

Clause embodied in Report No. 4 of the Audit Committee, as adopted by the Council of the City of Toronto at its meeting held on April 16, 17 and 18, 2002.

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**Public Inquiry in Relation to
MFP Financial Services Equipment Leases**

(City Council on April 16, 17 and 18, 2002, amended this Clause by adding thereto the following:

“It is further recommended that Council adopt the supplementary joint report dated April 15, 2002, from the Chief Administrative Officer and the City Solicitor, subject to deleting Recommendation No. (3), embodied therein, and inserting in lieu thereof the following new Recommendation No. (3):

- ‘(3) request the Chief Administrative Officer to submit a confidential report to the next meeting of City Council scheduled to be held on May 21, 2002, on all information and records proposed to be withheld from the inquiry Commissioner and Legal Counsel, for Council’s direction with respect thereto.’*

so that the recommendations embodied in such joint report shall now read as follows:

‘It is recommended that Council:

- (1) adopt the recommendation in the April 3, 2002 joint report of the Chief Administrative Officer and the City Solicitor to authorize the Chief Administrative Officer, in consultation with the Chief Financial Officer and Treasurer and City Solicitor to enter into any necessary agreements, as required, in connection with the obligation of the City to pay the costs of the public inquiry, including agreements, in substance satisfactory to the Chief Administrative Officer and in a form satisfactory to the City Solicitor, for commission counsel and inquiry facilities, within the budget limit as set out in that report, and report back periodically on the status of the inquiry budget;*
- (2) defer consideration of the issue of City standing and representation at the public inquiry, until such time as Council considers a report on the public inquiry project plan and budget; and*
- (3) request the Chief Administrative Officer to submit a confidential report to the next meeting of City Council scheduled to be held on May 21, 2002, on all information and records proposed to be withheld from the inquiry Commissioner and Legal Counsel, for Council’s direction with respect thereto.’ ”)*

The Audit Committee recommends the adoption of the following report (April 3, 2002) from the Chief Administrative Officer and City Solicitor:

Purpose:

The purpose of this report is to report on the status of Council's resolution that there be a public inquiry in relation to the MFP Financial Services Equipment Leases and on the source of funds for the inquiry, the cost of which was outlined in a report, dated January 30, 2002, from the City Solicitor to the Audit Committee.

Financial Implications and Impact Statement:

Because Council has already authorized a public inquiry under section 100 of the *Municipal Act*, there are no financial impacts arising in respect of the inquiry costs from this report. However, in determining a budget for the inquiry, the \$ 2 million amount, as previously identified in the report from the City Solicitor, dated January 30, 2002, should be used. Staff of the Finance Department have advised that funds have been set aside in the 2001 Budget accounts for the purposes of the inquiry.

Recommendations:

It is recommended that the Chief Administrative Officer, in consultation with the Chief Financial Officer and City Solicitor, be authorized to enter into any necessary agreements, as required, in connection with the obligation of the City to pay the costs of the public inquiry, including agreements, in substance satisfactory to the Chief Administrative Officer and in a form satisfactory to the City Solicitor, for commission counsel and inquiry facilities, within the budget limit as set out in this report, and report back periodically on the status of the inquiry budget.

Background:

At its meeting of February 13, 14 and 15, 2002, Council adopted Clause No. 1 of Report No.1 of the Audit Committee, "Status of Litigation with MFP Financial Services". Council adopted the recommendation that Council request a public inquiry in respect of the MFP contracts under section 100 of the Municipal Act and passed the necessary resolution to that effect as attached to the report, dated February 12, 2002, from the City Auditor. Council also had before it at the meeting a report, dated January 30, 2002, from the City Solicitor which, among other matters, estimated the costs of a public inquiry. Council requested the Chief Administrative Officer, in consultation with the Acting City Solicitor to submit a report to the Budget Advisory Committee on funds up to \$2 million for a public inquiry, as outlined in the January 30, 2002 report.

