

# TORONTO STAFF REPORT

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November 26, 2002

To: City Council

From: City Solicitor  
Chief Administrative Officer

Subject: Toronto Computer Leasing Inquiry and Toronto External Consultants Inquiry

Purpose:

To advise City Council on the status of the Toronto Computer Leasing Inquiry ("TCLI") and the Toronto External Contracts Inquiry ("TECI") and to obtain further instructions with respect to certain issues relating to the Inquiries.

Financial Implications and Impact Statement:

If the recommendations in this report are adopted, funding will need to be provided to current City employees who will be called as witnesses at the Inquiry. Funds of approximately \$50,000 have already been earmarked for this purpose based on the June 14, 2002 report from the City Solicitor and Chief Administrative Officer to the Audit Committee approved by Council at its meeting held on June 18, 19 and 20, 2002. It is estimated that the total funding costs for current City employees who will be called as witnesses will be approximately \$450,000. which exceeds the previously approved amount by \$400,000.

The Chief Financial Officer and Treasurer has reviewed these financial implications and advises that funds are available in a computer leasing liability account.

Recommendations:

It is recommended that City Council:

1. approve funding for legal representation for current City employees who will be called as witnesses at the Inquiries, based on the terms set out in this report;
2. instruct the City's outside counsel that they may make specific submissions on allegations of misconduct against various persons, if appropriate, based on the evidence presented at the hearing; and

3. direct that the City's outside counsel obtain their day- to-day instructions from the Chief Administrative Officer and City Solicitor on matters pertaining to the Inquiry between Council's November 2002 meeting and the February 2003 meeting.

Background:

There have been numerous reports submitted to City Council dealing with various matters related to the TCLI and TECI. As staff and outside counsel prepare for the resumption of the Inquiry on December 2, 2002, it was determined that further Council instructions are required.

Comments:

Status of the TCLI

Based on information received from Commission Counsel, we understand that the TCLI is scheduled to begin hearings on December 2, 2002. Commission Counsel have provided us with the following list of the anticipated witnesses to be called at the TCLI. This list is not necessarily complete, nor will witnesses necessarily be called in the order listed below.

1. Mayor Mel Lastman
2. Michael Garrett
3. Councillor Bas Balkissoon
4. Peter Wolfrain
5. Rob Ashbourne
6. Irene Payne
7. Dash Domi
8. Vince Nigro
9. Rob Simone
10. Scott Marentette
11. Gord Barrett
12. Frank Carnevale
13. Jeff Lyons
14. Brendan Power
15. Lou Pagano
16. Dave Beattie
17. Nadir Rabadi
18. Don Altman
19. Len Brittain
20. Dan O'Neil
21. Mark Fecenko
22. Brian Loreto
23. Jim Andrew
24. Rob Wilkinson
25. Jim Hart
26. Line Marks

27. Kathryn Bulko
28. Paula Leggieri
29. Lee Ann Currie
30. Janis Cowie
31. Duncan Card
32. Larry Griffiths
33. Tom Jakobek
34. Lana Viinamae
35. Ken Colley
36. Al Shultz
37. Councillor David Miller
38. Councillor Lorenzo Berardinetti
39. Joan Anderton
40. Wanda Liczyk
41. James Ridge
42. Jeff Griffiths

#### Section 5 Notices

We understand that Commission Counsel have recently served numerous notices, pursuant to subsection 5(2) of the Public Inquiries Act. This subsection provides that:

“No finding of misconduct on the part of any person shall be made against the person in any report of a commission after an inquiry unless that person has had reasonable notice of the substance of the alleged misconduct and was allowed full opportunity during the inquiry to be heard in person or by counsel.”

In general, it is common for Commission Counsel to issue these notices in order to alert individuals that the Commission may criticize an individual or may make a finding of misconduct against an individual in its report. Commission counsel may send out notices to many individuals in order to minimize any risk that they have failed to provide appropriate notice. The notice does not mean that the Commission will make a finding of misconduct against the individuals. The notices are confidential. Anyone who receives a notice is under no obligation to disclose this fact to the City or its employees.

We understand that, due to the low threshold that has been established, Commission Counsel have likely sent the notice to a number of current City employees who will be called as witnesses at the Inquiry. Understandably, this has created significant upset and concern amongst City employees.

