

POLICY

PROVISION OF LEGAL REPRESENTATION FOR CITY EMPLOYEES AND COUNCILLORS IN TERMS OF SECTION 109A OF THE MUNICIPAL SYSTEMS ACT

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CITY OF CAPE TOWN

**POLICY ON THE PROVISION OF LEGAL REPRESENTATION
FOR CITY EMPLOYEES AND COUNCILLORS
IN TERMS OF SECTION 109A OF THE SYSTEMS ACT**

TABLE OF CONTENTS

INTRODUCTION

POLICY

1. Qualification for legal representation	4
2. Responsible Person	4
3. Application for the provision of legal representation	5
4. Nature and extent of legal representation	6
5. Quality of legal representation	7
6. Decision and implementation	7
7. Balancing of fact and circumstances for and against the provision of legal representation	8
8. Facts and circumstances favouring the provision of legal representation	8
9. Facts and circumstances militating against the provision of legal representation	9
10. Specific Exclusions	10
11. Further provisions concerning legal representation in relation to defamation	11
12. Terms and Conditions	12
13. Right of Recourse	12

GLOSSARY OF TERMS

INTRODUCTION:

- A. The City of Cape Town (*the "City"*) is a municipality and as such it is vested in terms of section 109A of the Local Government: Municipal Systems Act 32 of 2000 (*the "Systems Act"*) with discretionary power to provide an employee or councillor of the City with legal representation, subject to such terms and conditions as it may determine, where –
- legal proceedings have been instituted against the employee or councillor as the result of any act or omission by the employee or councillor in the exercise of his or her powers or the performance of his or her duties; or
 - the employee or councillor has been summoned to attend any inquest or inquiry arising from the exercise of his or her powers or the performance of his or her duties.
- B. The City acknowledges that -
- by reason of the nature of the positions, functions, powers and duties of its employees and councillors, any of them may be exposed to the risk of civil liability, in his or her personal capacity or criminal sanction;
 - the City may be -
 - vicariously liable for loss or damage occasioned by such an act or omission by an employee; or
 - directly liable for loss or damage where such an act or omission is that of a councillor acting in an executive capacity;
 - public interests may be served by ensuring the co-operation of a councillor or employee of the City where he or she is involved in or faces a risk or threat of legal proceedings;
 - on occasion such co-operation may be ensured or facilitated by the provision of legal representation to such a councillor or employee.

C. The City recognises and adopts the following principles -

- use of the discretionary power conferred in terms of section 109A of the Systems Act must be subject to proper standards of transparency and propriety and the consistent application of policy guidelines;
- internal control processes within the administrative arrangements of the City must ensure transparency, propriety and lawfulness regarding the expenditure of public monies on the provision of legal representation to its councillors and employees;
- decision-makers responsible for committing the City to such expenditure must be guided by considerations of financial materiality and the propriety and lawfulness generally to be associated with discretionary expenditure of public money; and
- the responsible person may exercise their discretion as conferred by legislation and may determine that the interests of the City or those of an Applicant would be served by departure from such policy guidelines.

POLICY:

This policy revokes all previous policies, decisions and *ad hoc* clauses within any other policy, regarding the matter of legal representation for staff and councillors.

The aim of this policy is to ensure the fair application of broadly the same criteria and considerations in order to maintain both the confidence of the general public and Applicants in the transparency, propriety and lawfulness of decisions taken in terms of this policy. This Policy should be applied in that spirit.

1. Qualification for legal representation

- 1.1 Notwithstanding anything to the contrary contained elsewhere in this policy, legal representation shall not be granted to any Applicant who does not qualify for legal representation from the City in terms of section 109A of the Systems Act as quoted above.

- 1.2 Ex-employees/Ex-councillors may be entitled to legal representation in respect of actions performed within the course and scope of their office/employment and within the operational obligation/duty at the time of the occurrence of the incident, provided that failure to provide such representation would be detrimental to the case against the City.
- 1.3 The Applicant is entitled to indemnification for any related personal civil liability which would result from the conclusion of the legal proceedings; including legal costs in the defence or opposition of same, under a policy of insurance in which a right of subrogation inures to the benefit of the insurer.