Comments:

(i) Appointment of Inquiry Judge

By letter, dated March 7, 2002, the Chief Justice of the Ontario Superior Court designated Madam Justice Denise Bellamy to conduct the inquiry mandated pursuant to the resolution of the City of Toronto under section 100 of the Municipal Act. Justice Bellamy is now engaged in

finding commission counsel. It can be expected that upon such engagement, the inquiry Commissioner (the designated judge) will be requesting an agreement between the City and commission counsel to ensure payment.

Once retained, commission counsel will undertake his or her own review to determine the relevant documents and witnesses. Once the review is concluded, the inquiry will proceed to a pre-hearing (to determine such issues as standing) and the actual hearing.

Staff have been requested by the inquiry Commissioner to determine if there are any City facilities that could be used for inquiry office space and hearing room. Staff are presently determining options for submission to the inquiry Commissioner. If no suitable facilities are found, alternative options for third party facilities will have to be considered. The infrastructure requirements of the inquiry will likely be the subject of future discussion once commission counsel is retained. It is likely that the City will be required to enter into any necessary agreements to secure necessary equipment and facilities for the inquiry. This report therefore recommends that the Chief Administrative Officer, in consultation with the Chief Financial Officer and City Solicitor, be authorized to enter into any necessary agreements, as required, in connection with the obligation of the City to pay the costs of the public inquiry, including agreements for commission counsel and inquiry facilities, within the budget limit as set out in this report.

(ii) Inquiry Budget

As it was not possible to report in time to the Budget Advisory Committee, staff are reporting to Audit Committee on the source of funds necessary for the public inquiry. The report from the City Solicitor, dated January 30, 2002, estimated the costs of a public inquiry at between \$1 million and \$ 2 million. Because a public inquiry will be in the hands of the inquiry Commissioner, it is difficult to be more precise in respect of a budget. Accordingly, in determining a budget for the inquiry, the \$ 2 million amount should be used.

Staff of the Finance Department have been consulted in the preparation of this report and have accrued funds in 2001 for the purpose of the inquiry. It is anticipated that a report from the inquiry Commissioner should be received (i.e., completion of inquiry) either by the end of the 2002 calendar year or early in 2003; the timing, however, is outside the control of the City.

It should be emphasized that the costs of the inquiry are also outside the control of the City. It would appear already that one of the estimates contained in the report from the City Solicitor, dated January 30, 2002, is underestimated. While the assumption was that there would be one senior commission counsel, the inquiry Commissioner has indicated an intent to retain two senior counsel. Staff will be reporting back periodically on the status of the inquiry budget.

(iii) City's Counsel

As indicated in the report, dated January 30, 2002, from the City Solicitor, the public inquiry is one that acts in the public interest totally independent of the City. Should the City wish to be represented at the inquiry, it would need to retain its own counsel and seek standing.

Staff do not recommend retention of City counsel and obtaining standing. The City has, in effect, decided to turn over the inquiry to an independent third party for impartial review. Unless the inquiry Commissioner invites the City to provide counsel for some specific purpose, such as presenting evidence on internal administrative procedures (which is not anticipated given that this can be accomplished by commission counsel), City representation may undermine the perception of independent third party review. Associated with this is the difficulty in determining what the City's interest and position would be in the inquiry and who provides those instructions to external counsel.

Conclusions:

It is likely that the City will be required over the next few months to enter into agreements to secure necessary equipment and facilities for the public inquiry, including the retention of commission counsel, and the authority to enter into any necessary agreements should be delegated to the Chief Administrative Officer, in consultation with the Chief Financial Officer and the City Solicitor.

The costs of the inquiry are outside the control of the City. It would appear already that one of the estimates contained in the report from the City Solicitor, dated January 30, 2002, is underestimated. While the assumption was that there would be one senior commission counsel, the inquiry Commissioner has indicated an intent to retain two senior counsel. Staff will be reporting back periodically on the status of the inquiry budget.

Staff do not recommend retention of the City's own counsel for the public inquiry. The City has, in effect, decided to turn over the inquiry to an independent third party for impartial review.

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John Adams appeared before the Audit Committee in connection with the foregoing matter.

