

Third Party Election Advertising Enforcement under the Municipal Elections Act, 1996

Date: September 11, 2017
To: Executive Committee
From: City Solicitor and City Clerk
Wards: All

SUMMARY

This report responds to City Council's direction that the City Clerk and City Solicitor report on enforcement mechanisms available for the 2018 municipal election as a result of the newly established framework in the Municipal Elections Act, 1996 (MEA) to regulate registered third party advertisers.

This report recommends that City Council authorize the City Solicitor to retain external legal counsel to handle investigations and legal proceedings related to registered third party advertising under the MEA such as failure to qualify or register as a third party advertiser.

Third party signs are subject to the same by-law restrictions as election signs. Non-compliant third party election signs are governed by Toronto Municipal Code, Chapter 693, Signs, and would be enforced by the Municipal Licensing & Standards Division.

Financial matters, such as permitted spending and contributions for third party advertising are subject to the same regime as election campaign finances. If there is an apparent contravention of the MEA with respect to third party advertiser or election campaign finances, there is a statutory mechanism available through the compliance audit committee process to address this matter.

Finally, an individual may also commence a legal proceeding in court about any matter related to the MEA, including third party advertising.

The City Clerk and City Solicitor will report in the next term of City Council with lessons learned and recommendations with respect to future third party advertising enforcement based on the experience of the 2018 election.

RECOMMENDATIONS

The City Solicitor and City Clerk recommend that:

1. City Council authorize the City Solicitor to retain external legal counsel to conduct investigations and legal proceedings with respect to complaints and issues related to third party advertising under the Municipal Elections Act, 1996 that may arise during the 2018 municipal election.
2. City Council request the City Clerk and City Solicitor to report back to Executive Committee after the 2018 municipal election with respect to the lessons learned and provide recommendations on future enforcement of registered third party advertisers during elections.

FINANCIAL IMPACT

The funds required to retain external legal counsel for registered third party advertising enforcement for the 2018 municipal election is estimated at \$200,000 and is included in the City Clerk's Office 2018 operating budget submission for 2018 municipal election expenses, fully recovered from the Election Reserve Fund.

If prosecutions flow from an investigation, additional funds will be required in 2019. Funding for future years, including for potential prosecutions, will be reflected in the annual City Clerk's Office Operating Budget submissions for post-election expenses, also fully recovered from the Election Reserve Fund.

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

DECISION HISTORY

At its meeting of July 4, 5, 6 and 7, 2017, City Council adopted amendments to Toronto Municipal Code, Chapter 693, Signs, which provided that election signs erected by a third party advertiser are subject to the same conditions and limits as a candidate's election signs, and requested that the City Solicitor, the City Clerk and the Executive Director, Municipal Licensing and Standards report on additional enforcement arising from amendments from the MEA.

<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.LS19.1>

ISSUES BACKGROUND

The recent amendments to the MEA introduced new rules to regulate third party advertising, which will come into effect on April 1, 2018. The Province of Ontario will publish the spending limits and other required forms in the coming months. Previously, third party advertising with respect to municipal elections was unregulated.

Under the MEA, a "third party advertisement" is defined as an advertisement in any broadcast, print, electronic or other medium (i.e. billboard, newspaper, radio, etc.) that has the purpose of promoting, supporting or opposing a candidate, or, a "yes" or "no" answer to a question on the ballot. However, public endorsements that do not cost money to post or broadcast, such as comments on social media, are not considered third party advertising. With the exception of a question on the ballot, third party advertising does not include issues-based advertising during the election period. For example, issues-based advertising would include one that takes a position supporting or opposing a particular matter.

Third party advertisers must register with the City Clerk if they wish to advertise in Toronto, and they must identify themselves on signs and campaign advertisements so that it is clear who is responsible for each sign and advertisement. It is an offence under the MEA if a third party advertiser incurs expenses for a third party advertisement without having registered with the City Clerk.

Eligibility to register to be a third party advertiser

The following entities are eligible to register and participate as a third party advertiser:

- Individuals who are normally residents in Ontario.
- Corporations that carry on business in Ontario.
- Trade unions that hold bargaining rights for employees in Ontario.

Election candidates cannot register as third party advertisers, nor can they direct a third party advertisement.

Eligibility to make contributions to registered third party advertisers

Contributions to registered third party advertisers can only be made by:

- Individuals who are normally residents in Ontario.
- Corporations that carry on business in Ontario.
- Trade unions that hold bargaining rights for employees in Ontario.
- The registered third party itself.
- The spouse of a third party, if applicable.

A contributor other than a third party or their spouse cannot contribute more than \$1,200 to a registered third party for advertisements that appear during an election in a municipality and cannot donate more than \$5,000 to multiple third parties registered in the same municipality.

