

Review of Indemnification Policy for Members of Council

Date:	June 6, 2008
To:	Executive Committee
From:	City Manager and City Solicitor
Wards:	All
Reference Number:	

SUMMARY

The purpose of this report is to provide recommendations to amend the Indemnification Policy for Members of Council (the “Councillor Policy”) to facilitate the payment of legal expenses of Councillors. The Deputy City Manager/Chief Financial Officer was consulted in the preparation of this report.

This report recommends amendments to the Councillor Indemnification Policy in order to alleviate the financial burden that may be experienced by a councillor awaiting the outcome of a legal proceeding and to facilitate obtaining independent legal advice.

RECOMMENDATIONS

The City Manager recommends:

1. The adoption of the amendments to the Councillor Indemnification Policy set out in Appendix B to this report.

Financial Impact

The number of instances and costs per instance that might occur during the course of a year as a result of this Policy cannot be estimated. However, as the City Council budget has historically been under spent, it is recommended that any costs incurred related to the Indemnification Policy be absorbed within the annual City Council operating budget and charged against the Council general expense budget.

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

DECISION HISTORY

The Executive Committee, at its meeting of February 6, 2008 (EX. 17.18), requested the City Manager, in consultation with the Deputy City Manager/Chief Financial Officer and the City Solicitor, to review the Councillor Indemnification Policy and the insurance coverage for Members of Council and to report back to the Executive Committee with amendments to the Councillor Policy to facilitate the payment of legal expenses for Councillors. The Committee also directed that a clear language explanation of all policies providing for coverage of individual legal costs be provided to all Councillors in one document.

<http://www.toronto.ca/legdocs/mmis/2008/ex/comm/communicationfile-5796.pdf>

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. For convenience, the Councillor Policy, as adopted at Council's November 24, 2005 meeting, is attached to this report in Appendix A.

At its meeting on February 5, 6 and 7, 2007 (CC2.5), City Council approved amendments to the legal expense provisions of the Code of Conduct Complaint Protocol. The amendments require that claims for reimbursement by Members of Council be processed under the Councillor Policy, subject to specific provisions applicable to Code of Conduct complaints. At its meeting on July 16, 17, 18 and 19, 2007 (CC11.8), Council amended the cost payment provisions in the Complaint Protocol to clarify that the tariff in the Councillor Policy also applies to the payment of legal costs of a Member of a Local Board or a complainant.

At its meeting on October 22 and 23, 2007, City Council re-opened Item CC2.5 and adopted a motion to amend recommendation 1(c) of the Integrity Commissioner's report relating to eligibility for reimbursement in Code of Conduct matters.

Finally, the Integrity Commissioner has advised that he will be reporting on whether there should be an automatic right for the expenses of an initial consultation with a lawyer when a member of Council or a local board (restricted definition) is served with a complaint alleging a violation of the Code of Conduct. This will be part of a larger report on outstanding issues with the Code of Conduct and Complaint Protocol.

In this report, we make no comment or recommendations relating to reimbursement in Code of Conduct matters that are within the Integrity Commissioner's responsibility.

COMMENTS

The City's Insurance Policies

Members of Council, like City employees, while acting in the scope of their City duties are covered by the City's insurance policies against claims alleging unintentional acts, e.g. negligence. The City has a number of insurance policies in place which are renewed on an annual basis. The most relevant policies for Councillors are the Comprehensive General Liability ("CGL Policy") and Public Officials Errors and Omission ("E&O Policy"). The CGL Policy covers claims for bodily and personal injury (e.g., libel, slander, defamation, etc.) and property damage. The E&O Policy covers claims for financial loss arising from errors, omissions, misstatements, misleading statements, etc in the performance of professional duties. It applies to elected officials. The City's insurance policies do not provide coverage for fines, penalties, or legal defence costs arising from regulatory or statutory offences (e.g., occupational health & safety) or for civil actions alleging intentional wrongdoing, for example, theft, civil assault/battery.

Where a Councillor receives a lawyer's letter threatening legal action or where a Councillor is served with a statement of claim, the Insurance and Risk Management Section retains a lawyer from the Council approved roster of law firms retained to defend claims against the City. All expenses are covered by the insurer and all legal invoices are sent directly to Insurance and Risk Management for payment. There are no changes proposed to the manner that claims against Councillors are handled.