(City Council on April 16, 17 and 18, 2002, had before it, during consideration of the foregoing Clause, the following report (April 15, 2002) from the Chief Administrative Officer:

Purpose:

To provide Council with additional information with respect to the public inquiry.

Financial Implications and Impact Statement:

There are no financial implications at this time.

Recommendations:

It is recommended that Council:

- (1) adopt the recommendation in the April 3, 2002, report of the Chief Administrative Officer and the City Solicitor to authorize the Chief Administrative Officer, in consultation with the Chief Financial Officer and City Solicitor, to enter into any necessary agreements, as required, in connection with the obligation of the City to pay the costs of the public inquiry, including agreements, in substance satisfactory to the Chief Administrative Officer and in a form satisfactory to the City Solicitor, for commission counsel and inquiry facilities, within the budget limit as set out in that report, and report back periodically on the status of the inquiry budget;*
- (2) defer consideration of the issue of City standing and representation at the public inquiry until such time as Council considers a report on the public inquiry project plan and budget; and*
- (3) authorize the Chief Administrative Officer to determine, in consultation with the City Solicitor and the City's outside counsel in the MFP litigation, what City documents will be produced in the litigation and the public inquiry, and what documents the City will maintain its claim of privilege over and not produce.*

Background:

Council has before it Clause No. 5 of Report No. 4 of the Audit Committee dealing with the status of the public inquiry in relation to the MFP Financial Services Equipment Leases. Since the report was signed and since the Audit Committee meeting held on April 11, 2002, staff of the Legal Services Division met with Commission Counsel for the Inquiry who advised that a project plan and preliminary budget for the Inquiry will be prepared shortly and should be submitted to the City within approximately 2 - 3 weeks.

Comments:

In view of the pending receipt of the project plan and budget for the Inquiry and the resulting need to report with respect to same, it would be appropriate to defer consideration of the issue of City standing at the Inquiry, commented on in the April 3, 2002 report until more information is available.

It is acknowledged that Audit Committee had relevant questions with respect to the City's role at the Inquiry. At this early stage it is not necessary for the City to make a final determination with respect to standing and representation at the Inquiry. On receipt of further information from Commission Counsel, including the inquiry project plan, this matter will be reviewed again and a report to Council will be prepared on the advantages and disadvantages of seeking standing at the Inquiry.

Commission Counsel for the Inquiry are interested in obtaining the relevant documents from the City pertaining to these matters as soon as possible. The City Solicitor's office has already gathered many of the documents in a central location and will need to respond to Commission Counsel's request. It is anticipated that from time to time issues of privilege attaching to the City's documents may arise, including issues of solicitor/client privilege or litigation privilege. Before producing documents either in the litigation with MFP Financial Services or in response to requests from the Public Inquiry Commission counsel, the City should assess whether a claim of privilege attaches to the documents and whether the documents should be produced in the litigation or in the public inquiry. It is recommended that the Chief Administrative Officer be given authority to determine, in consultation with the City Solicitor and the City's outside counsel in the litigation, what documents will be produced in the litigation and also in the public inquiry, and what documents the City will maintain a claim of privilege over and will not produce.

Conclusions:

It would be appropriate for Council to defer the issue of City standing and representation at the public inquiry until such time as the project plan and preliminary budget has been received from Commission Counsel and a further report has been prepared on this matter. It is recommended that the Chief Administrative Officer, in consultation with the City Solicitor and the City's outside litigation solicitor, be given authority to determine what City documents will be produced in the MFP litigation and the public inquiry, and what documents the City will maintain a claim of privilege over.

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(City Council also had before it, during consideration of the foregoing Clause, a communication (April 11, 2002) from the Minister of Municipal Affairs and Housing, Province of Ontario, advising that Ministry staff are currently developing a proposed regulation with provisions respecting financing leases.)

(City Council also had before it, during consideration of the foregoing Clause, a communication (April 17, 2002) from Mr. Robert A. Spence, Barrister and Solicitor submitting comments respecting the public inquiry in relation to MFP Financial Services equipment leases.)