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**REPORT TO COUNCIL**

**ON AN INQUIRY INTO LOBBYING**

**ABOUT TENDER CALL No. 209-2013**

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LOBBYIST REGISTRAR

AUGUST 20, 2014

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## **INTRODUCTION**

In this report, Lobbyist Registrar finds that three unregistered lobbyists breached the Lobbying By-law, §§ 140-10 and 140-41A by communicating with public office holders about a procurement process, Tender Call No. 209-2013 (the “Tender”), when these communications were not permitted by the City’s procurement policies and the procurement document. Two of the lobbyists were vendors who bid on the Tender. One of the lobbyists was acting on behalf of or in the interests of one of the vendors.

The Lobbyist Registrar refers this report to the Acting Director, Purchasing and Materials Management Division (“PMMD”) for information; and requests all three lobbyists to attend training on the Lobbying By-law provided by the Office of the Lobbyist Registrar (the “OLR”).

## **FINDINGS**

1. John Aquino, an unregistered lobbyist, breached §§ 140-10 and 140-41A by sending a letter on behalf of Bondfield Construction Company Limited (“Bondfield”) about the Tender to a City staff lawyer on September 30, 2013, when these communications were not permitted by the City’s procurement policies and the procurement document.
2. Jeffrey S. Lyons, an unregistered lobbyist, breached §§ 140-10 and 140-41A by communicating about the Tender on behalf of or in the interests of Bondfield with a member of Council, when these communications were not permitted by the City’s procurement policies and the procurement document.
3. Anthony Quinn, an unregistered lobbyist, breached §§ 140-10 and 140-41A by communicating with City staff, staff in the Mayor’s Office and the Mayor on behalf of Bennett Contracting Millgrove Limited (“Bennett”) about the “Tender” when these communications were not permitted by the City’s procurement policies and the procurement document.

## **DISPOSITION**

1. This report is referred to the Director, Purchasing and Materials Management Division (“PMMD”), for information.
2. Mr. Aquino, Mr. Lyons and Mr. Quinn are requested to attend training on the Lobbying By-law provided by the OLR.

## **THE INQUIRY PROCESS**

On October 4, 2013, the OLR received a report from the Director, PMMD that lobbying had occurred about Tender Call No. 209-2013 – Humber Treatment Plant – Odour Control and Process Upgrades (the “Tender”) when this was prohibited by City policy and the procurement document. On October 16, 2013, Inquiries and Investigations Counsel (“OLR Counsel”) received a second report of lobbying related to the Tender. Information was gathered and an assessment was conducted. As a result, the Registrar commenced an inquiry into whether lobbyists communicated about the Tender in breach of § 140-41A.

On December 20, 2013, OLR Counsel sent a Notice of Inquiry setting out the allegations to Anthony Quinn, Secretary Treasurer of Bennett, together with an opportunity to respond to the allegations. On December 20, 2013, David Beneteau, General Counsel for Bennett, requested and was granted an extension to reply to the Notice of Inquiry. On January 16, 2014, R. Craig Bottomley of Pringle & Bottomley LLP responded to the Notice of Inquiry on behalf of Anthony Quinn and Bennett.

In January and February 2014, OLR Counsel received information about lobbying by additional parties during the Tender blackout period. As a result, the Registrar commenced two additional inquiries. On February 20, 2014, OLR Counsel sent a Notice of Inquiry setting out the allegations to Jeffrey S. Lyons of the Lyons Group, together with an opportunity to respond to the allegations. On February 21, 2014, OLR Counsel sent a Notice of Inquiry to John Aquino, Vice President and General Manager of Bondfield Construction Company Limited (“Bondfield”), together with an opportunity to respond to the allegations. On February 26, 2014, Mr. Lyons requested an extension to reply to the Notice of Inquiry, and was permitted a reply date of March 21, 2014. On February 26, 2014, Olly Jansen, General Counsel for Bondfield, requested an extension to reply to the Notice of Inquiry on behalf of Mr. Aquino, OLR Counsel granted a reply date of March 21, 2014. On March 19, 2014, Todd White of Todd Brett White Barrister, replied to OLR Counsel on behalf of Mr. Lyons and the Lyons Group. On March 20, 2014, Domenic Presta of Bianchi Presta LLP, replied to OLR Counsel on behalf of John Aquino and Bondfield.

On July 10, 2014 and July 15, 2014, the Lobbyist Registrar sent notice of her proposed findings, disposition and facts upon which they were based to all of the respondents and their counsels. The Registrar’s letter provided the respondents with an opportunity to respond on or before August 12, 2014.

On July 24, 2014, John Aquino of Bondfield responded to the Lobbyist Registrar’s letter. The OLR Investigator wrote to Mr. Aquino on July 31, 2014 requesting further information. On August 7, 2014, Mr. Aquino provided an affidavit with the requested information to the Registrar.

On August 10, 2014, Mr. Quinn’s counsel responded on his behalf.

To date, no response has been received from Mr. Lyons or his counsel.