2. Responsible Person

- 2.1 The person vested with authority, in line with Council's System of Delegations as amended from time to time (*"the System of Delegations"*), to consider an Application subject to such conditions as he or she may deem appropriate and permissible in accordance with this Policy in a particular case (the **"Responsible Person"**) shall be –
 - 2.1.1 the Speaker in respect of the Executive Mayor;
 - 2.1.2 the Executive Mayor in respect of councillors (including the Speaker), the City Manager and Managers directly accountable to the City Manager after consulting the whips of the various parties, only where the matter relates to a councillor;
 - 2.1.3 the City Manager in respect of employees, other than mentioned in 2.1.2 above.
- 2.2 The Responsible Person, on behalf of the City, shall exercise the discretion of the City to -
 - 2.2.1 refuse an Application; or
 - 2.2.2 approve an Application with or without conditions, in particular

a condition that the relevant official or councillor undertakes in writing to reimburse the City for legal expenses incurred on the basis of his or her deposition in the event of the Presiding Officer concerned rejecting the substance of his or her evidence;

provided that the Responsible Person shall be guided by this Policy in so doing.

- 2.3 The Responsible Person shall be entitled to take such advice as he/she deems to be appropriate in relation to any Application and may consult the Director: Legal Services or his/her delegate as far as possible in relation to legal matters and the imposition of conditions or other terms and conditions for the grant of legal representation by the City.
- 2.4 The Responsible Person/s shall report quarterly to the structure provided as per the System of Delegations regarding all requests for legal representation that were granted or refused.

3. Application for the provision of legal representation

- 3.1 An Application for the provision of legal representation by the City shall be done by submitting a report to the relevant responsible person.
- 3.2 The report shall furnish the responsible person with all information relevant to the matter in respect of which legal representation is required and shall contain at least but not limited to the following information;
 - 3.2.1 full particulars of the employee and councillor and their

designation within council;

- 3.2.2 whether the employee was acting within the scope of his/her employment at the time of the incident and whether he was in his operational or assigned responsibility at that particular time;
- 3.2.3 a description of the nature of the legal representation required and the urgency thereof;
- 3.2.4 a brief outline of the facts and circumstances giving rise to the request for legal representation;
- 3.2.5 attach all documentation relevant to the matter in respect of which legal representation is required including any report on the outcome of an internal investigation/assessment by the relevant line department;
- 3.2.6 list all previous applications for legal representation and indicate whether it was approved or denied;
- 3.2.7 indicate whether any other matter/s are the subject of litigation that are linked to the matter for which legal representation is required.

- 3.3 Failure or refusal by an Applicant to adhere to the requirements of paragraphs 3.1 and 3.2 will entitle, but not oblige, the City to refuse an Application.

4. Nature and extent of legal representation

- 4.1 Save where the contrary is clearly stated in this Policy, the term "legal representation" shall mean and be limited to payment of a part or all of the reasonable fees and expenses of legal representation, engaged upon terms and conditions recorded in writing and first approved on behalf of the City by the Director: Legal Services or his/her delegate.
- 4.2 Where in the opinion of the Responsible Person there is some

reasonable cause to believe that the City may be held to be vicariously liable for the consequence/s of the act or omission in respect of which an Application for the legal representation has been made, unless in the reasonable opinion of the Responsible Person the interests of the Applicant conflict with those of the City, legal representation must be by the same attorney or other lawyer, if any, who is appointed by the City to represent it in the relevant proceedings, inquest or other inquiry.

- 4.3 The appointment of a legal representative is governed by the System of Delegations.
- 4.4 The provision of legal representation includes any costs incidental to the matter such as the costs of expert witnesses and subpoenas.
- 4.5 If the application has been granted, then the councillor or employee shall in writing agree to be bound by the terms and conditions of this policy and shall also agree that any money due by the councillor or employee to the City of Cape Town in terms of this Policy, shall accrue interest at the applicable legal rate and may be recovered by means of direct deductions from any remuneration payable by the City of Cape Town to the councillor or employee, until the full amount owing, together with interest, has been paid.
- 4.6 When the City of Cape Town is providing legal representation to a councillor or employee, then the City of Cape Town may settle such legal proceedings and pay any amount due in terms of such settlement. The power to settle, in terms of this sub clause, shall be in line with the System of Delegations.

- 4.7 When the City of Cape Town has provided legal representation to a councillor or employee and legal costs are awarded to such councillor or employee then such legal cost are payable to the City of Cape Town.

5. Quality of legal representation

The City shall not be responsible for the quality of the legal representation provided or for any advice or other act or omission, whether or not culpable, pursuant to a mandate to represent an Applicant.

