
REPORT TO COUNCIL

**ON AN INQUIRY: LOBBYING ABOUT ZIP-LINES IN
EARL BALES PARK**

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SUMMARY

In December 2011 and January 2012, media reported that officials of ArborTrek Canopy Adventures, LLC (ArborTrek), a for-profit corporation based in Vermont, discussed an unsolicited proposal with a councillor to build and operate zip-lines, canopy tours and aerial-trekking courses at Earl Bales Park.

After these communications, the unsolicited proposal was submitted to the Toronto Office of Partnerships (TOP). TOP administers the City's unsolicited proposals process, which is a procurement process. TOP evaluated the ArborTrek proposal and rejected it.

The Lobbying By-law, § 140-10, requires lobbyists to be registered before they lobby. They must also report their lobbying activities within three business days after lobbying. The Registrar conducted an inquiry to determine whether unregistered lobbying or any other breach of the Lobbying By-law had occurred.

The Registrar's inquiry determined that the President of ArborTrek was an unregistered in-house lobbyist. This individual was required to register by § 140-10 and ARTICLE III of the Lobbying By-law before lobbying public office holders.

Another individual who communicated on behalf of ArborTrek with the councillor before the submission of the proposal was a voluntary lobbyist acting for a for-profit entity. He was required to register by § 140-10 and ARTICLE IV of the Lobbying By-law before lobbying public office holders.

Subsection § 140-41A of the Lobbying By-law prohibits lobbying about a procurement process except as permitted by applicable procurement policies and documents:

- A. Lobbyists shall not communicate in relation to a procurement process except as permitted by applicable procurement policies and procurement documents.*

The Registrar found that communications by the lobbyists with the councillor before the submission of the unsolicited proposal to TOP were prohibited by the applicable procurement document, [Process for Receiving and Reviewing Unsolicited Quotations and Proposals](#)¹.

The Registrar found that the lobbyists' communications with TOP about the unsolicited proposal complied were permitted under the applicable procurement document. In addition, these communications were not required to be registered, since they are exempt under § 140-5G.

The Registrar permitted the lobbyists to register, cautioned them to comply with the Lobbying By-law and requested that they attend training sessions provided by her office.

¹http://www1.toronto.ca/staticfiles/city_of_toronto/toronto_office_of_partnerships/files/pdf/unsolicited_proposal_process.pdf

FINDINGS

1. Michael Smith, President of ArborTrek Canopy Adventures LLC and Cary Green, lobbying on behalf of ArborTrek as an unpaid voluntary lobbyist, contravened § 140-41A of the Lobbying By-law by communicating with a councillor about an unsolicited proposal prior to submission of that proposal to the Toronto Office of Partnerships (TOP).
2. Communications by Mr. Smith and Mr. Green with TOP and its evaluation team during the TOP evaluation process complied with the applicable procurement policies and documents and were exempt from registration under § 140-5G.
3. Communications about the unsolicited proposal subsequent to the completion of the TOP process are required to be registered. To the extent that such communications have occurred without being registered and reported, they have breached the Lobbying By-law, § 140-10 and ARTICLE III (Registration of in-house Lobbyists) or IV (Registration of Voluntary Unpaid Lobbyists Lobbying for For-Profit Entities) of the Lobbying By-law.

DISPOSITION

1. The Registrar permits Mr. Smith and Mr. Green to register their communications with public office holders about the proposal subsequent to the completion of the TOP process.
2. Mr. Smith and Mr. Green are cautioned to comply with the Lobbying By-law.
3. Mr. Smith and Mr. Green are requested to attend training about the Lobbying By-law offered by the Office of the Lobbyist Registrar (OLR).

THE INQUIRY PROCESS

On May 3, 2012, the Lobbyist Compliance Investigator contacted the councillor's office to gather preliminary information. The councillor provided the Arbortrek proposal and some basic background information.

On May 28, 2012, Inquiries and Investigations Counsel sent a Notice of Inquiry setting out the allegations to Mr. Smith of Arbortrek, together with an opportunity to respond to the allegations. Mr. Smith responded by way of a letter dated June 7, 2012. In his response, Mr. Smith stated that if any lobbying was conducted on behalf of Arbortek a Mr. Cary Green of Verdiroc performed it.