## FACTS

### *The Tender*

1. On July 9, 2013, the City's Purchasing and Materials Management Division ("PMMD") issued Tender Call No. 209-2013 for Humber Treatment Plant – Odour Control and Process Updates (the "Tender"). The Tender contained provisions restricting communications to a named Buyer in PMMD. The City's Procurement Processes Policy, section 5.0 restricted all communications to the official point of contact named in the Tender, the Chief Purchasing Officer or designate.
2. A staff report recommended to the November 20, 2013 meeting of the City's Public Works and Infrastructure Committee ("PWIC") that the Tender be awarded to WCC Construction Canada, ULC ("WCC"), in the amount of \$51,894,000 net of HST. PWIC forwarded the staff report to Council without recommendations for consideration on December 16, 2013. [City Council on December 16, 17 and 18, 2013 adopted the following](#)<sup>1</sup>:
  1. *City Council authorize the award of Contract 13FS-15WP, Tender Call 209-2013 for Odour Control and Process Upgrades at the Humber Treatment Plant to WCC Construction Canada, ULC, in the amount of \$51,894,000 net of HST (\$52,807,334.40 net of HST recoveries) having submitted the lowest compliant bid and meeting the specifications in conformance with the Tender requirements.*
  2. *City Council receive the report (December 9, 2013) from the City Solicitor, the Executive Director, Engineering and Construction Services and the Director, Purchasing and Materials Management for information.*
  3. *City Council direct that the confidential information in Attachment 1 to the report (December 9, 2013) from the City Solicitor, the Executive Director, Engineering and Construction Services and the Director, Purchasing and Materials Management remain confidential in its entirety as it relates to litigation or potential litigation affecting the City of Toronto and contains advice or communications that are subject to solicitor-client privilege.*
3. The staff report on the Tender stated that one of the mandatory requirements in the Tender was that the successful bidder had successfully completed two projects of a minimum value of \$50 million in a municipal wastewater or water treatment facility located in North America, where 50% of the work in at least one of the projects must have been contained within an existing operating facility (the mandatory requirement).
4. The staff report also stated that PMMD received two letters from Bondfield on September 24 and 30, 2013. The letters alleged that WCC did not meet the mandatory requirement; and that if the City failed to investigate whether WCC met

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<sup>1</sup> <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.PW27.3>

the mandatory requirement and planned to award the contract to WCC, Bondfield would take the matter to court. City staff considered these two letters to be a material written objection to the award to WCC.

5. Under section 11.0 of the City's Procurement Processes Policy, all vendor complaints with respect to a tender are to be referred to the Chief Purchasing Official for resolution. Where the objection is material and cannot be resolved, the award shall be made by Council in accordance with the Purchasing Chapter.

***Communications by Anthony Quinn on behalf of Bennett about the Tender***

6. One of the unsuccessful bidders in the Tender was Bennett. In response to this inquiry, Bennett's counsel, R. Craig Bottomley, provided a chronology of communications by Anthony Quinn of Bennett with City staff and members of Council about the Tender.
7. Mr. Quinn stated through his counsel that on or about September 17, 2013, he phoned the (now retired) Director, Business Improvement, Engineering and Construction Services (the "Director, Business Improvement") about the Tender, asking for information on how to proceed with a complaint. On September 18, 2013, Mr. Quinn emailed the Director, Business Improvement, stating: "I am concerned about how this may spin with regard to the 50 mil threshold and would appreciate a few minutes of your time." On September 18, 2013, Mr. Quinn phoned the Director, Business Improvement a second time. The Director, Business Improvement referred him to the Director, PMMD.
8. In a telephone interview with Office of the Lobbyist Registrar, Inquiries and Investigations Counsel ("OLR Counsel"), the Director, Business Improvement described a phone call in early October 2013 from Mr. Quinn about the Tender. Mr. Quinn was concerned about the mandatory requirement of two previous contracts of \$50 million each. He wanted to know if the City was taking this approach in future contracts. Mr. Quinn stated that Bennett had done a lot of work for the City in the past, but if this were the new direction, Bennett would never get any more work. Mr. Quinn raised the issue of WCC, saying that he hoped WCC should not be allowed to satisfy the mandatory requirement and that he hoped they were not awarded the Tender as that was not fair. Mr. Quinn also stated that Bondfield was concerned about the mandatory requirement and about WCC. Mr. Quinn stated that he was going to write in and complain about this. The Director, Business Improvement referred him to the Director, PMMD or to the Buyer for the Tender. Mr. Quinn told the Director, Business Improvement that he called the Mayor's Office about his concerns and told them that he "left 11 million dollars on the table before at Highland Creek" (meaning that Bennett saved the City 11 million dollars). Mr. Quinn said that he told the Mayor's Office that Bennett had done good work in the past and for under cost but could not qualify to bid (because of the mandatory requirement) in the Tender Call. Mr. Quinn suggested the City should meet with the industry to discuss such mandatory requirements.

9. Mr. Quinn stated through his counsel that in early October 2013, he contacted the Mayor's Office and spoke to someone there to complain about the Tender process. Mayor Ford called Mr. Quinn back, wanting to arrange a meeting with senior officials at the City. The next day, the Mayor's Chief of Staff called Mr. Quinn to advise that the matter had to be referred to the "Lobbying Department" and that the Mayor could not have any further discussion about this issue until after the award was made. Mr. Quinn indicated he had no interest in "lobbying"; rather, he just wanted to complain about the credentials of WCC and their lack of \$50 million projects. Mr. Quinn reported that they also discussed the recent award of "P" Building at Ashbridges Bay Treatment Plant.
10. The Mayor's Chief of Staff wrote to OLR Counsel stating that the Mayor was "told about this company by a friend, and was told that they could save the City a lot of money". The Mayor then contacted Mr. Quinn and told the Chief of Staff to set up a meeting.
11. The Mayor's Chief of Staff sent an email dated October 9, 2013 to the Auditor General, the General Manager, Toronto Water, requesting that they attend a meeting with the Mayor on October 11, 2013. The Chief of Staff described the subject of the meeting as:

