Member is seeking reimbursement of legal expenses, the matter is referred to the Executive Committee and City Council for a decision. Members may seek interim reimbursement from the Executive Committee up to \$25,000.

Under the Councillor Policy, the City Solicitor provides a report and recommendation to Executive Committee and to Council for consideration. In appropriate circumstances, or when requested by the Councillor involved, the City Solicitor must consult with the Integrity Commissioner and/or external counsel in the preparation of the report. Where a Member is eligible for reimbursement, the reasonableness of the lawyer's fee is determined in accordance with the criteria set out in the policy.

C. Current Coverage for Defamation Actions

While claims *against* Councillors for defamation are covered under the City's Comprehensive General Liability Policy ("CGL Policy"), the CGL Policy does not provide insurance for costs incurred when a Member initiates a defamation action. As well, unlike the Indemnification Policy for Management/excluded Staff, the Councillor Policy does not currently provide for reimbursement in respect of expenses incurred by Members of Council when initiating a defamation action.

Currently, with respect to Member on Member litigation, the Member alleged to have made the defamatory statements is covered by the CGL Policy to defend the action, while the Member alleged to have been injured by the statement has no entitlement to reimbursement when *initiating* a claim. While, in this regard, it is apparent that the playing field may need to be levelled, any amendment to the policy to extend coverage for defamation, where the Member has initiated a defamation action, should build in

mechanisms to encourage the early resolution of Member on Member disputes (see part (G) below).

D. Indemnification for Defamation Actions in Other Municipalities

Staff made inquiries with sixty-eight municipalities across Canada in respect of their indemnification policies. Of the fifty-six municipalities who responded (or for whom information was available on-line) none reported that they indemnify members of Council for legal costs incurred in bringing a defamation action. The indemnification by-laws in the cities of Kenora, Ontario and Coquitlam, British Columbia specifically provide that the municipality will not indemnify a member of council defending a defamation action. Kenora and Coquitlam are the only responding municipalities that have by-laws specifically touching on defamation.

E. The Public Interest

In determining the circumstances in which Council may decide to reimburse Members for expenses incurred in initiating a defamation action, there are competing considerations that must be balanced.

As noted in the staff report considered by Council at its November 24, 2005 meeting, the spectre of litigation may inhibit interested stakeholders (constituents, interest groups, the press) and Members of Council from expressing themselves with the vigour and candour desired for constructive policy debate. On the other hand, while individuals who choose to enter public life should expect to be subject to scrutiny and comment in relation to their public policy functions, the fact of their public profile may expose public officials to egregious, defamatory attacks.

These competing considerations should be resolved by a consideration of the impact of the statements on the public interest, for example, whether the Member's ability to exercise his/her legislative function may be impaired or whether public confidence in Council as a whole risks being undermined. A consideration of the public interest, when determining eligibility for reimbursement, appropriately balances the need for vigorous political expression, while providing Members a measure of protection against egregious attacks. As such, any extension of coverage for the initiation of a defamation action should build in mechanisms to ensure that coverage is extended only where a legitimate public interest is also impacted.

It is suggested that any claims for reimbursement for defamation actions should be subject to an external screening process (set out in section G of this report) to ensure that Council is satisfied that the defamatory statements, if left unchallenged, would adversely impact the public interest.

F. Objectives

In view of the above considerations, an amendment to the Councillor Policy to cover defamation actions brought by Members of Council should satisfy the following public interest objectives:

- Encouraging the highest standards of professional and ethical behaviour among elected officials.
- Avoiding a proliferation of litigation that may have the effect of undermining free expression and political discourse in a democratic society.
- Discouraging Member on Member litigation, which brings City government into disrepute.
- Protecting the reputation of City government and its public officials with a view to attracting citizens into public life.

G. Amendments to Councillor Policy

The aforementioned objectives are addressed by amendments to the Councillor Policy offered in Appendix “B”, which are described immediately below. The amendments contemplate three litigation scenarios: (i) Member versus a third party; (ii) Member versus Member and (iii) Member versus a City employee.

(i) Member versus Third Party

Pursuant to the amendments offered, a Member claiming reimbursement for legal expenses incurred when bringing a defamation action against a person, other than another Member of Council or City employee, will be required to follow the process below:

Step 1: Referral to External Lawyer

The matter will be referred by the City Solicitor to an independent external lawyer who will screen the claim on the following criteria and provide a written recommendation as to eligibility:

1. The merits of the claim.
2. Whether the matter arises out of the exercise of the Member’s official duties as defined in Ontario law and jurisprudence.
3. Whether the alleged statements, if left unchallenged, will undermine public confidence in municipal government and government officials.
4. Whether the alleged statements, if left unchallenged, may disrupt the efficient functioning of City Council.

Step 2: To Executive Committee and Council

The recommendation from the external lawyer will be considered by Executive Committee and Council.

Step 3: Review for Reasonableness of Account

If Council determines that the Member is eligible, the City Solicitor will report back to Executive Committee and to Council on the reasonableness of the legal account.