6. Decision and implementation

- 6.1 In considering each Application the Responsible Person shall determine the relevant facts required to reach a decision on the basis of a preponderance of probability. The Responsible Person may make such enquiries and require the provision of such further information and/or documentation as the Responsible Person may deem reasonably necessary to permit a proper decision to be made.
- 6.2 Every decision of a Responsible Person to grant or refuse an Application shall be made in writing and a copy thereof shall be made available to the Applicant within not more than two working days after the date on which the decision is made. A further copy shall be delivered to The Director: Legal Services within the same period who will then appoint a suitable attorney upon the successful grant of the application.
- 6.3 Supervision of the imposition and satisfaction of any terms and conditions imposed by the City, including without limitation, the approval of the terms of any mandate to be given by an Applicant to an attorney, shall be the Responsibility of the Director: Legal Services or his/her delegate.

- 6.4 All procedures necessary to reach a decision to grant or refuse legal representation to an Applicant, whether urgently or in the ordinary course, must be provided timeously, without any unreasonable delay.

7. Specific exclusions

Legal representation will not be granted in the following instances:

- 7.1 In respect of ex-employees/ex-councillors except to the extent as provided for in 1.2 above;
- 7.2 Employees/councillors appearing in disciplinary hearings or any other matter where action is being taken against such employee/councillor by the City;
- 7.3 Where:
- 7.3.1 the Applicant seeks it in relation to an internal inquiry being conducted or to be conducted by or on behalf of the City;
 - 7.3.2 the City is or is to become a Plaintiff or Applicant or Complainant seeking relief against the Applicant in the matter in respect of which the application for legal representation is made;
 - 7.3.3 the claim or inquiry or other matter in respect of which the Application for legal representation is made is one in relation to which –
 - 7.3.3.1 the CCMA and/or the labour court and/or a bargaining council is or may become vested with jurisdiction, whether or not concurrently with any other court or dispute resolution forum; or
 - 7.3.3.2 the Applicant is represented by or is entitled to be represented by a trade union or an agent or

attorney or other representative of a trade union;

7.4 Any other instance where it does not appear to be in the interest of the City to grant the application.

8. Terms and Conditions

The Responsible Person may:

8.1 Impose pre-conditions to the grant of legal representation to the Applicant which must be satisfied before the grant of legal representation will become effective; and

8.2 Impose further terms and conditions governing the provision of the legal representation as the Responsible Person may deem appropriate.

9. Right of Recourse

The City of Cape Town may exercise a right of recourse against the councillor or employee for recovery of any expenditure incurred in terms of this policy if the finding is against such councillor or employee.

GLOSSARY OF TERMS

- **Subrogation:** In its most common usage refers to circumstances in which insurance company tries to recoup expense for a claim it paid out when another party should have been responsible for paying at least a portion of that claim.
- **Inure:** To result; to take effect; to be of use, benefit, or advantage to an individual

- **The City of Cape Town:** Means the municipality established in terms of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), read together with Provincial Notice 479 of 2000, as amended.
- **The City Manager:** Means the person appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998) as the Municipal Manager for the City of Cape Town, or the official to whom he or she has delegated his or her powers in terms of this policy.
- **Councillor:** Means a member of the municipal council of the City of Cape Town and includes a former member of the Municipal Council of the City of Cape Town, when the cause of action arose or the alleged offence took place during his or her tenure as councillor.
- **Inquest:** Means an inquest established in terms of any law.
- **Inquiry:** Means any inquiry established in terms of any law, but excludes investigations into alleged breaches of the Code of Conduct for councillors.
- **Legal Proceedings:** Means civil or criminal proceedings instituted in the Magistrates' Court, the High Court or any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts as well as appeal proceedings in the Supreme Court of Appeal, proceedings in the Constitutional Court as well as any search warrant or warrant of arrest issued against a councillor or employee.
- **Legal representation:** Means representation by one or more legal representative/s and the provision of legal representation by the City of Cape Town means that the City of Cape Town will pay not only the legal costs due to the legal representative of the councillor or employee, but also the legal costs of the opposing party or parties which may become payable by the councillor or employee, unless the City of Cape Town has a right of recourse

against the councillor/s or employee/s, in terms of clause 13 above, in which case the City of Cape Town will not pay such costs.

- **Legal representative:** Means any person admitted to practice as an attorney or advocate in the Republic of South Africa.