*. . . regarding the bid and contract for the Ashbridge's Bay water construction project. The constituent is complaining that he put in a bid that was \$11 million under that of the winning bid, and the Mayor would like some clarity brought to the situation as to how this competing bid was not awarded the contract.*
12. On October 10, 2013, the Director, PMMD wrote to the Chief of Staff advising:

*. . . based on our conversation, you believe that the call in question is Tender 209-2013. That Tender is currently in the evaluation process and therefore is in the blackout period. As such, the meeting should not take place as it would violate the blackout period and the lobbying by-law. Further, I would have to let the Lobbyist Registrar know about this situation.*
13. On December 10, 2013, Mr. Quinn attended the office of a member of Council and spoke to the councillor's staff to complain about the Tender process. He did not speak with the member of Council, who had no record or recollection of any meeting with Mr. Quinn.
14. When Mr. Quinn communicated about the Tender with the Mayor, staff in the Mayor's Office, the Director, Business Improvement and staff in a member of Council's office, the Tender was in a "blackout period" when all communications about the Tender were restricted to the buyer named in the Tender.
15. When he communicated about the Tender as described above, Mr. Quinn was not registered as a lobbyist in the City's lobbyist registry.

16. Mr. Quinn's counsel provided submissions dated August 10, 2014 in response to the Registrar's revised proposed findings and disposition. The content of that submission is reproduced below:

*As you know, I am counsel for Anthony Quinn and write to provide the following submissions in response to the Amended Inquiry Report. You will recall that I previously wrote to express my concern that:*

*It seems to me that while the inquiry/report accurately recounts the dates and content of the impugned communications, there is absolutely no analysis as to whether these communications were, in fact, complaints (and therefore an exception to the communication blackout).*

*This concern remains unaddressed.*

*As you know, the blackout requirements surrounding a bid are abridged by the following restrictions under the Toronto Municipal Code:*

***§ 140-5. Restriction on application (communication).***

*This chapter does not apply in respect of:*

*...*

***D. A communication that is restricted to compliments or complaints about a service or program.***

*It must be noted that, at no time, did Mr. Quinn attempt to alter the outcome of Bennett's failed bid in relation to the impugned Humber Project (Bennett was second lowest bidder). Rather, the thrust of Mr. Quinn's complaint was centered upon an apparently arbitrary (and newly introduced) condition that all competing contractors must have completed at least two (2) previous projects in excess of \$50M each. While this theme resonates throughout the facts put forward in the Amended Inquiry Report, it is expressed in paragraph 6, which states:*

*Mr. Quinn was concerned about the mandatory requirement of two previous contracts of \$50 million each. He wanted to know if the City was taking this approach in future contracts. Mr. Quinn stated that Bennett had done a lot of work for the City in the past, but if this were the new direction, Bennett would never get any more work... .*

*...*

*Mr. Quinn stated that he was going to write in and complain about this...*

*...*

*Mr. Quinn suggested the City should meet with the industry to discuss such mandatory requirements.*

*In addition, comments Mr. Quinn may have made about the Ashbridge's Bay project(s), located at paragraph 9 of the Amended Inquiry Report, should not be*



*imported into the analysis as to whether an act of “lobbying” has occurred in relation to the Humber project; however, Madam Registrar’s “Findings” seem to suggest otherwise.*

*Finally, it is worth repeating that if in fact Mr. Quinn is found to have breached the terms of section 140 of the Act, none of the so-called “lobbying” was done in an effort to secure the Humber contract for Bennett. Rather, Mr. Quinn’s efforts were intended to shine light on a perceived flaw in the bid process.*

*I respectfully request that you consider these submissions. If the matter is still to be referred to the Acting Director of the Purchasing and Materials Management Division, I ask that a copy of this letter be appended to the findings.*

***Communications by John Aquino on behalf of Bondfield about the Tender***

17. On September 24, 2013, John Aquino, Vice President and General Manager for Bondfield, wrote to the Manager, Professional Services and Buyer, PMMD about the Tender, asking the City to verify that three other bidders’ submitted experience and qualifications “in order to maintain the integrity of the bidding process as it is questionable whether or not these bidders are compliant.”
18. On September 30, 2013, Mr. Aquino wrote again to the Manager, Professional Services and Buyer, PMMD, with copies to the Director, PMMD and a City staff lawyer. One copy of this letter, which was provided to the OLR by the Director, PMMD, did not list the Mayor as a recipient of a copy of the letter. Another copy, obtained by the OLR from a different source, indicates that the Mayor received a copy of this letter. The letter discussed whether WCC met the mandatory requirement in the Tender for two completed projects of \$50 million or more. The letter suggested that the City should “look behind the bid of WCCC which may on its face appear to be compliant” and concluded: “If the City of Toronto fails to conduct the investigation and awards the contract to WCCC, Bondfield will take this matter before the court for determination.”
19. Mr. Aquino was not registered as a lobbyist in the City’s lobbyist registry when the letters were sent.
20. Mr. Aquino’s counsel, Domenic Presta, Bianchi Presta LLP, responded to the Notice of Inquiry on March 20, 2014, in part:

*My client contacted legal counsel Jeffrey Lyons to discuss the tender process for the Humber Treatment Plant. On September 24th and 30th, 2013 Bondfield had sent complaint letters to the City of Toronto with respect to a non-compliant bidder. No formal response to Bondfield’s complaint letters had been received. My client contacted Mr. Lyons in order to obtain legal advice with respect to Bondfield’s legal rights in the circumstances.*

*At no time did my client contact anyone at the City of Toronto, whether a Councilor [sic] or employee, regarding the Humber Treatment Plant other than the complaint letters of September 24th and 30th 2013. The allegations set out*

*in your correspondence of the 21st of February, 2014 are without any factual basis.*

21. On July 24, 2014, Mr. Aquino wrote to the Lobbyist Registrar in response to the proposed findings:

*I reiterate the information set out in my counsel's letter to you dated March 20th, 2014. The conclusion in paragraph 8 of your Proposed Findings is not correct. I did not forward a copy of the September 30th, 2014 letter to the Mayor. If this correspondence was forwarded to the Mayor it was not by me nor did I direct anyone to copy it to the Mayor. My intention throughout was not to lobby but to obtain information and clarification.*

*I apologize for any inadvertent communication but again there was no intention to breach the lobbying provisions of the Toronto Municipal Code. I have made myself more fully aware of the possible inadvertent breaches of the provisions in order to avoid future potential inadvertent situations such as the present case.*

22. In response to a request by the Registrar for further information about the September 30, 2013 letter and whether it was sent to the Mayor, Mr. Aquino provided an affidavit under oath stating under oath in part:

5. *That I confirm that the September 30th, 2013 letter was prepared by representatives of Bondfield Construction Company Limited and was not and was never meant to be addressed to the Mayor, however, the correspondence was forwarded to legal representative to obtain legal opinion with respect to the positions set out in the correspondence;*

6. *That I make oath and say that I am not aware of, nor did I request or direct anyone to change or alter the correspondence in any fashion whatsoever;*

7. *That the correspondence was meant for the purpose of obtaining information only and was not meant to be provided to anyone with respect to any lobbying effort whatsoever.*

23. The Mayor's Office has confirmed that they did not receive a copy of the September 30, 2013 letter.

***Communications by Jeffrey S. Lyons on behalf of Bondfield about the Tender***

24. On October 2, 2013, a member of Council asked the member's Executive Assistant: "can you please see if this matter is going to PWIC [Public Works and Infrastructure Committee] in November?" Attached to the councillor's email was a letter dated September 30, 2013 by John Aquino of Bondfield to the named Buyer and Manager, Professional Services, PMMD: "**Re: Request for Tender No. 209-2013, Contract No. 13FS-15WP Humber Treatment Plant – Odour Control and Process Upgrades ("RFT") Non-Compliant Bidder – Walsh Construction Company Canada**". The letter was copied to the Director, PMMD; a lawyer in City Legal Services; and to "Mayor Rob Ford".

25. The councillor's Executive Assistant sent an email to the Manager, Professional Services, PMMD, asking: "Do you know if the below item will be coming to PWIC in November? . . . **Request for Tender No. 209-2013, Contract No. 13FS-15WP Humber Treatment Plant – Odour Control and Process Upgrades ("RFT") Non-Compliant Bidder – Walsh Construction Company Canada.**" The wording, font and emphasis in the phrase identifying the Tender was precisely the same as the heading of the letter about the Tender dated September 30, 2013 by Mr. Aquino.
26. On October 2, 2013, Jeffrey S. Lyons sent an email to the member of Council. Attached to the email was Mr. Aquino's letter on behalf of Bondfield to PMMD dated September 30, 2013 "**Re: Request for Tender No. 209-2013, Contract No. 13FS-15WP Humber Treatment Plant – Odour Control and Process Upgrades ("RFT") Non-Compliant Bidder – Walsh Construction Company Canada**". The attached copy of the letter showed "Mayor Rob Ford" as a recipient of a copy.
27. The councillor stated to OLR Counsel that Mr. Lyons contacted her regarding the Tender to ask if the Tender was on the Agenda for the November 2013 PWIC meeting. The councillor told Mr. Lyons that she did not know but would find out. The councillor's Executive Assistant tried to find out about the Tender and was informed that there was a "blackout period" in effect. When given this information, the councillor instructed an Administrative Assistant to tell Mr. Lyons that she could not provide the requested information as there was a blackout in effect.
28. The councillor's Executive Assistant stated in writing to OLR Counsel: "Jeff Lyons called [the councillor's] City Hall office and [the councillor] return[ed] his call. When he asked if an item was on the agenda [the councillor] asked him to e-mail the item name. He sent this letter as an attachment which [the councillor] forwarded to me and then I cut and paste[d] the name from it to inquire if it was on the agenda."
29. The councillor provided to OLR Counsel a copy of Mr. Lyons' email to the councillor dated October 2, 2013 at 4:56 p.m. with Mr. Aquino's September 30, 2013 letter attached.
30. Mr. Lyons was not registered as a lobbyist in the City's lobbyist registry when he called and emailed the councillor about the Tender. The "blackout period" between the time of its issuance and its award was in effect, when all communications were restricted to the designated point of contact named in the Tender.
30. Mr. Lyons' counsel, Todd Brett White Barrister, responded to the Notice of Inquiry on behalf of Mr. Lyons on March 19, 2014 as follows:

*I can advise that Mr. Lyons is not a lobbyist in relation to the City of Toronto, since 2002, and has never lobbied in relation to the Odour Control and Process upgrades at the Humber Treatment Plant at any time. He has never been retained to lobby or advise by any person or company in relation to the Humber Treatment Plant.*

