



CITY OF KINGSTON
REPORT TO ADMINISTRATIVE POLICIES COMMITTEE

Report No.: AP-10-028

TO: Administrative Policies Committee
FROM: Hal Linscott, Director of Legal Services and City Solicitor
RESOURCE STAFF: Hal Linscott, Director of Legal Services and City Solicitor
DATE OF MEETING: August 18, 2010
SUBJECT: Review of Reimbursement Policy for Expenses Incurred by Members of Council in Obtaining Legal Opinions Regarding Potential Pecuniary Interest

EXECUTIVE SUMMARY:

Earlier this year Council requested that City staff review the current policy enacted in 1999 that provides for the reimbursement of legal expenses incurred by members of Council for independent legal advice in potential pecuniary interest situations. That policy provides that requests for reimbursement be dealt with in an ad hoc and expedient basis, with each request being considered on its own merits by the Director of Legal Services in conjunction with the Chief Administrative Officer prior to legal expenses being incurred and that reimbursement be 100% of costs, not to exceed \$1000 in a calendar year for an individual councillor.

The recent Council motion directs staff to review the current policy, which has not been reviewed by Council since its inception in 1999, and report back to the Administrative Policies Committee on whether the policy is still appropriate or should be discontinued and, if continued, whether the \$1000 maximum amount per councillor per calendar year should be altered, together with any other recommendations.

The current policy of reimbursing members of Council for the cost of obtaining a legal opinion as to whether they have a pecuniary interest under the *Municipal Conflict of Interest Act* should be continued, as amended in the Recommendations section of this report, as that policy satisfies a number of public interest objectives including protecting the reputation of city government and its public officials with a view to attracting citizens into public life; encouraging high standards of professional and ethical behaviour by elected officials and avoiding litigation that may impair the efficient functioning of Council.

RECOMMENDATION:

1. That City Council approve the continuation of the policy that provides for the reimbursement of legal expenses incurred by members of City Council to obtain independent legal advice as to whether, pursuant to the *Municipal Conflict of Interest Act*, they have a pecuniary interest in a matter before Council or a committee or local board of Council that will require them to disclose that interest and not take part in the discussion, vote on or attempt to influence the vote on the matter.

2. That prior to obtaining the independent legal opinion for which reimbursement is being sought from the City, the councillor request approval for reimbursement from the Director of Legal Services, who in consultation with the Chief Administrative Officer, will conduct an initial screening limited to determining if there is a question for which reimbursement of an outside legal opinion is appropriate.
3. That reimbursement shall be for one hundred percent of the cost of the independent legal opinion up to the annual maximum amount per councillor in a calendar year.
4. That the annual maximum amount in a calendar year be increased from \$1000, established in 1999, to \$1500.
5. That the necessary funds be included in the operating budget of the Clerk’s Department.

AUTHORIZING SIGNATURES:

ORIGINAL SIGNED BY DIRECTOR OF LEGAL SERVICES _____ Hal Linscott, Director of Legal Services and City Solicitor
ORIGINAL SIGNED BY CHIEF ADMINISTRATIVE OFFICER _____ Gerard Hunt, Chief Administrative Officer

CONSULTATION WITH THE FOLLOWING COMMISSIONERS:

Cynthia Beach, <i>Sustainability & Growth</i>	N/R
Terry Willing, <i>Community Services</i>	N/R
Denis Leger, <i>Transportation, Properties & Emergency Services</i>	N/R
Jim Keech, <i>President and CEO, Utilities Kingston</i>	N/R

(N/R indicates consultation not required)

OPTIONS/DISCUSSION:**Overview of *Municipal Conflict of Interest Act***

The purpose of the *Municipal Conflict of Interest Act* is to prohibit members of Council and local boards from engaging in the decision making process in respect to matters in which they have a personal, economic interest. The Act recognizes that no person can serve two masters and that the judgment of even the most well meaning person may be impaired when their personal financial interests are affected. Public office is a trust conferred by public authority for public purpose and the Act enjoins holders of public office within its ambit from any participation in matters in which their economic self-interest may be in conflict with their public duty.

Where a member has a non-exempt pecuniary interest in a matter, he or she shall:

- Prior to any consideration of the matter at the meeting of Council or local board, disclose the pecuniary interest and the general nature thereof;
- Not take any part in the discussion of the matter;
- Not vote on any question in respect of the matter;
- Not attempt, in any way, whether before, during or after the meeting to influence the voting on any such question; and
- Where the meeting is closed to the public, forthwith leave the meeting.

An elector may bring an application to a Judge of the Superior Court of Justice to determine whether a member has contravened the Act. If a Judge determines that the Act has been contravened the Judge shall declare the member's seat vacant and may disqualify the member or former member from being a member during a period of not more than seven years and may order restitution under certain circumstances. A Judge making a finding that the Act has been contravened may determine that the breach was committed through inadvertence or by reason of an error in judgment, in which case the Judge has the discretion to leave the member in office and not disqualify.