We have stressed to employees that the objective of the Inquiry is to have a full public hearing into the many issues identified in the inquiry’s terms of reference. We have also emphasized that it is essential that all current employees co-operate freely and fully, and with complete candor, with the Commissioner and her counsel. As City Council is aware, the most senior individuals who were directly involved in the issues that are the subject of the inquiry are no longer employees of the City.

### Funding for Legal Fees for Current City Employees Who Will be Called as Witnesses

As a result of these developments, we believe several current employees will wish to retain their own counsel to assist them at the Inquiry to ensure their interests are fully protected. We believe it is appropriate to clarify the funding that will be available for current City employees who do wish to retain their own legal counsel to represent them at the Inquiry when they are presenting their evidence.

In an earlier report from the City Solicitor to City Council, dated June 10, 2002, titled "Preliminary Budget of the Toronto Computer Leasing Inquiry and MFP Litigation Budget", it was recommended that funding be provided to current City employees who wish to retain their own counsel if they were called as a witness at the Inquiry, up to a maximum of \$5,000. It appears that some, but not all, current City employees who will be called as witnesses, may wish to retain their own counsel to provide legal assistance to them. We have informed City employees that the firm of Paliare Roland Rosenberg Rothstein LLP, who have been retained by the City to act on its behalf at the Inquiry, cannot represent individual City employees. Even though the Paliare Roland firm cannot represent individual employees, they may be able to assist employees who will be required to give evidence at the Inquiry or their counsel. For example, Paliare Roland can assist employees with the review of documents and the identification of key issues before they are giving evidence at the Inquiry. Nevertheless, certain City employees will likely wish to retain their own counsel.

Rather than fix a maximum amount, in our view it is appropriate to provide funding to employees based on principles similar to those for individuals with standing at the TCLI. If an employee does retain outside legal counsel, that counsel will likely be involved in assisting in reviewing documents, attending meetings with Commission Counsel and in attending with their client at the Inquiry while they give evidence. The Rules of Procedure established for the TCLI and TECI provide that witnesses are entitled to have their own counsel present while they testify and that counsel for a witness will have standing for the purposes of that witness' testimony. The Rules also provide that witnesses are entitled, but not required, to have counsel present while Commission counsel interview them.

We recommend that funding be provided to current city employees for their own legal counsel, if desired, based on the following principles:

- (i) The total amount of funding available will be based on the number of hearing days in which the employee is giving evidence or in which the employee's interests are directly affected. ("Funded Days").
- (ii) The City will provide funding at a rate of \$200 per hour for senior counsel and \$110 per hour for any junior lawyer to attend at the Inquiry. The City will also provide funding for the use of students and law clerks at the rate of \$75 per hour. These amounts are the same as that being provided to the individuals with standing. The firm may only claim for hours spent attending the Inquiry on Funded Days, to a maximum of ten hours per

Funded Day. The City will pay only for one lawyer to attend on a Funded Day, meetings with Commission Counsel or interviews with Commission Counsel.

- (iii) The same hourly rates will apply for preparation time. The firm may claim up to one hour of preparation time for every hour spent attending the Inquiry on Funded Days ("Preparation Time"). The City is not concerned when this preparation takes place. However, the Preparation Time will not exceed the total number of hours spent in attendance at the Inquiry on Funded Days.
- (iv) In addition to the Preparation Time, the firm shall be entitled to up to 20 hours of senior counsel time and 30 hours of junior counsel time for document review. Counsel should undertake to make the most efficient use of their resources, using law clerks, students and junior counsel where it is more efficient and cost effective to do so.
- (v) The City will pay for one lawyer to attend when their client is being interviewed by Commission counsel.
- (vi) The City will pay reasonable disbursements. The photocopy rate the City is prepared to pay is \$0.15 a page.
- (vii) Accounts should be subject to assessment. The City will appoint a third party to review any disputes regarding fees.
- (viii) The firm will forward to the City a detailed bill which should identify the date and time spent by each lawyer or student, a description of the work performed and a detailed listing of any disbursements.

