

Clause embodied in Report No. 15 of the Administration Committee, which was before the Council of the City of Toronto at its meeting held on November 6, 7 and 8, 2001.

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**Options for Methods to Deal With
Decisions on Compliance Audit Applications**

(City Council on November 6, 7 and 8, 2001, deferred consideration of this Clause to the next regular meeting of City Council scheduled to be held on December 4, 2001.)

(City Council on October 2, 3 and 4, 2001, deferred consideration of this Clause to the next regular meeting of City Council scheduled to be held on November 6, 2001.)

Clause No. 15 of Report No. 13 of The Administration Committee,
entitled "Options for Methods to Deal With
Decisions on Compliance Audit Applications".)

The Administration Committee reports having forwarded the following report (August 22, 2001) from the Acting City Clerk to Council for consideration:

Purpose:

To report on options for external bodies, rather than City Council, to make decisions on election campaign compliance audit applications.

Financial Implications and Impact Statement:

None.

Recommendation:

It is recommended that this report be received for information.

Background:

On July 24, 25 and 26, 2001 City Council amended Clause No. 24 of Report No. 11 of The Administration Committee (Compliance Audit Requests under the *Municipal Elections Act, 1996*) to provide:

- (1) the Acting City Clerk be requested to submit a report to the September 2001 meeting of the Administration Committee on issues concerning the validity of establishing an arms-length municipal board and other options to review municipal election returns,

finances, and compliance with Council's election campaign policies, and other similar matters, including but not limited to the powers of investigation, evaluation and the issuance of orders; and

- (2) the Administration Committee be requested to consider the development of amendments to the elections legislation to address shortcomings that have been identified in the debate concerning the compliance audits.

Comments:

Legislative control of election campaign finances first came into effect in Bill 106, the *Municipal Elections Statute Law Amendment Act* (Royal Assent on June 8, 1988). While the previous election legislation enabled a municipal council to regulate contributions, few councils did so. The former City of Toronto had a voluntary program for disclosure of campaign contributions made to candidates but, in staff's recollection, few candidates participated in this program.

The current compliance audit provisions were first enacted in Bill 16, the *Municipal Elections Statute Law Amendment Act, 1990* (Royal Assent on December 20, 1990). Prior to this, it was the responsibility of an elector to initiate court action if he or she believed a candidate had contravened a provision of the election campaign finances. The compliance audit provisions transferred this responsibility, in part, from an elector to the council or local board. An elector still has the option to commence his or her own legal action if a council or local board refuses the elector's request for a compliance audit.

The compliance audit provisions have been continued through to the present legislation with some minor technical amendments occurring over the intervening years. A copy of section 81 of the *Municipal Elections Act, 1996* (the "Act"), which sets out the current provisions for compliance audits, is attached as Appendix A.

During the period from December 1990 through to December 1996, the Commission on Election Finances had certain responsibilities in the area of municipal elections, including compliance audits. If a council or local board refused an elector's request for an audit, the elector could appeal this decision to the Commission. To staff's knowledge, only one such appeal was ever made to the Commission. In that instance, the Commission also refused the request for a compliance audit.

With the introduction of the *Municipal Elections Act, 1996*, being the first major overhaul of the election legislation since 1988, the Commission on Election Finances, at its request, was removed from its responsibilities for municipal elections. This meant, in part, there was no longer any appeal from a council's refusal of a compliance audit request and an elector would need to commence court action if he or she wished to pursue the matter.

In 2001, the City Clerk received four applications for compliance audits on candidates in the 2000 municipal election. Council refused all four applications. Staff were directed by Council to prepare a report to identify options that would transfer the decision-making process on compliance audits from Council to some other body.

It must be noted that with the exception of the option to maintain the status quo, all other identified options will require legislative amendments to the *Act*.

Option 1 – Status Quo:

Under this option, no changes would be made to the compliance audit provisions and Council would continue to be the decision making body for compliance audits.

Pros:

- would not require any legislative changes; and
- there would be political accountability in the decision making process.

Cons:

- would not address Council's desire to remove itself from making decisions on compliance audit requests;
- some electors may not avail themselves of the compliance audit process as they feel Council will not act on their request; and
- electors would need to commence their own court action should Council decide to refuse the compliance audit request.

Option 2 – Establishment of a Council Appointed Body:

Under this option, the *Act* would be amended to require Council to establish an arms-length committee that would receive and make decisions on compliance audit requests. The membership of this committee would be at Council's discretion, but should probably include individuals who have knowledge of the election campaign finances provisions of the *Act* and are representative of the community. It would not be appropriate for City staff to be appointed to this committee.

Pros:

- would address Council's desire to remove itself from making decisions on compliance audit requests; and
- would somewhat increase the public's confidence in the process as Council would not, in effect, be policing its own members.

Cons:

- would require legislative amendments that the Province may or may not be willing to enact;

- as Council would be making the appointments to the committee, the public might still perceive that Council could influence the decision-making process;
- would remove the decision-making process from an elected body with political accountability; and
- might lead to an increase in the number of compliance audit requests as electors may feel the process is subject to a more independent review and, therefore, have greater success in receiving a favourable decision on their request.

Option 3 – Transfer this Function to a Provincial Body:

Under this option, the legislation would be amended to provide that compliance audit requests would be considered by one of the provincially appointed quasi-judicial boards, such as the Ontario Municipal Board (OMB). The OMB already has responsibilities for some municipal matters and is accustomed to conducting public hearings.

Pros:

- would address Council's desire to remove itself from making decisions on compliance audit requests; and
- would increase the public's confidence in the process as Council would not, in effect, be policing its own members.