On June 7, 2012, Mr. Green and the Inquiries and Investigations Counsel had a telephone discussion regarding the allegations contained in the Notice of Inquiry.

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Mr. Green by way of a June 12, 2012 email responded to the allegations contained in the Notice of Inquiry on behalf of Michael Smith of Arbortrek, himself and Verdiroc.

On September 25, 2012, Inquiries and Investigations Counsel requested further information of Mr. Green, which he provided that same day.

On January 29, 2013, the Lobbyist Compliance Investigator contacted the councillor's office seeking clarification of certain information. The councillor provided the requested information on January 30, 2013.

On January 29, 2013, Inquiries and Investigations Counsel requested information from the Director of a City Division, which was provided by the Director on that same day.

On July 22, 2013, Inquiries and Investigations Counsel requested information from the Toronto Office of Partnerships, which was provided by that office on the same day.

The proposed findings were sent to the parties on July 31, 2013. Mr. Smith responded on August 6, 2013. Counsel for Mr. Green responded on September 4, 2013.

Counsel for Mr. Green in response to a letter of September 16, 2013 from Inquiries and Investigations Counsel provided further information on September 17, 2013.

EVIDENCE

Mr. Smith stated in a letter to Inquiries and Investigations Counsel dated June 7, 2012, in response to the OLR's notice of inquiry that:

- Sometime in September or October, 2011, Mr. Green set up a phone call with a member of Council. Participating in the call were Mr. Smith, Mr. Green, another employee of ArborTrek and the member of Council. They discussed ArborTrek's proposal to build a zip line canopy tour, aerial trekking course and other eco-adventure activities in Earl Bales Park. During this phone conversation, Mr. Green stated that the councillor recommended that ArborTrek "develop a proposal and submit it to his office at which time he would pass it on to the proper channels".
- In October 2011, Mr. Green set up a second phone call with the councillor to "clarify process details and requirements for proposal". Present on the call were Mr. Smith, another ArborTrek employee, Mr. Green and the member of Council.
- In late November, 2011, Mr. Green's office mailed or delivered hard copies of the proposal and brochures to the member of Council's office.

Copies of emails provided by Mr. Smith and Mr. Green confirm that:

- On December 2, 2011, Michael Beber of ArborTrek emailed the link to the proposal to the councillor, with a copy to Mr. Smith, in reply to the councillor's previous email.
- On December 9, 2011, the Director of TOP called and emailed Mr. Smith regarding ArborTrek's Earl Bales Park proposal, which she had received in hard copy, to request an electronic version of it.

The councillor confirmed by email to the OLR dated January 30, 2013 that he had a meeting about the proposal and that he sent the package they left to the partnerships office.

SUBMISSIONS BY THE PARTIES

The Registrar's proposed findings were sent to the parties on July 31, 2013.

Michael Smith accepted the Registrar's findings and requested the opportunity to file a late registration to report the preliminary communications with the councillor. The Registrar has permitted Mr. Smith to file a late registration as an in-house lobbyist for ArborTrek. ArborTrek is a for-profit corporation based in Vermont. They had not had previous contact with the City of Toronto and were not aware of its Lobbying By-law until the matter was brought to their attention through this inquiry.

Cary Green responded through his counsel, Bruce S. Batist, who wrote that they rejected the proposed findings of unregistered lobbying, and submitted that all lobbying occurred in relation to an unsolicited proposal process established by TOP. Counsel for Mr. Green submitted that Mr. Green was acting as a volunteer on behalf of ArborTrek, and was therefore not a lobbyist; and that Mr. Green's activities did not fall within the definition of lobbying.

