

REPORT TO COUNCIL ON AN INQUIRY

LOBBYING DURING A TORONTO TRANSIT COMMISSION PROCUREMENT

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INTRODUCTION

This inquiry was conducted under the authority of s. 169 of the *City of Toronto Act, 2006* and §§ 3-26 and 140-33B(5) of the Toronto Municipal Code to determine whether there had been a contravention of the Lobbying By-law.

The inquiry concerned a Request for Proposals (RFP) by the Toronto Transit Commission (TTC) to provide an open standards based fare system. In July 2011, the Office of the Lobbyist Registrar (OLR) received information that five registered lobbyists were lobbying about this RFP. The Lobbying By-law, § 140-41A, provides:

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

The procurement document for the RFP prohibited lobbying by proponents and their representatives. In addition, the TTC Procurement Policy restricted communications about the RFP to a single point of contact.

I found that the registrations of the proponent and its consultant lobbyist were related to the RFP, and that they lobbied TTC Commissioners about the RFP at meetings in July 2011. This contravened the RFP document and § 140-41A. As a result, I closed (revoked) the registrations of the proponent and its consultant lobbyist under § 140-36B of the Lobbying By-law. The following registrations were revoked on September 14, 2011:

- Xerox Corporation (lobbying through its subsidiary, ACS), Subject Matter Registration SM16814, to lobby about “Procurement: Transit/TTC; Transportation – Metrolinx”.
- Paul Christie, Subject Matter Registration SM16839, to lobby about “Transit/TTC” on behalf of Xerox Corporation and its subsidiary, ACS.

I found that all parties honestly but mistakenly believed the July 2011 meetings were permitted by the Lobbying By-law. In light of these circumstances, I took no further action other than to revoke the registrations and make this report to Council.

I found that the subject matter registrations of three other registered lobbyist corporations and one consultant lobbyist were not related to the RFP. Therefore, I permitted these registrations to remain open.

The findings in this report raise an issue whether the TTC properly interpreted and implemented its procurement policy and RFP document. I recommend that the TTC review its procurement policy, documents and procedures in light of this report. I further recommend as a best practice that the TTC should seek advice from the Lobbyist Registrar before giving advice about the Lobbying By-law, or refer the parties directly to the Registrar for advice.

PROCEDURAL BACKGROUND

The Investigation

On July 29, 2011, the OLR received information that five subject matter registrations in the Lobbyist Registry could be related to an active TTC procurement (the RFP). I instructed Inquiries and Investigations Counsel to conduct an investigation to determine if § 140-41A of the Lobbying By-law had been breached. The investigation consisted of obtaining copies of the RFP, the TTC Procurement Policy, the minutes of the pertinent TTC Board meetings and relevant written correspondence regarding the call.

Submissions and Rulings on Requests by Parties

Submissions were received from the TTC and all of the above registrants concerning whether communications with TTC commissioners and other TTC officials about the RFP were permitted in August 2011, before I issued my determination in September 2011 that lobbying was not permitted during the RFP.

Excerpts of a previous draft of this report were provided to the parties for their response in February 2012. I received responses from the TTC and from two of the lobbyist corporations whose registrations were found to comply with the Lobbying By-law.

The response of Xerox Corporation suggested a minor wording change, as follows.

On September 14, 2011, I therefore advised Xerox/ACS and Paul Christie that they were permitted to contact the single point of contact named in the procurement document and I terminated their registrations effective September 14.

While not precisely using this wording, I agree generally with the content of the suggested wording. That content is reflected in this report.

The response of one of the lobbyist corporations found to comply with the Lobbying By-law stated that my report appeared to be accurate.

The response of another of the lobbyist corporations found to comply with the Lobbying By-law requested that I refrain from making any report about the inquiry or that I use a generic name, such as "Company", instead of the name of the corporation.

In my view, it is in the public interest and consistent with the principle of transparency to make this report to Council. The report concerns the conduct of lobbying during a procurement process. Ensuring compliance with § 140-41A of the Lobbying By-law is central to public confidence in the integrity of City government and local board decision-making regarding procurements.

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The lobbyists whose registrations and lobbying activities breached the Lobbying By-law are identified in this report, as this is necessary for the purposes of the report. It is not necessary for the purposes of the report to disclose the names of the lobbyists whose registrations complied with the Lobbying By-law. I have therefore used generic references for the corporations whose registrations were found to comply the Lobbying By-law, referring to each of them as “corporation” or “lobbyist corporation”.

FACTUAL BACKGROUND

In January 2011, the TTC issued a Request for Proposals to provide an open standards based fare payment system, P39PN10902 (the RFP). The sole proponent to bid on the RFP was a subsidiary of Xerox Corporation, ACS.

On June 8, 2011, the TTC Board decided to adopt the Presto fare collection system. At the same time, at the request of ACS, the TTC Board extended the ACS RFP from June 15, 2011 to November 23, 2011. ACS also requested the Board to grant an exemption from the black-out period on lobbying during the RFP to ACS. The Board’s decision did not address this latter request.