Cons:

- would require legislative amendments that the Province may or may not be willing to enact;
- would remove the decision-making process from an elected body with political accountability;
- might lead to an increase in the number of compliance audit requests as electors may feel the process is subject to a more independent review and, therefore, have greater success in receiving a favourable decision on their request; and
- there would be a time delay in considering the matter as the majority of the provincial boards, including the OMB, have busy calendars.

Option 4 – Transfer this Function to Elections Ontario:

Under this option, the legislation would be amended to provide that compliance audit requests would be considered by Elections Ontario which now has the responsibilities of the former Commission on Election Finances.

Staff have met with officials from Elections Ontario and discussed this as a potential option. It is unclear at this time as to the cost implications in utilizing these services.

Pros:

- would address Council's desire to remove itself from making decisions on compliance audit requests;
- would increase the public's confidence in the process as Council would not, in effect, be policing its own members; and
- the staff at Elections Ontario are familiar with election campaign finances rules and are accustomed to reviewing candidate's campaign financial statements.

Cons:

- would require legislative amendments that the Province may or may not be willing to enact;
- would remove the decision-making process from an elected body with political accountability; and
- might lead to an increase in the number of compliance audit requests as electors may feel the process is subject to a more independent review and, therefore, have greater success in receiving a favourable decision on their request.

Staff were also requested to report on options for the powers of investigation, evaluation and the issuance of orders in connection with the compliance audit decision-making process.

Under the *Act*, auditors have the powers of a commission under Part II of the *Public Inquiries Act*. These powers are very broad in nature and include the power to require witnesses to appear before them, require the production of documents in the possession of any person and the taking of evidence. The auditor is also entitled to have access to all "relevant books, papers, documents or things of the candidate".

In staff's opinion, the current provisions of the *Act* with respect to the powers of an auditor are sufficient to ensure a thorough review of the candidate's financial records can be conducted. It must be noted, however, that should a candidate decide to destroy or hide the existence of certain campaign financial records, such as invoices for goods/services or evidence of contributions, an audit will not, in most likelihood, uncover the existence of these records.

Conclusions:

At Council's request, staff have identified four options for processes to make decisions on compliance audit applications. One of the options is the status quo; the other three would transfer the decision-making process to an external body. These three options would all require legislative amendments to the *Municipal Elections Act, 1996*.

In staff's opinion, the present powers given to an auditor under the *Act* are sufficient to ensure a thorough review of the candidate's campaign records can be conducted, assuming the candidate does not destroy or hide any of the applicable records.

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List of Attachments:

Appendix A – section 81 of the *Municipal Elections Act, 1996*

Appendix A

Section 81 of the Municipal Elections Act, 1996

81(1) Compliance audit – application:

An elector who is entitled to vote in an election and believes on reasonable grounds that a candidate has contravened a provision of this Act relating to election campaign finances may apply for a compliance audit of the candidate's election campaign finances.

81(2) Compliance audit – application – requirements:

The application shall be made to the clerk of the municipality or the secretary of the local board for which the candidate was nominated for office, within 90 days after the filing date or the candidate's supplementary filing date, if any; it shall be in writing and shall set out the reasons for the elector's belief.

81(3) Compliance audit – application – decision:

Within 30 days after receiving the application, the council or local board, as the case may be, shall consider the application and decide whether it should be granted or rejected.

81(4) Compliance audit – appointment of auditor:

If the council or local board decides to grant the application it shall, by resolution, appoint an auditor to conduct a compliance audit of the candidate's election campaign finances.

81(5) Compliance audit – auditor – licensed only:

Only an auditor who is licensed under the *Public Accountancy Act* may be appointed under subsection (4).

81(6) Compliance audit – duty of auditor:

An auditor appointed under subsection (4) shall promptly conduct an audit of the candidate's election campaign finances to determine whether he or she has complied with the provisions of this Act relating to election campaign finances and prepare a report outlining any apparent contravention by the candidate.

81(7) Compliance audit – who to receive:

The auditor shall submit the report to,

- (a) the candidate;
- (b) the council or local board;
- (c) the clerk with whom the candidate filed his or her nomination; and
- (d) the applicant.

81(8) Compliance audit – powers of auditor:

For the purpose of the audit, the auditor,

- (a) is entitled to have access, at all reasonable hours, to all relevant books, papers, documents or things of the candidate and of the municipality or local board; and
- (b) has the power of a commission under Part II of the *Public Inquiries Act*, which Part applies to the audit as if it were an inquiry under that Act.

81(9) Compliance audit – costs:

The municipality or local board shall pay the auditor's costs of performing the audit.

81(10) Compliance audit – consideration – legal proceeding:

The council or local board shall consider the report within 30 days after receiving it and may commence a legal proceeding against the candidate for any apparent contravention of a provision of this Act relating to election campaign finances.

81(11) Compliance audit – recover of costs:

If the report indicates that there was no apparent contravention and the council or local board finds that there were no reasonable grounds for the application, the council or local board is entitled to recover the auditor's costs from the applicant.

81(12) Compliance audit – auditor – immunity:

No action or other proceeding for damages shall be instituted against an auditor appointed under this section for any act done in good faith in the execution or intended execution of the audit or for any alleged neglect or default in its execution in good faith.

The Administration Committee reports, for the information of Council, having also had before it a communication (August 1, 2001) from the Acting City Clerk, enclosing for information and any attention deemed necessary, Clause No. 24 contained in Report No. 11 of The Administration Committee, headed "Compliance Audit Requests Under the Municipal Elections Act, 1996", which was adopted, as amended, by the Council of the City of Toronto at its meeting held on July 24, 25 and 26, 2001; and advising that Council requested the Administration Committee to consider the development of amendments to Elections legislation to address shortcomings that have been identified in the City Council debate concerning the Compliance Audits.