Mr. Batist submitted that Mr. Green, acting as a volunteer, assisted ArborTrek in the submission of its unsolicited proposal. Any communication with the councillor was to obtain administrative guidance and assistance in navigating the City of Toronto's partnership and proposal system. Mr. Batist submitted that the councillor told Mr. Green that he would forward the unsolicited proposal of ArborTrek through the appropriate channels, and to the appropriate City representatives. The councillor was aware of the role of Mr. Green and the intentions of ArborTrek in making use of the unsolicited proposal process. Mr. Batist wrote in part:

"To be clear, Mr. Green was approached by ACA [ArborTrek] and became involved with their proposal for a facility at Earl Bales Park, solely in his capacity as a volunteer. We have reviewed the definition of lobbying, pursuant to Section 140 of the City of Toronto's Lobbying By-law. We do not consider any of the actions of Mr. Green or ACA fall within that definition. Specifically, contacting a councillor for the purpose of seeking administrative assistance on submitting an unsolicited proposal is not lobbying. At no

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time during the Contested Time Period did [the councillor] review, approve or deny the unsolicited proposal. Contacting a public official, such as a councillor for the purpose of administrative guidance is an accepted role of a city councillor, based on the following excerpt from the City of Toronto's website:

Councillors, also known as Members of Council, play both a legislative role and a constituency role. In their legislative role they are responsible for considering and establishing policies and by-laws to implement Council's decisions. In their constituency role Councillors are responsible for consulting with the constituents of their ward and for ensuring that all sides of an issue are considered in the decision-making process. Councillors work on city-wide, ward-based and local neighbourhood issues. (Emphasis added)

City of Toronto website: <http://www.toronto.ca/civic-engagement/learning-material/governance.htm>, and:

Mr. Batist wrote further in the same letter:

"Any communication between Mr. Green and ACA and [the councillor] was for the purpose of:

1. Confirming the councillor who represents the specific geographic area/ward, of particular interest to the ACA project, and;
2. Seeking assistance and guidance in understanding how to submit the ACA proposal and who to contact regarding such an unsolicited proposal.

"According to Section 130 of the *City of Toronto Act*, the role of City Council is:

- (a) *to represent the public and to consider the well-being and interests of the City;*
- (b) *to develop and evaluate the policies and programs of the City;*
- (c) *to determine which services the City provides;*
- (d) *to ensure that administrative policies, practices and procedures and controllership policies, practices and procedures are in place to implement the decisions of council;*
- (e) *to ensure the accountability and transparency of the operations of the City, including the activities of the senior management of the City;*
- (f) *to maintain the financial integrity of the City; and*
- (g) *to carry out the duties of council under this or any other Act. 2006, c. 11, Schd. A, s. 131*

"We believe that [the councillor] was, at all material times, acting in his appropriate role as City Councillor. We also believe that [the councillor] is of the same view. At no time did he question any communications with Mr. Green. At no time did [the councillor] or anyone in his office characterize any contacts by Mr. Green or ACA as solicitation."

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Mr. Batist submitted further that TOP never took issue with communications on behalf of ArborTrek with the councillor, as follows:

“Until your letters this year, it was never brought to the attention of either Mr. Green or ACA that their communications with [the councillor] were a concern or a potential breach of the UPP [*Unsolicited Quotations or Proposals Policy*], or an offence of any kind whatsoever. Rather, the TOP received, considered and rejected the ACA proposal.”

In conclusion, Mr. Batist submitted that any communication between Mr. Green or ArborTrek and the councillor did not constitute lobbying, because they were operating under the [*Unsolicited Quotations or Proposals Policy*](#)²:

“In conclusion, any communication between [the councillor] and Mr. Green or ACA does not constitute lobbying. Rather, Mr. Green and ACA were operating under the UPP. Their actions, and how they were received by various City of Toronto officials, clearly support that conclusion, as do the following:

1. The TOP never took issue with the fact that the unsolicited proposal of ACA came from [the councillor’s] office;
2. The TOP confirmed that ACA’s proposal was adequate and met the UPP standards;
3. The TOP never raised a concern during the period of the UPP;
4. The TOP created an Evaluation Team to consider and evaluate ACA’s proposal; and,
5. Representatives of the City of Toronto have and continue to refer to the ACA proposal [as] an “unsolicited proposal” in both private and public documents.”