(ii) Member versus Member

Litigation between Members of Council, while relatively uncommon, has the potential to bring municipal governance into disrepute and to undermine public confidence in City Council. As such, any amendments to the Councillor Policy to provide for reimbursement, in such circumstances, should discourage litigation and promote early resolution.

Pursuant to the amendments offered, therefore, in order to be eligible for reimbursement for legal expenses incurred in bringing a defamation action against another Member, the Member bringing the action will be required to follow a separate process (described immediately below), which would be attached as a schedule to the Councillor Policy.

Step 1: Mediation by Integrity Commissioner

In order to be eligible for reimbursement, the Member must first seek to have the matter resolved through mediation by the Integrity Commissioner (IC). The mediation process will be subject to the following requirements:

- The IC will only become involved where no legal action has been commenced and where the matter falls within his/her jurisdiction, that is, the matter touches on the *Code of Conduct for Members of Council*, e.g. discreditable conduct, or otherwise raises an issue of the ethical behaviour of Councillors.
- All discussions and communications will be on a “without prejudice” basis and will be kept confidential.
- With the assistance of the IC, the parties may resolve the matter in either a private (e.g. exchange of letters) or public (e.g. apology on the floor of Council) fashion, or in any other agreed upon manner.

- If the dispute is not resolved, the IC shall make a finding in writing as to whether the parties participated in the mediation in good faith, a copy of which will be provided to the City Solicitor and to Executive Committee.

Step 2: Referral to External Lawyer

Where mediation by the IC is unsuccessful and a defamation action is commenced for which the Member is seeking reimbursement, the matter will be referred by the City Solicitor to an independent external lawyer who will screen the claim on the criteria set out in Part (i) above.

Where the IC has determined that the claiming Member did not participate in mediation in good faith, the City Solicitor will not refer the matter to an external lawyer and the claiming Member will not be eligible for reimbursement.

Step 3: To Executive Committee and Council

Where the IC has determined that the claiming Member participated in mediation in good faith, the recommendation from the external lawyer will be considered by Executive Committee and Council.

Step 4: Review for Reasonableness of Account

If Council determines that the Member is eligible, the City Solicitor will report back to Executive Committee and to Council on the reasonableness of the legal account.

If Council authorizes the IC mediation process, the IC should have the opportunity to report on any related amendments to the Code of Conduct Complaint Protocol for Members of Council.

Cost Recovery

Whether in scenario (i) or (ii), where the Member receives a judgement or the matter settles, the Member will be required to reimburse the City for its costs out of the costs and damages awarded by a Court, or out of the proceeds of any settlement.

(iii) Member versus Staff

The amendments offered specifically provide that there will be no reimbursement of legal expenses with respect to an action brought by a Member of Council against a City employee. While this scenario is unlikely, where an employee is alleged to have made defamatory statements about a Member of Council, it is preferable for the City to deal with the matter as a human resource management issue, including determining whether any misconduct has occurred and the imposition of discipline, where appropriate.

H. Directors of Agencies, Boards, Commissions, Corporations and Special Purpose Bodies

Council, in its decision of February 23, 24 and 25, 2009 [EX 29.13] extended the Indemnification Policy for Members of Council to directors of those agencies, boards, commissions, corporations and special purpose bodies included in the City's errors and omissions insurance policy. While Council also decided that all future amendments to the Councillor Policy apply to directors of agencies, boards, commissions, corporations and special purpose bodies included in the City's Errors and Omissions insurance policy, it is recommended that the amendments in Appendix B to this report not be extended. In the event that a director seeks reimbursement for costs incurred in bringing a defamation action, the matter may be referred to the City Manager and City Solicitor to determine an appropriate course of action.

Conclusion

Staff were asked for a report on indemnifying Members of Council for expenses incurred in defamation actions. This report offers a process that responds to that request. By ensuring that the public interest is the predominant consideration in evaluating reimbursement claims for defamation actions, the amendments offered strike the appropriate balance between the need to ensure unencumbered political discourse, while providing a measure of protection to Members from egregious defamatory attacks.

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SIGNATURE

Joe Pennachetti, City Manager

ATTACHMENTS

Appendix A, Indemnification Policy for Members of Council
Appendix B, Amendments for Defamation Actions

Appendix A

Indemnification Policy for Members of Council

- (1) Where a Member of Council (“Member”) is charged with an offence under the *Criminal Code*, or under any other statutes(s), arising out of an act done in the performance of his/her official duties:
 - (a) The Member shall, in the first instance, be responsible for his/her own defence including the retaining of legal counsel or a paralegal.
 - (b) Where the Member is acquitted and is seeking reimbursement for legal expenses, the matter shall be referred to the Executive Committee and City Council for their consideration on advice from the City Solicitor.

