

Council Report

DATE: Tuesday, February 11, 2020

WARD(S): ALL

TITLE: REIMBURSEMENT OF LEGAL EXPENSES FOR MEMBERS OF COUNCIL

FROM:

SUZANNE CRAIG, INTEGRITY COMMISSIONER AND LOBBYIST REGISTRAR

ACTION: DECISION

Purpose

Members of Council are exposed to a variety of potential or actual liabilities or costs in the good faith performance of duties.

The purpose of this report is to offer for Council's consideration, amendments to the Code Complaint Protocol that provide a process for the reimbursement of legal expenses where a Member of Council is named in a Code of Conduct complaint.¹

¹ Code in this Report refers to the Code of Ethical Conduct for Members of Council and Local Boards

Report Highlights

- In 2010, the Integrity Commissioner recommended that the Code Complaint Protocol be amended to include a new provision that would consider payment of legal expenses to Members of Council while they were acting within the scope of their duties or in the course of their mandate and were not acting against the interests of the City in matters governed by the Code.
- The provision providing for such indemnification was adopted by Council in 2011 and formed part of the Code Complaint Protocol until the Code Complaint Protocol was amended in 2019.
- There had been no recommendations made to remove the reimbursement provisions of the Code Complaint Protocol from the 2019 updated version.
- As such, staff seek Council's direction on whether to re-introduce the reimbursement provisions into the Code Complaint Protocol, such that legal expenses in relation to non-MCIA and MCIA Code complaints are also subject to reimbursement
- The objective of the inclusion of a section for payment of legal expenses into the Code Complaint Protocol is to provide Members of Council with reasonable protection from personal financial losses or expenses incurred while they were acting within the scope of their duties or in the course of their mandate, and were not acting against the interests of the City in matters governed by the Code.

Recommendations

If Council determines that amendments to the Code of Ethical Conduct for Members of Council and Local Boards Complaint Protocol (the "Code Complaint Protocol") regarding indemnification are necessary, the Integrity Commissioner recommends that Council consider the adoption of the options set out below.

Background

A. Non-MCIA Code Complaints

In 2017 the Province passed legislation to amend the *Municipal Act, 2001* and the *MCIA*, giving Integrity Commissioners the authority to review and consider complaints made under the *MCIA* beginning March 1, 2019.

In response to these amendments, in 2019 the Integrity Commissioner and City staff brought forward a revised Code of Ethical Conduct for Members of Council and Local Boards (the "Code"), as well as a revised Code Complaint Protocol. The revised Code as well as a revised Code Complaint Protocol were approved by Council on June 12, 2019.

Section 19 of the pre-June 2019 Code Complaint Protocol, was not included in the revised Code Complaint Protocol.

Currently, if a formal complaint against a Member of Council is filed with the Integrity Commissioner under the Code with regards to a violation under the *MCIA*, the legal expenses related to responding to the complaint are covered under the Indemnification By-law, so long as the Member has been exonerated. In other words, a Member of Council may seek reimbursement for such legal expense under the Indemnification By-law, *if* the Member is found not to have contravened section 5 of the *MCIA*.

Currently, neither the Indemnification By-law nor the Code Complaint Protocol address indemnification for legal expenses incurred by a Member of Council related to Code complaints that are not related to the *MCIA*.

B. Indemnification for Code Complaints in Other Municipalities

Staff made inquiries and found some examples of indemnification policies in other municipalities in respect of their indemnification policies.

City of Vaughan

From 2011 until the recent amendments in 2019, Vaughan's Code Complaint Protocol contained a provision that allowed for reimbursement of legal expenses related to Code of Conduct complaints in certain circumstances, as excerpted below:

Reimbursement of Legal Expenses

19. (1) A Member of Council who is subject of an Integrity Commissioner complaint under Part A (Informal Complaint Procedure) or Part B (Formal Complaint Procedure) under this Protocol may charge against the Member's office budget the actual legal expense incurred for consultation with a lawyer of up to \$500.00.

(2) A Member of Council who is the subject of an Integrity Commissioner complaint investigation * under this Protocol may be reimbursed for actual and reasonable expenses incurred for consultation with a lawyer of up to \$5000.00, where it is determined that there has been no contravention of the Code of Ethical Conduct by the Member.

*An Integrity Commissioner complaint investigation begins when the Integrity Commissioner opens a case file and gives notice of the same to the Member of Council subject of the formal complaint.