In response to a further query from my office, Mr. Batist confirmed that Mr. Green was a resident of the ward represented by the councillor with whom Mr. Green communicated. Mr. Batist also wrote that Mr. Green was a volunteer for the previous ward councillor, and served two years as a member of the Friends of Earl Bales Group.

² <http://www.toronto.ca/calldocuments/pdf/unsolicited.pdf>

DISCUSSION

The Registrar's task in an inquiry under the *City of Toronto Act, 2006*, s. 169 and the Lobbying By-law is to determine whether a lobbyist has breached the Lobbying By-law. In this case I considered two issues:

1. Did lobbyists acting on behalf of ArborTrek engage in unregistered lobbying activities that were required to be registered under the Lobbying By-law?
2. Did lobbyists acting on behalf of ArborTrek engage in lobbying activities in relation to a procurement process that were prohibited under § 140-41A of the Lobbying By-law?

Mr. Smith has not disputed my findings regarding his lobbying activities and requested permission to file a late registration. I have permitted him to do so.

I have considered the submissions of Mr. Green's counsel together with the records of communications by the respondents with the councillor and the unsolicited proposal policy and process. Mr. Batist submitted that Mr. Green was acting "as a volunteer" and "assisted ACA [ArborTrek] in ensuring its proposal reached the TOP". He communicated with the councillor "to obtain administrative guidance and assistance in navigating the City of Toronto's partnership and proposal system".

Mr. Green was required to register as a voluntary unpaid lobbyist acting on behalf of a for-profit corporation

I have concluded that Mr. Green was a voluntary unpaid lobbyist lobbying on behalf of a for-profit corporation (ArborTrek), as this term is defined in the Lobbying By-law, § 140-27. He was therefore required to register as a voluntary lobbyist under ARTICLE IV of the Lobbying By-law and § 140-10 before he communicated with any public office holder.

The definition of "lobby", § 140-1, includes "Procurement of goods, services or construction and awarding a contract". The subject of the communications was an unsolicited proposal for building and operating zip-lining, which would involve a contract with the City for goods, services or construction. This is a procurement process to which § 140-41A applies.

Mr. Green, acting as a volunteer lobbying on behalf of and for the benefit of the interests of a for-profit corporation (ArborTrek), was a "voluntary unpaid lobbyist" as defined by § 140-27A:

VOLUNTARY UNPAID LOBBYIST:

- A. *An individual, corporation, organization or other person, or a partnership, who or that, without payment, lobbies or causes an employee to lobby a*

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public office holder on behalf of or for the benefit of the interests of a for-profit entity or organization (restricted definition).

I have considered and discuss below the facts that Mr. Green is a resident of the ward of the councillor with whom he communicated, and a former member of a volunteer organization, the Friends of Earl Bales Group.

The “ward constituent” exemption does not apply

Mr. Green was a “ward constituent” by virtue of his residency in the ward represented by the councillor with whom he communicated. Under § 140-6, a “ward constituent” is exempt from registration when communicating with their ward councillor about a general neighbourhood or public policy issue, so long as this is not for the special benefit of the individual, business or organization. The purpose of this exemption is to enable residents, individuals and business owners or operators to communicate with their ward councillor about general neighbourhood and public policy issues without the need to register in the lobbyist registry. However, this exemption does not apply in this case, since Mr. Green was acting for the special benefit of a non-resident for-profit entity (ArborTrek), and since the communication concerned a procurement to which § 140-41A applies.

Mr. Green was a volunteer for the previous ward councillor and served for two years as a member of the Friends of Earl Bales Group. If these communications had been made on behalf of the Friends of Earl Bales Group, which appears to be an association of volunteers in support of Earl Bales Park, Mr. Green would not have been required to register under ARTICLE IV. However, the communications at issue were made on behalf of and for the benefit of the interests of ArborTrek, a for-profit corporation. Therefore, Mr. Green met the definition set out in § 140-27 and was required to register under ARTICLE IV and § 140-10 before meeting with the councillor. He was also required to comply with § 140-41A, which is a part of the Lobbyists’ Code of Conduct.