*On October 2, 2013, Mr. Lyons was contacted by a friend, who is one of the directors of Bondfield Construction Limited in relation to a legal issue, regarding*

*whether Walsh Construction was a non-compliant bidder for the City of Toronto. Bondfield had sent a letter on September 30, 2014 to [PMMD staff], [Legal Services staff] and Mayor Rob Ford, setting out their complaint that Walsh Construction Company was a non-compliant bidder. Mr. Lyons was contacted by Bondfield because of their relationship and because Mr. Lyons is a lawyer.*

*He did not know whether Toronto City Council had received the complaint of September 30th and did not know whether Council was aware of the legal issue involving Walsh Construction and whether the legal complaint was being considered on the City Council Agenda, as the company had not received any response to their complaint.*

*As a result, Mr. Lyons called a friend . . . who is a Toronto City Councillor. He asked her whether she was aware of the legal challenge regarding Walsh Construction Company and whether the issue of Walsh Construction's non-compliance was on Council's agenda at all. [The councillor] told him that she was not aware of the legal challenge and did not know whether the non-compliance issue was on any agenda for City Council. [The councillor] asked Mr. Lyons to send her a copy of the complaint, which he believed would be relayed to the appropriate City staff.*

*Consequently, on October 2, 2013, Mr. Lyons emailed [the councillor] a copy of the legal complaint, dated September 30, 2013. Attached is a copy of the e-mail that was sent to [the councillor]. [The attachment is a copy of Mr. Aquino's September 30, 2013 letter to PMMD staff.]*

*That was the extent of Mr. Lyons' contact with [the councillor]. His communication with [the councillor] was not on behalf of any company or bidder. He was not acting as a lobbyist for Bondfield Construction and has never been retained or consulted to act as a Lobbyist in relation to the Humber Treatment Plant. It was simply an enquiry regarding what Mr. Lyons believed to be a legal issue.*

*At no time did Mr. Lyons ever communicate with [the councillor] or anyone else in relation to the procurement process or in relation to any bid or on behalf of any company or bidder. He had no idea about the details of any bids or any idea as to what stage of the process the procurement was in. Mr. Lyons was not aware that there was a "blackout period" in effect, as he had no involvement and no interest whatsoever in the procurement process. The extent of his knowledge was the contents of the legal complaint letter, dated September 30, 2013, which had clearly already been sent to [PMMD staff], [ Legal Services staff] and Rob Ford.*

*Mr. Lyons was never paid or instructed to lobby any City official and continues to maintain that he has not and will not do so without strict adherence to lobbying registration rules.*

*Mr. Lyons advised his friend at Bondfield Construction that the company should retain senior counsel to pursue the legal issue and recommended that they retain the law firm of [a law firm]. Mr. Lyons' understanding is that Bondfield Construction did in fact retain [the law firm], for the purpose of fully raising the complaint and legal issues. That was the extent of Mr. Lyons' involvement.*

## REASONS FOR FINDINGS

I have found that Jeffrey S. Lyons, John Aquino and Anthony Quinn breached the Lobbying By-law, §§ 140-10 and 140-41A by communicating about the Tender as unregistered lobbyists with public office holders other than the named official point of contact, when these communications were prohibited by the City's Procurement Processes Policy and the Tender document.

### ***Law and Policy***

The Lobbying By-law, § 140-10 provides:

*No person shall lobby a public office holder without being registered as required under Articles II, III or IV, unless otherwise exempted under this chapter.*

Generally, the Lobbying By-law requires lobbyists to register and report communications with public office holders about the procurement of goods, services or construction and awarding of a contract. Communications with designated employees about a procurement process are exempt from registration. A registered lobbyist may only lobby about a procurement process if the communication is permitted by the applicable procurement policies and documents. See the [Interpretation Bulletin, Lobbying and Procurements](#).<sup>2</sup> The Lobbying By-law, §§ 140-41A and 140-41C, provides:

#### **§ 140-41. Compliance with policies restricting communication.**

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

...

C. *In the event of a conflict or inconsistency between Subsection A and any other provision of this chapter, Subsection A prevails.*

The City's [Procurement Processes Policy](#)<sup>3</sup>, defines a "procurement process" as including a tender call. Section 5.0 restricts all communications about a procurement process to the official point of contact named in the tender "from the time of issuance, during the competitive process, and up to and including the announcement of the award". The period from the issuance to the announcement of the award is commonly known as the "blackout period".

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<sup>2</sup>[http://www1.toronto.ca/city\\_of\\_toronto/lobbyist\\_registrar/files/pdf/interpretation-bulletin\\_lobbying-procurements.pdf](http://www1.toronto.ca/city_of_toronto/lobbyist_registrar/files/pdf/interpretation-bulletin_lobbying-procurements.pdf)

<sup>3</sup>[http://www1.toronto.ca/City%20Of%20Toronto/Purchasing%20and%20Materials%20Management/Selling%20to%20the%20City/Purchasing%20&%20Material%20Management/Policies-Legislation/policy\\_procurement\\_process.pdf](http://www1.toronto.ca/City%20Of%20Toronto/Purchasing%20and%20Materials%20Management/Selling%20to%20the%20City/Purchasing%20&%20Material%20Management/Policies-Legislation/policy_procurement_process.pdf)

Section 5.0 of the Procurement Processes Policy provides in part:

*An official point of contact shall be named in all calls to respond to all communications in respect of the call from the time of issuance, during the competitive process, and up to and including the announcement of award. The official point of contact shall be the Chief Purchasing Official or designate. . . . All communications with respect to a call must be made to an official point of contact named in the call.*

*Vendors, or any representatives employed or retained by them, and any unpaid representatives acting on behalf of either, are strictly prohibited from communicating, either verbally or in writing, with any other City staff, City official or member of City Council with respect to any call from the time of its issuance until the time of the award.*

The Tender document named an official point of contact, who was a Buyer in PMMD. Communications with anyone other than the named Buyer, Chief Purchasing Official or designate about the Tender during the period between its issuance and award were strictly prohibited by the Procurement Processes Policy and the Tender document.