On July 8, 2011, the General Secretary of the TTC wrote to ACS, stating in part:

. . . . Please note that if you wish to meet with the Mayor of Toronto, the Commission Chair and Vice Chair and Commissioners, TTC staff will be required to coordinate and be present at all meetings In addition, per the email form [the Senior Contract Administrator], ACS must register with the Office of the Lobbyist Registrar.

On July 14, 2011, the General Manager of the TTC wrote to the TTC Commissioners and Chair, with a copy to the Mayor’s Office, about the RFP in part:

*On December 21, 2010, a memorandum was issued to you advising of a procurement blackout period for the above-stated requirement. At the June 8, 2011 Commission meeting a motion to extend the validity period for the bid submitted by ACS Transport Solutions, Inc. to November 23, 2011 (original bid validity was to expire on June 15, 2011) was approved. **Therefore, the blackout period will remain in effect until the new expiry date.** [emphasis added]*

ACS has advised of their intention to communicate with the Mayor of Toronto, the Commission Chair, Vice Chair and the Commissioners. Consequently, staff has notified ACS that they must register with the Office of the Lobbyist Registrar and must coordinate all meetings through TTC staff. All inquiries and communications with respect to this requirement, including ACS specifically, must continue to be directed to . . . [the] Senior Contract Administrator . . . who is required to be in attendance for any meeting that may occur.

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On July 15, 2011, Xerox Corporation (ACS) submitted Subject Matter Registration SM16814, to lobby about “Procurement: Transit/TTC; Transportation – Metrolinx”. The decision or issue to be lobbied is described as: “Discuss topics related to services ACS can provide to TTC or Metrolinx to include supply of a fare collection system, based on Open Payment technology that can also address the regional requirements of acceptance of Presto”. The OLR approved this registration on July 19, 2011.

On July 22, 2011, Paul Christie, consultant lobbyist for ACS, submitted Subject Matter Registration SM16839, to lobby about “Transit/TTC”. The decision or issue to be lobbied was described as “Automatic Fare Collection”. The OLR approved this registration on July 25, 2011.

On July 28, 2011, ACS and Paul Christie reported to the Registry that they held meetings with TTC Commissioners, the TTC Chair and Vice-Chair, and the Chief Project Manager on July 26 and 27, 2011.

On July 29, 2011, the OLR received information that the registrations of ACS and Paul Christie may be related to an active RFP. As a result of this information, an inquiry was begun to determine if the registrations complied with the Lobbying By-law and whether any breach of the by-law had occurred.

On September 14, 2011, I advised the registrants of my determination that the registrations of Xerox/ACS and Paul Christie related to the RFP. I advised Xerox Corporation, ACS and Paul Christie that they were prohibited from communicating about the RFP with anyone at the TTC other than the single point of contact named in the procurement document, in accordance with the TTC procurement policy. Effective September 14, I revoked (closed) these registrations under § 140-36B¹ because they did not comply with § 140-41A of the Lobbying By-law. I determined that three other registrations were not related to the RFP and therefore were permitted to remain open.

DISCUSSION OF THE ISSUES

1. Were the July 2011 meetings with the TTC Board members about the RFP permitted under §140-41A.? No.

(a) The Issue

The central issue in this inquiry was whether § 140-41A. permitted ACS, the sole bidder in the RFP, and Paul Christie, consultant lobbyist for ACS, to discuss the RFP with TTC Commissioners and officials other than the single point of contact. I received submissions from ACS, Paul Christie and the TTC on this issue.

¹ Section 140-36B. provides: *The Registrar may suspend or revoke a return or other document submitted to the Registrar under this chapter that is subsequently found not to comply with the requirements of this chapter or to contain information or a statement that is inaccurate or no longer accurate.*

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(b) Relevant provisions of the Lobbying By-law, Procurement Policy and procurement document

1. The Lobbying By-law (Chapter 140 of the Toronto Municipal Code):

Section 140-41.A.

§ 140-41.A. Lobbyists shall not communicate in relation to a procurement process except as permitted by applicable procurement policies and documents.

The definition of “Lobbying”, § 140-1:

LOBBY – To communicate with a public office holder on any of the following subject matters:

- A. Development, introduction, passage, defeat, amendment or repeal of a by-law, bill or resolution on any matter, by Council, a local board (restricted definition), the Board of Health, or a committee, another body or individual under delegated authority.*
- B. Without limiting subsection A, the following:
 - (2) Procurement of goods, services or construction and awarding a contract.**

2. The procurement document, RFP NO. P39PN10902 , section 3, Lobbying:

- 1. Lobbying shall mean anyone who “lobbies”, (as defined in the City of Toronto Municipal Code, Chapter 140) or is expected to lobby a Member of the Commission (i.e. Commissioner), their staff , or any Commission officer or employee, as set out in the City of Toronto Municipal Code, Chapter 140-Lobbying. For the purposes of Chapter 140 of the City of Toronto Municipal Code, the Commission is a “local board (restricted definition).”, For further information, please see City of Toronto Web site at www.toronto.ca/lobbying.*
- 2 A Proponent, including its employees, officers, directors, representatives and agents are prohibited from engaging in any form of Lobbying with respect to this Request for Proposal, or any part thereof. Notwithstanding anything to the contrary as set out in these instructions to Proponents, the obligations as set out in the City of Toronto Municipal Code, Chapter 140, shall apply.*

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3. The TTC procurement policy, approved July 14, 2010:

3.8 *Bid Process*

The period of time from the issuance of a Request through to award of Contract.