I have concluded that the communications by Mr. Smith and Mr. Green on behalf of ArborTrek with the councillor were not exempt ward constituent communications. ArborTrek and Mr. Smith were not ward constituents of the councillor in question, as this is defined in the by-law. In addition, the communications were for the “special benefit” of ArborTrek. The Lobbying By-law provides:

§ 140-1 Definitions.

CONSTITUENT:

...

B. With respect to a member of Council for a City ward:

(1) An individual who resides in the ward.

(2) An owner or operator of a business or other entity located in the ward.

ArborTrek is a Vermont-based corporation. It is not a “business or other entity located in the ward”. Therefore its owners and operators were not constituents of a member of Council. Mr. Smith is not a resident of the councillor’s ward. Therefore they were not “constituents” when they communicated with the councillor.

§ 140-6. Restriction on application (ward constituent communications); exceptions.

A. This chapter does not apply in respect of a communication to a member of Council by a constituent of the member of Council, or an individual on behalf of a constituent of the member of Council on a general neighbourhood or public policy issue, subject to the exceptions in Subsections B and C.

B. Subsection A does not apply if the communication is in respect of a matter, described in Subsection A of the definition of lobby in § 140-1, that is for the special benefit of the individual, business or organization.

While Mr. Green is a resident of the ward represented by the councillor with whom he communicated about ArborTrek’s unsolicited proposal and a former member of the Friends of Earl Bales Group, the communications at issue were for the special benefit of ArborTrek.

In addition, the communications at issue were made in relation to a procurement process to which § 140-41A applies. As discussed below, communications with a public office holder other than the Toronto Office of Partnerships before the submission of an unsolicited proposal were not permitted under that section.

Communications with a councillor before submitting an unsolicited proposal were not permitted

I have concluded that communications with a member of Council about an unsolicited proposal are communications about a procurement process to which § 140-41A applies. The *Unsolicited Quotations or Proposals Policy* is a procurement policy. Communications with public office holders other than the Toronto Office of Partnerships (TOP) before the unsolicited proposal is submitted to TOP, are not permitted by the applicable procurement process for unsolicited proposals, and therefore are prohibited by § 140-41A.

Communications with a member of Council about an unsolicited proposal are governed by the City’s *Unsolicited Quotations or Proposals Policy* adopted by Council on June 19, 20 and 22, 2007 (the Policy). Section 1 of that policy states:

- 1. Unsolicited quotations or proposals should not be allowed to circumvent the City’s procurement process.*

An unsolicited quotation or proposal should not be considered if:

- (a) It resembles a current or upcoming competitive procurement that has or will be requested*

- (b) *It requires substantial assistance from the City to complete the quotation or proposal*
- (c) *The goods or services are readily available from other sources*
- (d) *It is not deemed by the Division Head to be of sufficient value to the City of Toronto*

In January 2008, the Toronto Office of Partnerships issued procedures under this policy, entitled *Process for Receiving and Reviewing Unsolicited Quotations and Proposals* (the TOP process document). The TOP process document states its purpose as follows:

*To assist external organizations that may be eager to partner with the City, Council adopted the **Unsolicited Quotations or Proposals Policy** at its meeting on June 19, 20 and 22, 2007. While the Policy provides guidance for those seeking to do business with the City outside of the conventional procurement system, it does not establish a definitive process through which such proposals may receive serious consideration. With this in mind, the following sets out a framework through which potential partners have an opportunity for their ideas to be presented and evaluated. Furthermore, the framework provides a formal mechanism for the disposition of all unsolicited quotations or proposals in a timely and conclusive manner*

Section 1.4 of the TOP process document provides “Staff Guidelines” as follows:

Section 1(b) of the Policy states that an unsolicited quotation or proposal is not to be considered if “it requires substantial assistance from the city to complete the quotation or proposal”.