Finally, § 140-41A prevails over all other sections of the Lobbying By-law, where the communications relate to a procurement process. Exemptions such as those in § 140-5 do not apply in such a case. This is made clear by § 140-41C, which provides:

*C. In the event of a conflict or inconsistency between Subsection A and any other provision of this chapter, Subsection A prevails.*

I adopt the view expressed by the City Solicitor in her report recommending the adoption of § 140-41C, that § 140-41A prevails over all other provisions of the Lobbying By-law with respect to communications about a procurement process:

*In my view, a proper interpretation of the Lobbying By-law would find that subsection 140-41A prevails over any other provision in the Lobbying By-law where the subject matter of a communication is in relation to a procurement process.<sup>4</sup>*

### **Findings with Respect to Mr. Lyons**

I find that Mr. Lyons breached § 140-41A when he communicated about a procurement process with a member of Council during the period when these communications were prohibited by section 5.0 of the City Procurements Processes Policy and the Tender document.

Mr. Lyons' counsel has characterized his communications with the councillor as concerning a legal matter and not related to any procurement process. I find that the communications were related to the Tender and therefore subject to § 140-41A. This is shown by the letter that Mr. Lyons appended to his email to the councillor. The

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<sup>4</sup> <http://www.toronto.ca/legdocs/mmis/2013/cc/bgrd/backgroundfile-62228.pdf> (September 30, 2013) Report from the City Solicitor on Lobbying During a Procurement Process - Recommended Amendments to Municipal Code Chapter 140. Lobbying (CC39.8):

appended letter from Mr. Aquino to PMMD dated September 30, 2013, was about the Tender and was considered by PMMD staff to be a material objection to the Tender. Subsection 140-41A applies to any situation where a lobbyist communicates with a public office holder “in relation to a procurement process”. Mr. Lyons was a lobbyist when he communicated with the councillor about the Tender, that is, “in relation to a procurement process.” Therefore, § 140-41A applied to his communications with the councillor.

Mr. Lyons’ counsel has submitted that he was not a “lobbyist”. I find Mr. Lyons was acting as an unregistered “consultant lobbyist” or a “voluntary unpaid lobbyist” as defined in the Lobbying By-law when he communicated with the councillor about the Tender. When he communicated about the Tender with the councillor, he was not registered as a lobbyist; this however does not establish whether or not he was a lobbyist. Whether he was a lobbyist must be determined with reference to the definition of “lobbyist” in the Lobbying By-law.

“LOBBY” is defined under § 140-1B(2) as including communication with a public office holder about “Procurement of goods, services or construction and awarding of a contract.”

“LOBBYIST” is defined under § 140-1 as follows:

*LOBBYIST:*

- A. A consultant lobbyist as defined in § 140-11.*
- B. An in-house lobbyist as defined in § 140-20.*
- C. A voluntary unpaid lobbyist as defined in § 140-27.*

Under § 140-11, “consultant lobbyist” is defined as:

*An individual who, for payment, undertakes to lobby on behalf of a client.*

An “in-house lobbyist” is defined under § 140-20 as including an officer who is compensated for the performance of his or her duties, a part of whose duties is to lobby on behalf of the corporation of which he or she is an officer.

Under § 140-27, “voluntary unpaid lobbyist” is defined as:

- A. An individual, corporation, organization or other person, or a partnership, who or that, without payment, lobbies or causes an employee to lobby a public office holder on behalf of or for the benefit of the interests of a for-profit entity or organization (restricted definition).*
- B. A director of a for-profit entity or organization (restricted definition), who is not an in-house lobbyist as defined in § 140-20, when he, she or it lobbies or causes an employee to lobby a public office holder on behalf of, or for benefit of the interests of, the for-profit entity or organization (restricted definition).*

If Mr. Lyons was paid by Mr. Aquino to communicate with public office holders about the Tender on behalf of Bondfield, then he fell within the definition of “consultant lobbyist” when he communicated with the councillor. If he was acting without payment on behalf of or for the benefit of the interests of Bondfield, then he fell within the definition of “voluntary unpaid lobbyist”. Either Mr. Lyons was paid and therefore acting as a “consultant lobbyist”, or he was unpaid and acting for the benefit or in the interests of Bondfield as a “voluntary unpaid lobbyist”. In either case, he was acting as an unregistered “lobbyist” when he communicated with the councillor. Therefore, §§ 140-10 and 140-41A applied to his communications with the councillor.

***Findings with respect to Mr. Aquino***

I find that Mr. Aquino breached § 140-41A when he sent the letter of September 30, 2013 to a City staff lawyer. This was not permitted by the City’s Procurements Processes Policy or the Tender document. In addition, he was lobbying as an unregistered lobbyist when he sent the letter of September 30th and therefore breached § 140-10.