Corporations and trade unions are permitted to make contributions to registered third parties but not to candidates in the election. A media company wishing to contribute to a registered third party advertiser would be subject to the contribution limit imposed in the MEA.

Rules for registered third party advertisers

Registered third party advertisers will be subject to:

- Spending limits that will be based, in part, on the number of electors entitled to vote in a regular election or by-election in the municipality in which the third party advertising will occur.
- Restrictions that permit third party advertising only during the campaign period and the requirement to file financial statements and auditors' reports with the City Clerk by the deadline date(s) outlined in the MEA.
- A compliance audit process relating to campaign finances as set out in the MEA.

COMMENTS

The City Clerk is not empowered to investigate and enforce election-related complaints against registered third parties because it would be a conflict of interest for the City Clerk to administer the election in a fair and impartial manner while simultaneously investigating and enforcing non-compliance activities of registered third parties.

The City has four enforcement mechanisms to regulate third party advertising during the 2018 municipal election.

1. City Solicitor to retain legal counsel

This report recommends that City Council authorize the City Solicitor to retain external legal counsel in connection with third party advertising enforcement matters that are not related to election sign and/or election campaign finance enforcement.

In order to assess the needs and demands of the enforcement of the third party advertising provisions in the MEA, the City will retain external legal counsel for the 2018 municipal election to investigate complaints, make enforcement recommendations to the City Manager, and to carry out enforcement activities contemplated in the MEA, including "requiring a person to remove a third party advertisement that does not comply with the MEA".

The City Clerk and City Solicitor will report to the next term of City Council with lessons learned and recommendations with respect to future third party advertising enforcement based on the experience of the 2018 election.

2. Municipal Licensing and Standards enforces non-compliant third party election signs

Election signs are an important part of the election process at the municipal, provincial and federal level. Registered third party advertisers are given the opportunity to use signs to create awareness and/or to promote or oppose a candidate. Election signs provide a direct benefit to candidates, registered third parties and to the general public by allowing freedom of expression that is protected and entrenched in the Canadian Charter of Rights and Freedoms; a right that is integral to the democratic process.

Election signs must comply with provincial and federal laws, as well as the City of Toronto's own by-laws. Where there is non-compliance, the MEA explicitly empowers municipalities to require the removal or discontinuance of any advertising that contravenes MEA requirements.

Recent amendments to Toronto Municipal Code, Chapter 693, Signs, now ensure that election signs erected by registered third party advertisers are subject to the same conditions and limits as a candidate's election signs. The rules are under the purview and are enforced by the City's Municipal Licensing and Standards Division. Some of the key City of Toronto election sign rules include:

- Election signs may not be illuminated or attached to trees and are prohibited on all City property (including parks, community and civic centres, etc.) except certain portions of the public highway.
- No sign shall display the City's logo, in whole or in part.
- On highways with sidewalks, election signs are not to be located within a certain distance from either side of the sidewalk.
- A candidate must file a nomination as a candidate in the election and a third party advertiser must register with the City Clerk prior to erecting an election sign.

3. Compliance audit process is available to enforce apparent contraventions of election campaign finances

In general, the election campaign finance rules that apply to candidates also apply to third party advertisers. Under the MEA, an elector who believes that a registered third party has contravened the election campaign finance rules may apply for a compliance audit of the registered third party's campaign finances after the financial filing period has passed. The compliance audit process for registered third parties is similar to the one used for candidates.

The Compliance Audit Committee will consider the application and if it decides to grant the application, will appoint an auditor to conduct a compliance audit of the registered third party's election campaign finances. The Compliance Audit Committee will meet to consider the auditor's report and conclude if there has been an apparent contravention of the MEA and whether to commence legal proceedings against the registered third party. The Compliance Audit Committee does not have authority to set penalties; only the court can decide if there has been a contravention of the MEA and, if so, which penalties should be imposed on the registered third party.

Under the recently amended MEA, the City Clerk must now review the contributions reported on the filed financial statements for both City Council candidates and registered third parties. The City Clerk will rely on an external auditor to perform this function. If a contributor appears to have over contributed more than the allowable contribution limit, the City Clerk will report this to the Compliance Audit Committee, who will decide whether to commence a legal proceeding against the contributor.

4. Individuals can commence a legal proceeding with Superior Court of Justice

The MEA prescribes that in all instances, breaches of the MEA can also be addressed through prosecutions. A person may commence a legal proceeding by laying an information before a justice of the peace if they believe that a registered third party has contravened any provisions of the MEA. This process is similar to the process against candidates in the election. Any legal proceeding relating to the 2018 municipal election must be commenced before November 15, 2022.

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SIGNATURE

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