*To ensure that proponents do not contravene this section, thereby invalidating the unsolicited offer, **all initial inquiries relating to unsolicited quotations or proposals are to be referred to the Toronto Office of Partnerships (TOP). The Office is to be the sole point of contact prior to the submission of any documentation. The TOP will serve as a liaison for a potential proponent and will, as required, consult directly with the relevant Division(s) to coordinate the appropriate advice and guidance requested by the proponent.** (Emphasis added)*

Section 1.4 of the TOP process document, quoted above, clearly states that TOP is to be the *sole point of contact prior to the submission of any proposal and throughout the evaluation process*. The purpose of these restrictions on communications is to ensure that the Policy requirement is met that the unsolicited proposal has not received substantial assistance from the City to complete it. These provisions do not permit communications of substance about an unsolicited proposal with a member of Council before its submission to TOP. The only communications that are permitted at this stage are with TOP. Since the communications with the councillor were not permitted by the TOP process document, they contravened § 140-41A, which provides:

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- A. *Lobbyists shall not communicate in relation to a procurement process except as permitted by applicable procurement policies and procurement documents.*

The communications that occurred in this case between lobbyists for ArborTrek and the member of Council were not simply a referral, which would be permitted under the process document. Two phone conversations were held, after which the proposal was provided to the member of Council. All of these communications occurred before the proposal was submitted to TOP. These communications were characterized by Mr. Green's counsel as for the purpose of "guidance" and "assistance" with the submission of the proposal. I conclude that these communications were substantial and were contrary to the intent of the process, which is as stated to ensure that there is no "*substantial assistance from the City to complete the quotation or proposal*". It is for this reason that the process document specifically states that TOP is the "*the sole point of contact prior to the submission of any proposal*". I conclude that the communications by Mr. Smith and Mr. Green with the councillor prior to submission of the proposal to TOP were not permitted under the applicable procurement documents, and therefore breached § 140-41A.

I have accepted that the councillor was effectively made part of the evaluation team by TOP after it received the unsolicited proposal. As a result, meetings that were part of the TOP process for unsolicited proposals which included the councillor were permitted under the TOP process and were exempted under § 140-5G, which provides:

This chapter does not apply in respect of:

...

- G. *Submitting a bid or proposal as part of the procurement process, and any communication with designated employees of the City, a local board (restricted definition) or the Board of Health (including a City employee when working as a designated employee for a board), as permitted in the procurement policies and procurement documents of the City, local board (restricted definition) or Board of Health.*

The Disposition

In determining the disposition of this case, I have taken into account the fact that TOP did not raise the issue of breach of its policy and procedures with the parties. As a result, the applicants could be reasonably expected to think that they had complied with the policy and procedures related to unsolicited proposals.

I have also taken into account the fact that my office's Interpretation Bulletin on Procurements did not provide clear information on the issue of communications prior to

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the submission of an unsolicited proposal. I have amended this [interpretation bulletin](#)³ to clarify permitted and prohibited communications in relation to unsolicited proposals.

I have taken into account the fact that ArborTrek, Mr. Smith and Mr. Green had no previous contact with or knowledge of the Lobbying By-law or the lobbyist registry. Mr. Smith, when advised of my proposed findings, immediately requested an opportunity to register his lobbying activities.

Mr. Green is, however, a senior official of an Ontario corporation that has been registered in the City's lobbyist registry as a client of a consultant lobbyist. I have taken into consideration that Mr. Green appears not to have been aware of his obligation to register as a voluntary unpaid lobbyist when lobbying on behalf of a for-profit corporation.

None of the parties appear to have been aware of the City's rules that apply to the unsolicited proposal process.

In the interest of transparency, I have permitted the parties to register their communications subsequent to the completion of the unsolicited proposal process. I have not prescribed any penalty for the breach of § 140-41A, because of the extenuating circumstances described above. I have cautioned ArborTrek, Mr. Smith and Mr. Green that they are expected in future to be aware of and comply with the Lobbying By-law, and have requested that they attend training at our offices concerning the Lobbying By-law.

All of which is respectfully submitted,

Linda L. Gehrke
Lobbyist Registrar

³ See Appendix A – Office of the Lobbyist Registrar, [Interpretation Bulletin on Lobbying and Procurements](#) (September 20, 2013) [http://www1.toronto.ca/staticfiles/city_of_toronto/lobbyist_registrar/files/pdf/interpretation-bulletin_lobbying-procurements.pdf]