Interpretation Notes:

- (i) The term “acquitted” shall be taken to be the same as a dismissal of the charge(s) and may, in appropriate circumstances, include the withdrawal of the relevant charge(s).
 - (ii) Section (1) shall not be read so as to preclude the reimbursement of funds in circumstances where no charge has been laid and where independent legal advice is necessary, except for a proposed application alleging a Member has contravened the *Municipal Conflict of Interest Act*.
- (2) Where a civil action or proceeding, which is not covered by the City’s insurance policy, is brought against a Member, which in the opinion of City Council arises out of acts or omissions done or made by such Member in his/her capacity as a Member of Council, the City may pay damages or costs awarded against such Member or legal expenses incurred by him/her as may be determined by City Council on advice from the City Solicitor, as provided for by section 218 of the *City of Toronto Act, 2006*, as amended. Whenever a civil action or other proceedings is brought against a Member, the Member is to advise the Insurance and Risk Management Section of the Corporate Finance Division immediately with respect to such action proceeding.
 - (3) The Executive Committee may reimburse funds to cover the legal expenses of Members in matters covered by sections (1) and (2) above to a maximum of \$25,000 if the Executive Committee, in consultation with the City Solicitor, determines that reimbursement of funds is warranted upon consideration of all the circumstances. In the event that the initial reimbursement is exhausted before the

matter is concluded, any further financing shall be referred to the Executive Committee for its consideration and recommendation to Council.

- (4) Section (3) does not apply to an application alleging a Member has contravened the *Municipal Conflict of Interest Act*.
- (5) Where a request for reimbursement of legal expenses has been made under this policy, the City Solicitor shall provide a report and a recommendation to the Executive Committee and to City Council for their consideration. In appropriate circumstances, or when requested by the Councillor involved, the City Solicitor shall consult with the Integrity Commissioner and/or external counsel in the preparation of the report.
- (6) Where a Member of Council is eligible for the reimbursement of legal expenses, the City Solicitor's report shall include an assessment of the reasonableness of the lawyer's account, having regard to the factors ordinarily considered by a court, including, but not limited to, the experience, skill and competence of the lawyer, the complexity of the issues, the importance of the matter and the time expended by the lawyer.

Appendix B

Amendments for Defamation Actions

1. Amend the Indemnification Policy for Members of Council by adding the following sections:
 - (7) Sections 8 through 14 of the policy shall apply to requests for reimbursement where a Member brings an action in defamation, and shall prevail to the extent of any inconsistency with sections 1 through 6.
 - (8) A Member claiming reimbursement for legal expenses incurred in a defamation action brought against a person other than a Member of Council shall refer the claim to the City Solicitor.
 - (9) The City Solicitor shall refer the claim to an independent external lawyer who will screen the claim on the following criteria and provide a written recommendation as to eligibility (the “external report”):
 - (a) The merits of the claim.
 - (b) Whether the matter arises out of the exercise of the Member’s official duties as defined in Ontario law and jurisprudence.
 - (c) Whether the alleged statements, if left unchallenged, will undermine public confidence in municipal government and government officials.
 - (d) Whether the alleged statements, if left unchallenged, may disrupt the efficient functioning of City Council.
 - (10) The recommendation in the external report shall be considered by Executive Committee and Council.
 - (11) If, upon consideration of the external report, Council determines that the Member is eligible, the City Solicitor shall report back to Executive Committee and to Council on the reasonableness of the legal account, in accordance with section 6.
 - (12) A Member shall not be eligible for reimbursement where a defamation action is brought by the Member against a City employee.
 - (13) Where a legal proceeding has concluded and the Member receives a judgement or the matter has settled, the Member shall reimburse the City for costs incurred pursuant to this policy, out of the costs and/or damages awarded by a Court or out of the proceeds of any settlement.

- (14) Where a Member is seeking reimbursement for expenses related to a defamation action brought against another Member, Schedule 1 to this policy shall apply.

Schedule 1

- (1) A Member shall not be eligible for reimbursement of legal expenses incurred in bringing a defamation action against another Member, unless the Member has, prior to the commencement of any legal proceedings, sought to have the dispute resolved through mediation by the Integrity Commissioner.
- (2) The Integrity Commissioner shall only engage in mediation where the matter is within his or her jurisdiction and where the claiming Member has not initiated a legal proceeding.
- (3) Subject to section 5 of this Schedule, all discussions and communications to resolve the dispute shall be held on a without prejudice basis and shall be kept confidential.
- (4) The parties shall make a good faith effort to resolve the dispute.
- (5) If the dispute is not resolved, the Integrity Commissioner shall determine, in writing, whether each party participated in the mediation in good faith (the "Integrity Commissioner's report"), a copy of which shall be provided to the City Solicitor and to the Executive Committee.
- (6) Subject to section 7 of this Schedule, where mediation by the Integrity Commissioner is unsuccessful and a legal proceeding is commenced for which the Member is seeking reimbursement, paragraphs 8 through 14 of the policy shall apply.
- (7) Where there Integrity Commissioner's report states that the claiming Member did not participate in mediation in good faith, the City Solicitor shall not refer the matter to an external lawyer and the Member shall not be eligible for reimbursement.