Town of Whitchurch-Stouffville

Whitchurch-Stouffville reimburses legal expenses related to Code of Conduct complaints in certain circumstances, as set out below:

Reimbursement of Legal Expenses

19. (1) A Member of Council who is subject of an Integrity Commissioner complaint under Part A (Informal Complaint Procedure) or Part B (Formal Complaint Procedure) under this Protocol may charge against the Member's office budget the actual legal expense incurred for consultation with a lawyer of up to \$700.00.

(2) A Member of Council who is the subject of an Integrity Commissioner complaint investigation * under this Protocol may be reimbursed for actual and reasonable expenses incurred for consultation with a lawyer of up to \$10,000.00, where it is determined that there has been no contravention of the Code of Ethical Conduct by the Member.

*An Integrity Commissioner complaint investigation begins when the Integrity Commissioner opens a case file and gives notice of the same to the Member of Council subject of the formal complaint.

City of Ottawa

Ottawa reimburses legal expenses related to Code of Conduct complaints in certain circumstances, as set out below (By-law 2018-400 (Code of Conduct for Members of Council)):

The Member who is the subject of the investigation may consult with a lawyer and charge this to their office budget. If the complaint is determined to have merit, the Integrity Commissioner may require the Member to reimburse these expenses to the City.

City of Toronto

Toronto reimburses legal expenses related to Code of Conduct complaints in certain circumstances, as set out below:

11. (1) Subject to this section and Council's policy on office expense budget use, claims for reimbursement by a member of Council for costs under this section shall be processed under the Indemnification Policy for Members of Council.

(2) A complainant and a member who are parties to a complaint under this procedure shall each be reimbursed for actual and reasonable legal and related expenses up to a maximum of: (a) \$5,000; or (b) \$20,000, if the Integrity Commissioner has elected to investigate the complaint by exercise of the powers of a commission under Parts I and II of the Public Inquiries Act.

(3) In the case of an application under the Judicial Review Procedure Act for judicial review of actions taken on a complaint against a member of council by the Integrity Commissioner, Council: (a) where a member made the judicial review application, the member is eligible for reimbursement of legal costs, including additional legal costs in a successful application, that are not covered by the costs awarded by the court, up to a maximum of \$20,000. (b) a member may apply for reimbursement of the legal costs of intervention in a judicial review application where the member's interests are at stake, up to a maximum of \$20,000.

(4) Council may consider the reimbursement of costs above the limit in subsections (2) and (3) on a case by case basis.

(5) Costs may be provided in advance in an investigation, if the Integrity Commissioner is of the opinion that the use of a lawyer by one or more of the parties would facilitate the carrying out of the investigation, and subsections (6) and (7) do not apply to the advance costs paid under this subsection.

(6) Costs shall only be reimbursed under this section to the complainant, if the Integrity Commissioner concludes that the complaint is not frivolous, vexatious or made in bad faith and the Integrity Commissioner's conclusion is not overturned on judicial review.

(7) Costs shall only be reimbursed under this section to the member: (a) if the Integrity Commissioner concludes that there has been no contravention of the Code of Conduct by the member or that the member is not blameworthy as described in section 7, and the Integrity Commissioner's conclusion is not overturned on judicial review; or (b) where Council receives the Integrity Commissioner's report on a violation and determines that it should not take any action.

(8) Any award of costs under subsection (7) shall be contingent on a report from the City Solicitor in consultation with the Integrity Commissioner.

Previous Reports/Authority

[2011 REPORT ON REIMBURSEMENT OF LEGAL EXPENSES FOR MEMBERS OF COUNCIL ON COMPLAINTS TO THE INTEGRITY COMMISSIONER](#)

Analysis and Options

C. Policy Decision Considerations

Any amendment to the Code Complaint Protocol to reimburse legal expenses incurred to respond to Code of Conduct complaints brought against Members of Council should satisfy the following public interest objectives:

- Encouraging the highest standards of professional and ethical behaviour among elected officials;
- Protect elected officials who act in good faith in the performance of their official duties.

In the course of carrying-out their official duties, Members of Council are potentially subject to a legal action or Code of Conduct complaint, including one that alleges a contravention of the *MCIA*. Generally, the indemnification for Code complaints will provide for the payment of legal fees, as well as costs incurred or made against a Member of Council in response to a Code of Conduct complaint.