Mr. Aquino was a “lobbyist” when he sent letters about the Tender to City staff. Mr. Aquino was an officer of Bondfield acting on its behalf and in Bondfield’s interests when he sent the letters. If he was not paid, then he was a “voluntary unpaid lobbyist” under the Lobbying By-law. If he was a paid officer, then he was an “in-house lobbyist” for Bondfield. Sending letters to City staff about a procurement falls within the definition of “lobby”. (See the definitions of “lobby” and “lobbyist” in ***Findings with Respect to Mr. Lyons*** above at pages 12, 13 and 14.)

Mr. Aquino does not dispute that he communicated with City staff about the Tender by letters of September 24 and 30, 2013. However, he denies that he sent or directed that the letter of September 30, 2013 be sent to the Mayor, and has apologized for any inadvertent breach of the Lobbying By-law. He has also characterized the letters as seeking information. His counsel has characterized the letters as “complaint letters”.

Mr. Aquino sent the letters of September 24 and 30, 2013 during the period when communications were restricted by section 5.0 of the Procurements Processes Policy to the staff contact designated in the Tender and the Chief Purchasing Official or his designate. The designated staff contact was the PMMD Buyer, to whom the letters were addressed. The manager to whom the letters were addressed was the Chief Purchasing Official’s designate. The Chief Purchasing Official was copied. All of these communications were permitted. Therefore, the letter of September 24, 2013 did not contravene § 140-41A.

However, Mr. Aquino copied his September 30, 2013 letter to a City staff lawyer, which was not permitted under the City Procurements Processes Policy or the Tender document. The copying of the September 30th letter to the City staff lawyer therefore breached § 140-41A. He was acting as an unregistered lobbyist when he sent this letter, and so also breached § 140-10.



One of the copies of the September 30, 2013 letter received by the OLR from the councillor with whom Mr. Lyons communicated, shows that it was copied to “Mayor Rob Ford”. The letter received by the OLR from PMMD did not show the Mayor as the recipient of a copy of it. Mr. Aquino has denied under oath that he directed the letter to the Mayor or altered it, and states he provided a copy to legal counsel. The OLR has confirmed that the Mayor’s Office did not receive a copy of the letter. In the circumstances, I find, on a balance of probabilities, that the letter was not copied to the Mayor by Mr. Aquino.

Mr. Aquino’s letters of September 24 and 30, 2013 could be described as “letters of complaint”. City staff treated these letters as a “material objection”. A complaint to the City’s Chief Purchasing Official is permitted under section 11.0 of the City’s Procurement Processes Policy. Section 11.0 specifies when a “complaint” is considered to be a “material objection” and sets out procedures for these.

However, the fact that a communication is a “complaint” or a “material objection” does not remove the application of section 5.0 of the Procurement Processes Policy and the Tender itself, both of which restrict all communications during the period from issuance to award to the designated point of contact named in the Tender, the Chief Purchasing Official or his designate.

The fact that the communications were in the nature of a complaint or a request for information does not exempt them from § 140-41A. Subsection 140-41C provides that in the case of a conflict or inconsistency, § 140-41A prevails over all other provisions in the Lobbying By-law, including the exemptions provided for complaints (§ 140-5D) and requests for information (§ 140-5C). The communications were about a procurement process and therefore subject to § 140-41A, which prevails over all other provisions of the Lobbying By-law. See the discussion of this issue in **Law and Policy** above at pages 11 and 12.

For the following reasons, neither § 140-5C nor § 140-D would apply to these communications, in any event. The exemption under § 140-5D applies to complaints about a “service or program”. Mr. Aquino’s communications were complaints about a procurement process, not about a service or program. Subsection 140-5C exempts from the by-law “A communication that is restricted to a request for information.” This is a very narrow exemption applicable only where there is a request for information and no other type of communication. The letters of September 24 and 30, 2013 cannot be characterized as “restricted to a request for information” in my view. They were considered by City staff to constitute a “material objection”, which is a complaint of a serious nature.

Finally, section 11.0 of the Procurements Processes Policy provides a procedure for complaints, which restricts communications about complaints to the Chief Purchasing Official. Mr. Aquino’s communications with public office holders other than the Chief Purchasing Official were not permitted by section 11.0 of the policy.

A further discussion of the issue of complaints during a procurement process is found below, in the discussion of my findings with respect to Mr. Quinn.

***Findings with respect to Mr. Quinn***

Mr. Quinn's communications with City staff, the Mayor's staff and the Mayor were not permitted under the City's Procurements Processes Policy and the Tender document. They occurred during the period between the issuance and award of the Tender, when the policy and the Tender restricted all communication by vendors to the designated staff contact, the Chief Purchasing Official or his designate. As a result, his communications breached § 140-41A. In addition, Mr. Quinn was an unregistered lobbyist and therefore breached § 140-10 by these communications.

Mr. Quinn's counsel has submitted that Mr. Quinn's communications were "complaints" and therefore an exception to the communication blackout, under § 140-5. This issue is discussed below. See also a discussion of the issue of complaints during a procurement process above, in my findings with respect to Mr. Aquino.

Mr. Quinn's counsel has also submitted that he was not trying to influence the outcome of the Tender by his communications. Rather, Mr. Quinn was trying to "shine light on a perceived flaw in the bid process". Accepting this to be true would not affect the findings I have made that he breached §§ 140-10 and 140-41A. The determination whether someone is a "lobbyist", and whether a communication constitutes "lobbying" or is related to a procurement process does not involve consideration of intent to influence.