The total amount that may be recovered for legal fees will be limited by application of the principles set out above. While this will add to the cost of the Inquiry, it is anticipated that the funding for staff's counsel will be limited due to the short period of time staff will be expected to testify. It is unknown how many staff will retain their own lawyer but it is estimated that this could cost an additional \$450,000. Further, Council should be aware that in some cases City employees will end up paying personally a portion of the legal fees that exceed or are not covered by the principles set out above. Some employees will do so in order to respond to the allegations of misconduct contained in any notice given to them and to protect their reputations.

#### Outside Counsel's Role at the TCLI and TECI

In a report from the Chief Administrative Officer and City Solicitor dated June 10, 2002 there was a discussion regarding the role of the City at the Inquiry if standing was sought. The report commented and recommended that the City's role should involve the following:

- (i) Assisting where appropriate or necessary in ensuring that all relevant information is presented to the Inquiry;

- (ii) Assisting where necessary and appropriate in ensuring that the Commissioner is aware of all internal administrative procedures, both past and present at the City that may bear on the issues being addressed by the Inquiry;
- (iii) Ensuring that the City's litigation position with MFP and Aztec are protected to the extent possible and appropriate;
- (iv) Responding to any requests from the Inquiry Commissioner or Commission Counsel to assist in respect of the Inquiry.

These roles are currently being performed by our outside counsel and will continue to be performed by them. In addition the earlier report recommended that the City not take a specific position at the Inquiry on allegations of misconduct against specific persons. The City's outside counsel has requested that they not be restricted in this regard. Depending on the nature of the evidence that is presented at the Hearing, our outside counsel may wish to make final submissions regarding the possible misconduct of various parties or persons. This may be important as Commission Counsel have indicated they may not make final submissions to the Commissioner and leave that up to the various counsel for the parties who have standing at the Inquiry. Accordingly, it is recommended that our outside counsel be instructed that they can make specific submissions on allegations of misconduct against various persons, if appropriate based on the evidence presented at the hearing, except for current City employees unless the evidence shows fraud, criminal misconduct or bad faith on the part of current employees.

The City's outside counsel receive their day to day instructions from the Chief Administrative Officer and City Solicitor. We will continue to provide regular reports to City Council on matters relating to the inquiry. However, as the next City Council meeting is not until February, 2003, the City's outside counsel may need to get instructions from time to time on urgent matters from the City's Chief Administrative Officer and City Solicitor on matters pertaining to the inquiry.

### TECI

At its meeting on October 1-3, 2002, City Council decided to extend the terms of reference of the TCLI by establishing a second public inquiry known as the Toronto External Contracts Inquiry or TECI. The Commissioner has retained additional counsel to assist her with the TECI. It is anticipated that the Hearing portion for the TECI will immediately follow the Hearing portion of the TCLI and that the Commissioner will present one report dealing with both Inquiries. We are still waiting for a budget from the Commission regarding the TECI. Until we receive that we are not able to report to the Policy and Finance Committee on the matter.

The Commissioner held a hearing on standing on November 5, 2002. Full standing at the TECI has been granted to the City, Ball Hsu and Associates Inc., Mr. Ball Hsu, Dell Computer Corporation and Ms. Wanda Liczyk. Special standing has been granted to the Canadian Union of Public Employees, Local 79. In addition, the Commissioner granted standing to Ball Hsu Associates Inc., Mr. Ball Hsu and Dell Computer Corporation for the TCLI which will commence on December 2, 2002.

The Legal Division is in the process of collecting and producing documents relating to the TECI. We propose to follow the same procedure that was done on the TCLI regarding privileged documents. Accordingly, we will be identifying any privileged documents and then producing them to Commission counsel on the basis that they can be reviewed by them, but this does not amount to a waiver of the privilege that attaches to those documents. If any of the documents which are identified as privileged, are ones which the Commission wishes to have produced in the Inquiry, we will have an opportunity to review the privilege issues with Commission Counsel. It is hoped that any issues of privilege will be resolved. So far there has not been any disagreement between us and Commission Counsel on issues of privilege. Accordingly, the Director of Litigation of the Legal Division, in consultation with the City's outside solicitors will be dealing with the document production issues including identifying any privileged documents.

Conclusions:

It is recommended that City Council approve the recommendations set out at the beginning of this report.

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