Consequences of a Conflict of Interest Allegation or Breach for a Councillor and for Council

As noted in the previous paragraph, the consequences of breaching the Act are very serious for the member who may lose their office and be disqualified for running for office for up to seven years. Even if a member is found not to have breached the Act, substantial time and effort would be required to participate in the legal proceedings to defend themselves during which their credibility and ability to carry out his or her duties and responsibilities as a councillor may be impaired. Not surprisingly, new members of Council may be under the impression that they can seek legal advice regarding a potential pecuniary interest from the municipal solicitor. However, the municipal solicitor cannot provide advice to any individual member of Council as to the councillor's personal status, power or duty to vote or not vote as the municipal solicitor's duties are to the municipal corporation which is his or her client. Apart from the fact that the municipal solicitor is not in a solicitor-client relationship with any member of Council, the solicitor must be available at all times to give open and expert legal advice to the municipal corporation which may or may not share an interest in common with any member of Council in the particular circumstances of any case. Furthermore, the municipal solicitor is not in a position to know all of the facts involving the individual situation of a member of Council and, therefore, cannot give legal advice regarding whether a pecuniary interest exists. Having to pay out of one's own pocket for a legal opinion as to whether one has a pecuniary interest has the potential to reduce the number of citizens who run for or remain in municipal public office. Unlike some municipalities where elected office is viewed as a full time position and paid accordingly, the annual allowance paid to a councillor on Kingston City Council can make it challenging for a councillor to fund expenses for legal advice required to ensure compliance with the *Municipal Conflict of Interest Act*.

Allegations or a finding of a breach of the Act against a member can also have significant negative consequences and costs for the Council and municipality on which the member sits. It can bring the legitimacy of the actions and decisions of the Council into question, can undermine public confidence in municipal government and government officials, and create a public perception that decisions have been made for improper reasons. Where a member is removed from office because of a breach,

the cost of a by-election to replace that member would be significant. While a member's contravention of the Act does not automatically invalidate the Council decision where the member's participation was held in contravention, it does allow the municipality to void the decision within a two year period unless to do so would adversely affect the rights of any person arising from that decision who acted in good faith and without notice of the failure to comply with the Act. Conflict of interest proceedings are often associated with Council decisions that are difficult and controversial and where the decision of Council may be made with a narrow majority. In such a scenario, if a member who voted in favour of the decision is found to have breached the Act, either the Council that made the decision or a newly elected Council that takes office within the two year period might find itself under tremendous pressure to void that decision. While an action to void an earlier decision might be the appropriate course of action, it has the potential to hijack a Council's plans and agenda for the future and impair the efficient functioning of Council.

Overview of Current Policy Established in 1999

The current policy provides that prior to legal expenses being incurred a councillor is to make a request for reimbursement to the Director of Legal Services who, in conjunction with the Chief Administrative Officer, will consider the request on its merits. As noted earlier, the municipal solicitor cannot provide a legal opinion to an individual councillor regarding a potential pecuniary interest and therefore the review conducted by the Director of Legal Services, in conjunction with the CAO, is an initial screening limited to determining if there is a question for which a legal opinion is appropriate – if there is approval is given. For example, the initial screening process might determine that a member is concerned that the interests of a sibling have given rise to a pecuniary interest on the part of the member in which case the member can be pointed to the relevant section of the Act which provides that the interest of a parent, spouse or child of the member is deemed to be the member's but siblings are not included. It is recommended that the approval of the Director of Legal Services continue to be required.

Once approval is granted to a councillor for reimbursement, they can proceed to obtain a legal opinion from the lawyer of their choice. City staff does not see the legal opinion, it contains solicitor- client advice directed to the councillor and it would not be appropriate for it to be provided to anyone other than the client. Upon submission of the legal account, the councillor is reimbursed up to the annual maximum of \$1000 in a calendar year.

The number of approved requests in recent years is listed below:

2005	4
2006	1
2007	5
2008	2
2009	2
2010	1, as of the end of July.

The policy established in 1999 limits funding for legal opinions to a \$1000 per councillor in a calendar year, there has been no increase during that eleven year period. On several occasions a councillor has indicated that this amount has not been sufficient to cover the cost of the legal opinion or a councillor has sought and obtained approval for reimbursement of several opinions in one year, subject to the limit of \$1000 per calendar year. The City Treasurer advises that \$1283 in today's dollars is equivalent to \$1000 in 1999. Anecdotal information suggests that legal fees have increased more rapidly than CPI so it is recommended that the annual maximum amount per councillor be increased to \$1500.

In view of the above factors, it is recommended that the current policy of reimbursing members of Council for the cost of obtaining a legal opinion as to whether they have a pecuniary interest under the *Municipal Conflict of Interest Act* should be continued, as amended in the Recommendations section of this report, as that policy satisfies a number of public interest objectives, including protecting the reputation of city government and its public officials with a view to attracting citizens into public life; encouraging high standards of professional and ethical behaviour by elected officials and avoiding litigation that may

impair the efficient functioning of Council. The authority to pay the expenses of members of Council incurred while acting in their capacity as members of Council is contained in Section 283 of the *Municipal Act*.

EXISTING POLICY/BY LAW:

The current policy enacted in 1999 provides for the reimbursement of legal expenses incurred by members of Council for independent legal advice in potential pecuniary interest situations. That policy provides that requests for reimbursement be dealt with in an ad hoc and expedient basis, with each request being considered on its own merits by the Director of Legal Services in conjunction with the Chief Administrative Officer prior to legal expenses being incurred and that reimbursement be 100% of costs, not to exceed \$1000 in a calendar year for an individual councillor.

NOTICE PROVISIONS:

N/A

ACCESSIBILITY CONSIDERATIONS:

N/A

FINANCIAL CONSIDERATIONS:

Funds are currently budgeted in the Clerk's Department annual operating budget and that will continue. If the maximum annual limit for a member of Council is increased to \$1500, an expenditure of up to \$19,500 could be incurred if all 13 members of Council used their individual maximum. Based on past experience, that is unlikely to occur

CONTACTS:

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OTHER CITY OF KINGSTON STAFF CONSULTED:

Desiree Kennedy, City Treasurer, 613-546-4291, Ext. 2220

EXHIBITS ATTACHED:

N/A