Current Councillor Indemnification Policy

The existing Councillor Policy provides that, for criminal and quasi-criminal matters arising out of an act done in the performance of their duties as a councillor, the defence of which is not covered under the City's insurance policies (see above), Members of Council are responsible for obtaining their own lawyer. Where the Councillor is acquitted and is seeking reimbursement of legal expenses, the matter is referred to the Employee and Labour Relations Committee and City Council for a decision. Where a civil action or proceeding is brought against a Councillor, which is not covered by the City's insurance policies, the City may pay damages or costs awarded against the Councillor.

Where a request for reimbursement of legal expenses has been made for matters not covered by the City's insurance policies, the Councillor provides his/her invoices to the City Solicitor who provides a report and recommendation to the Employee and Labour Relations Committee and to Council for 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. Where a Councillor is eligible for reimbursement, the Councillor is reimbursed in accordance with the tariff set out in the policy.

Suggested Amendments to Policy

The Councillor Indemnification Policy, as currently drafted, only provides for reimbursement at the conclusion of the legal proceeding. It does not allow for reimbursement at any point before then. As well, it does not reimburse Councillors for costs incurred seeking independent legal advice where there is a reasonable prospect of charges being laid.

Of the options set out below, we recommend adopting options 1 and 3, which are captured in the proposed amendments to the Councillor Policy, set out in Appendix B to this report. The recommended options may alleviate the financial burden of litigation, allow for better control of the lawyer's account and facilitate early independent advice where important *Charter* rights are at issue. We recommend against giving staff the authority to decide on reimbursement requests made by Councillors, an issue considered in option 2 below.

In terms of process, we also recommend that the Employee and Labour Relations Committee be replaced by the Executive Committee as the committee that reviews requests for indemnification by Members of Council. Legal expenses facing Members are clearly not matters affecting Employee and Labour Relations in the City. This amendment to the process is also set out in Appendix B to this report.

The approach to the payment of legal costs in the *Rules of Civil Procedure* (the "Rules") has changed. The *Rules* no longer provide for a costs grid, but rather set out certain factors that may be considered in an award of costs. We suggest that the Committee consider adopting this latter approach, as it will give Council greater flexibility to tailor the reimbursement to the particular circumstances, while avoiding the rigidity of a costs grid. In this regard, the suggested amendment is set out in Appendix "B" to this report."

The draft amendments in Appendix B also include specific exemptions to reflect the limitations on indemnification in the *Municipal Conflict of Interest Act*. Section 14 of the *Municipal Conflict of Interest Act* permits indemnification only if the member has been found not to have contravened section 5 of that *Act*.

In the event that Council adopts the recommended amendments, staff will consolidate all amendments to the Councillor Policy and produce a plain language document for Councillors which reviews all policies relating to the reimbursement of legal expenses. In the interim, for ease of reference, at Appendix "C" I provide a "Consolidated Indemnification Policy for Members of Council" which reflects the suggested changes.

Option 1: Interim Legal Expenses to \$25,000

Council may wish to consider amending the Councillor Policy to allow for the payment of legal costs prior to the conclusion of a legal proceeding, other than a proceeding under the *Municipal Conflict of Interest Act*, to a maximum of \$25,000 on approval of the

Executive Committee and Council. As currently drafted, the Councillor Policy allows for reimbursement only following the conclusion of the legal proceeding, assuming the Member is eligible. The pros and cons of this option are as follows:

Pros:

- Alleviates the financial burden of waiting until the end of the legal proceeding (months or years), to obtain reimbursement.
- Makes the policy consistent with the Indemnification Policy for Management/Excluded Staff (the “Staff Policy”), which allows for reimbursement to a maximum of \$25,000 prior to the conclusion of the legal proceeding.
- Allows for scrutiny/control of the legal account at an earlier stage. The lawyer is on notice of what the City considers to be a reasonable legal bill.

Con:

- Potential for undesirable result where Member of Council who is ultimately convicted of an offence has already been reimbursed for a portion of his/her legal expenses.

Option 2: Authorization by DCM/CFO up to \$25,000

As currently drafted, the Councillor Policy requires that all claims be referred to the Employee and Labour Relations Committee and City Council for their consideration and decision. Unlike the Staff Policy, which provides for approval by the Deputy City Manager/Chief Financial Officer up to \$25,000, under the Councillor Policy, staff do not make decisions on reimbursement requests.

Pros:

- May allow for somewhat more efficient processing for reimbursement claims.

Cons:

- Inappropriate for City officials to be deciding to approve requests for indemnification brought by individual Members of Council.
- To the extent of the DCM/CFO’s authority to decide, Council deprived of the ability to self-regulate the reimbursement of legal expenses for its Members.