Mr. Quinn was a "lobbyist" who was "lobbying" when he communicated as an officer of Bennett on behalf of that corporation in relation to a procurement. As an officer of Bennett, he was considered under the Lobbying By-law to be an "in-house lobbyist", or if unpaid, as a "voluntary unpaid lobbyist".

"LOBBY" is defined under § 140-1 as communication with a public office holder on a range of subject matters, including:

*B.(2) Procurement of goods, services or construction and awarding a contract.*

Intent to influence is not an element of the definition of "LOBBY". The Lobbying By-law does not require intent to influence as part of the definition of "lobbyist" or "lobby". Mr. Quinn communicated with public office holders about a procurement process. This was lobbying, as that term is defined in the by-law. As discussed above, "LOBBY" is defined under § 140-1B(2) as including communication with a public office holder about "Procurement of goods, services or construction and awarding of a contract."

"LOBBYIST" is defined under § 140-1 as follows:

*LOBBYIST:*

- A. A consultant lobbyist as defined in § 140-11.*
- B. An in-house lobbyist as defined in § 140-20.*
- C. A voluntary unpaid lobbyist as defined in § 140-27.*

Mr. Quinn was an officer of Bennett communicating on Bennett's behalf and in its interests. If he was paid to do so, he was an "in-house lobbyist". He was a "voluntary unpaid lobbyist" if he was not paid.

An "in-house lobbyist" is defined under § 140-20 as including an officer who is compensated for the performance of his or her duties, a part of whose duties is to lobby on behalf of the corporation of which he or she is an officer.

Under § 140-27, "voluntary unpaid lobbyist" is defined as:

- A. *An individual, corporation, organization or other person, or a partnership, who or that, without payment, lobbies or causes an employee to lobby a public office holder on behalf of or for the benefit of the interests of a for-profit entity or organization (restricted definition).*
- B. *A director of a for-profit entity or organization (restricted definition), who is not an in-house lobbyist as defined in § 140-20, when he, she or it lobbies or causes an employee to lobby a public office holder on behalf of, or for benefit of the interests of, the for-profit entity or organization (restricted definition).*

Mr. Quinn communicated with public office holders about the Tender when this was not permitted under the City's Procurement Processes Policy and the Tender document. This was a breach of § 140-41A. Mr. Quinn was not registered to lobby when he communicated with public office holders about the Tender. This was a breach of § 140-10.

Counsel for Mr. Quinn has submitted that Mr. Quinn's communications were in the nature of a complaint, and thus were exempt from § 140-41A under § 140-5D, which provides:

*This chapter does not apply in respect of:*

- D. *A communication that is restricted to compliments or complaints about a service or program.*

Accepting that the communication about the Tender was in the nature of a "complaint", the communication was nevertheless subject to the prohibition in § 140-41A. See the discussion of this issue in **Law and Policy** at pages 11 and 12; and in **Findings with Respect to Mr. Aquino** at pages 14 and 15.

In any event, the "complaint" made by Mr. Quinn would not fall within the exemption specified in § 140-5D because it did not relate to a "service or program"; rather, the complaint was about a procurement process.

Finally, section 11.0 of the Procurements Processes Policy provides a procedure for complaints, which restricts communications about complaints to the Chief Purchasing Official. Mr. Quinn's communications with public office holders other than the Chief Purchasing Official were not permitted by section 11.0 of the policy.

## CONCLUSION AND DISPOSITION

The purpose for restricting communications about procurements is to preserve the integrity and fairness of the City's procurements. This purpose is set out clearly in the City's Procurement Processes Policy. Section 140-41A of the Lobbying By-law, by requiring that lobbyists comply with the City's procurement policies and documents when communicating with public office holders, supports the integrity and fairness of the City's procurements. These provisions ensure adherence to Recommendation 107 of Madam Justice Bellamy in her *Report on the Toronto Computer Leasing Inquiry*:

*There should be no lobbying of any kind at any time during a City procurement process.<sup>5</sup>*

In this case, two vendors and a third party acting on behalf of or in the interests of one of the vendors breached the City's Procurement Processes Policy, the Tender document, and § 140-41A. They were acting as unregistered lobbyists when they did so, and therefore breached § 140-10.

Breach of § 140-41A is a matter of the utmost seriousness and is punishable as a provincial offence by a fine up to \$25,000 on a first conviction. However, the 6-month time limit for prosecution under the *Provincial Offences Act* expired before the OLR could collect all the relevant information.

In addition, the City's Procurement Processes Policy, section 5.0 contains sanctions in the discretion of Council, as follows:

*Any vendor found to be in breach of the policy will be subject to disqualification from the call or a future call or calls in the discretion of Council.*

I am referring this report to the Director, PMMD, for information.

All three lobbyists have shown a fundamental misunderstanding of the Lobbying By-law and how it applies in a procurement process. As a result, I am requesting that they attend training on the Lobbying By-law provided by the OLR.

This report is made as it is in the public interest to do so.

Respectfully Submitted,

Linda L. Gehrke  
Lobbyist Registrar  
City of Toronto

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<sup>5</sup> The Honourable Madam Justice Denise E. Bellamy, Commissioner, *Report, Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry*, (2005, City of Toronto) Volume 4, page 94.