Indemnifying Members of Council for Code complaints brought against them in the exercise of their municipal duties and functions is a best practice. It helps the City attract and retain municipal officials with the assurance that they will not suffer negative personal financial consequences from the good faith exercise of their official duties.

The *MCIA* provides that a municipality may protect a member of Council or any local board who has been found not to have contravened Section 5 of the *MCIA* by the payment of legal costs or reimbursement to the member for such costs.

The Integrity Commissioner proposes to enhance the Code Complaint Protocol (and recommends a corresponding amendment to the City's Indemnification By-law) to provide reimbursement for these circumstances in accordance with the *MCIA* and the *Municipal Act*. This is consistent with bylaws enacted by other municipalities.

D. Options

The *MCIA* provides the legal framework within which to identify, declare, address and adjudicate conflicts of interest of Members of Council. The Integrity Commissioner may receive and investigate *MCIA* complaints. If, upon completion of an investigation, the Integrity Commissioner determines that on a balance of probabilities there has been a violation of the *MCIA*, or is otherwise of the opinion that it is in the City's interest for a judge to determine if there has been a violation of the section 5, 5.1 or 5.2 of the *MCIA*, the Integrity Commissioner may apply to a judge for such a determination.

The Integrity Commissioner recommends that Council consider the following in respect of reimbursement of actual legal expenses incurred by Members of Council for Code (non-*MCIA* and *MCIA*) complaints to the Integrity Commissioner.

Consideration 1:

- That Council consider re-introducing section 19 of the Code Complaint Protocol with the following modifications:

- A provision that will allow funding for payment of legal expenses for responding to a Code of Conduct complaint (including a complaint alleging a contravention of the *MCIA*), in advance of a ruling that the member has not breached the Code. Payment will be made on the condition that the Member would not be entitled to the payment if the member was found to have breached the Code (including the *MCIA*).
- A provision that a Member be required to repay any advanced funds received, if following the conclusion of a Code complaint investigation, the Integrity Commissioner makes a finding of contravention in respect a Member's conduct.²

Or

- A provision that a Member not be required to repay the City any of the funds advanced, if the Integrity Commissioner finds that:
 - there has been no contravention; or
 - a contravention has occurred by reason of inadvertence, or
 - a contravention has occurred by reason of a bona fide error in judgment;

Consideration 2:

- That Council consider including a provision that will allow Members to seek advance reimbursement up to a specific amount (i.e. \$25,000), and that Council approval be obtained for further advance funding.

Consideration 3:

- That Council consider including a provision that sets out the process for requests for reimbursement, which would include:
 - a Member's request for and approval of advance funding be made to the City Solicitor and in appropriate circumstances, the City Solicitor may consult with the Integrity Commissioner and/or external counsel on making this decision.

Consideration 4:

- That Council consider whether to extend similar indemnification to members of local boards (which would include members on the Accessibility Advisory Committee, Committee of Adjustment, Heritage Vaughan Committee, and Property Standards Committee).

² Section 12 of the Code Complaint Protocol provides that if, upon completion of the investigation, the Integrity Commissioner determines that on a balance of probabilities there has been a violation of the *MCIA*, or is otherwise of the opinion that it is in the City's interest for a judge to determine if there has been a violation of the *MCIA*, the Integrity Commissioner may apply to a judge for such a determination. Only a judge can make a determination of whether there has been a violation of sections 5, 5.1, or 5.2 of the *MCIA*.

Financial Impact

The financial impact to the City is not known at this time, as it will depend on the volume of requests submitted and the costs of legal fees for each one.

Broader Regional Impacts/Considerations

NA

Conclusion

The current Indemnification By-law includes reimbursement for legal expenses in relation to *MCIA* proceedings only but not for expenses related to non- *MCIA* Code Complaints to the Integrity Commissioner. As such, the Integrity Commissioner recommends that Council provide direction to staff on whether it wishes to re-introduce reimbursement provisions into the Code Complaint Protocol with any necessary modifications, as provided for in this report.

For more information, please contact: Suzanne Craig

Attachments

1. 2011 REPORT ON REIMBURSEMENT OF LEGAL EXPENSES FOR MEMBERS OF COUNCIL ON COMPLAINTS TO THE INTEGRITY COMMISSIONER

Prepared by

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