Option 3: Independent Legal Advice (Criminal/Quasi-Criminal Matters Only)

Where independent legal advice is required, Council may wish to consider reimbursing Members of Council for legal expenses incurred prior to the laying of a criminal or quasi-criminal charge, other than an application alleging a Member has contravened the *Municipal Conflict of Interest Act*. The pros and cons of this option are as follows:

Pros:

- Facilitates obtaining independent advice for criminal/quasi-criminal matters, including important *Charter* rights, arising out of the performance of the Member's official duties.
- Is consistent with the Staff Policy, which provides for reimbursement where no charge has been laid and where independent legal advice is necessary.
- Early legal advice may have the effect of avoiding or minimizing costs for legal proceedings for which a Member might otherwise have sought reimbursement.
- Allows for scrutiny/control of the legal account at the earliest point. The lawyer is on notice of what the City considers to be a reasonable legal bill.

Cons:

- Prior to the commencement of a proceeding, before all the facts have emerged, it may be somewhat more difficult to determine whether reimbursement is warranted under the Policy.

Options 1 and 3 above, if adopted, would facilitate the reimbursement of legal expenses for eligible Members of Council and allow for improved management of the legal account. The proposed amendments also make clear that proceedings alleging a breach of the *Municipal Conflict of Interest Act* are not covered by the Councillor Policy. Finally, if adopted, claims for reimbursement by Councillors will be directed to the Executive Committee, which is a more appropriate forum to deal with indemnification requests by Councillors.

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SIGNATURE

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ATTACHMENTS

Appendix A, Current Indemnification Policy for Members of Council
Appendix B, Amendments to Indemnification Policy for Members of Council
Appendix C, Proposed Consolidated Indemnification Policy for Members of Council

Appendix “A”

Current 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 Employee and Labour Relations Committee and City Council for their consideration on advice from the City Solicitor.

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).

- (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 279 of the *Municipal Act, 2001*, S.O. 2001, 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) 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 Employee and Labour Relations 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.
- (4) Where a Member is eligible for reimbursement of legal expenses, the Member shall be reimbursed in accordance with the Costs Grid set out below and in accordance with Part II (Disbursements) of Tariff A to the *Rules of Civil Procedures*, as amended (hereinafter referred to as the “Tariff”). The Executive Director of Human Resources, on advice from the City Solicitor, shall review the Costs Grid in the Tariff from time to time. Notwithstanding the Tariff, the City Solicitor shall assess the reasonableness of the bill in accordance with the provisions of this policy. Members who retain a lawyer shall be provided with a

letter setting out the Tariff and stating that the City reserves the right to assess the bill for its reasonableness. In exceptional circumstances, the City may, upon the recommendation of the City Solicitor, reimburse for rates in excess of those set out in the Tariff. The letter will also include the telephone number of the Lawyer Referral Service offered by the Law Society of Upper Canada.

Table No. 1

Costs Grid

(Criminal or Civil Matters)

Law Clerks	Up to \$60.00 per hour
Student-at-Law	Up to \$80.00 per hour
Lawyer (less than 10 years)	Up to \$225.00 per hour
Lawyer (10 or more but less than 20 years)	Up to \$300.00 per hour
Lawyer (20 years and over)	Up to \$350.00 per hour

Appendix “B”

Amendments to Indemnification Policy for Members of Council

- (1) Amend the Councillor Policy in section (1) by adding the title “Interpretation notes:” above the current interpretation provision, renumbering that provision as (i): and adding the following:
 - “(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) Amend the Councillor Policy in section (2) by deleting “279 of the *Municipal Act, 2001*, S.O. 2001” and substituting “218 of the *City of Toronto Act, 2006*”.
- (3) Amend the Councillor Policy by renumbering sections (3) and (4) as (5) and (6) and inserting new paragraphs (3) and (4) as follows:
 - “(3) Upon the approval of the Executive Committee and Council, Members may be reimbursed for legal expenses in matters covered by sections (1) and (2) above to a maximum of \$25,000, where the 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*.”
- (4) Amend the Councillor Policy by replacing the words “Employment and Labour Relations Committee” wherever they appear, with the words “Executive Committee.”
- (5) Amend the Councillor policy by deleting section (4)[renumbered section (6)] and Table No. 1 (Costs Grid) and inserting a new paragraph (6) as follows:
 - “(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 “C”

Proposed Consolidated 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) Upon the approval of the Executive Committee and Council, Members may be reimbursed for legal expenses in matters covered by sections (1) and (2) above to a maximum of \$25,000, where the 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.