3.17 *Procurement*

The process for acquiring goods and/or services. This process includes defining the requirement, sourcing, preparing and distributing a Request, evaluating the Bids, and issuing a Contract.

7.0: *COMMUNICATION DURING BID PROCESS*

The single point [of] contact person throughout the Bid Process relating to a specific Request is the M&P representative identified in the Report.

Anyone interested in lobbying TTC Commissioners, their staff or any TTC employee or officer is required to register with the City of Toronto's Lobbyist Registry under the terms set out in Municipal Code, Chapter 140 [the Lobbying By-law]. More specific information concerning the Lobbyist Registry is available on the City's website at www.toronto.ca/lobbying.

4. Toronto Transit Commission, Minutes from Wednesday, June 8, 2011, Item 14:

14. *Electronic Fare Collection at the TTC*

Vice-Chair Milczyn moved that the following be added as a second recommendation in the Staff Report:

...

- (ii) *that until such time as a final agreement can be reached between the TTC, the Province and Metrolinx on the Presto System that the Affiliated Computer Services (ACS) Request for Proposal (RFP) be extended to remain open until November 23, 2011.*

The recommendation in the staff report, as amended, was approved unanimously.²

² Staff Recommendation to the Toronto Transit Commission Meeting of June 8, 2011: " It is recommended that the Commission: 1. Approve the adoption of the PRESTO fare collection system " subject to certain conditions being met.

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(c) Findings and Conclusions on the Issue

Section 140-41A permits only those communications that are permitted by the TTC's procurement policies and documents. The purpose of § 140-41A is to ensure that there is no lobbying about the procurement and to provide a mechanism for appropriate communications with a designated staff person about the procurement. The ultimate purpose of these provisions is to protect the integrity of the procurement process.

The RFP document in this procurement clearly and explicitly prohibits the proponent and its representatives from lobbying with respect to the procurement, and adopts the definition of lobbying in Chapter 140. Lobbying is defined in Chapter 140 as including communication with a public office holder about a procurement.

The provision in the RFP prohibiting lobbying by the proponents and its representatives is consistent with the purpose of § 140-41A. It mirrors the language of the recommendation by 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.³

The clear intent of the lobbying prohibition in the RFP document for this procurement was to prohibit the type of meetings that occurred in July 2011.

The context of the meetings was that the TTC extended the RFP when it adopted staff's recommendation to approve the adoption of the Presto fare collection system subject to certain conditions on June 8, 2011. The sole proponent in the RFP, ACS, asked the Board to extend the validity period of its bid and also for an exemption from the lobbying black-out period during the extended period. The Board adopted a motion to extend the RFP, but was silent on the exempting ACS from the black-out on lobbying. In the absence of a decision to permit lobbying and to amend the RFP document, the RFP's prohibition on lobbying continued to be in effect.

The meetings of ACS and Paul Christie with TTC Commissioners in July 2011 clearly constituted "lobbying", that is, discussions with public office holders about a procurement (the RFP), which was to be determined by decision of the TTC Board. This was so, whether or not the meetings were arranged by the single point of contact. The definition of "lobbying" is concerned with the subject matter of the meeting. The description the proponents gave of their meetings with TTC Commissioners was "Discuss topics related to services ACS can provide to TTC or Metrolinx to include supply of a fare collection system, based on Open Payment technology that can also address the regional requirements of acceptance of Presto". This description of the subject matter, in my view, was related to the RFP for an open standards based fare

³ *Toronto Computer Leasing Inquiry, Toronto External Contracts Inquiry* (2005), Volume 4, page 94, Recommendation 107.

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system. The proponent and their consultant lobbyist were lobbying in relation to the RFP when they met with the TTC Commissioners in July 2011 to discuss this subject. They requested the TTC Board's permission to do so and registered with the Lobbyist Registry before they met with the Commissioners. All parties believed that these meetings were permitted.

The TTC's General Manager stated in a letter to me dated August 19, 2011 that "all requests for information and communication are arranged and communicated through a single point of contact". The General Manager of the TTC wrote further that while requests to meet with members of the Commission are "highly unusual" and are not normally encouraged, in this case the TTC elected to make an exception, and this was permitted under its procurement policy so long as the communications were arranged through the single point of contact.

The TTC responded to a draft of this report that it has for the past 10 years interpreted its procurement policy as permitting site tours and pre-bid meetings; that a restrictive interpretation limiting communications to a single point of contact would make it impossible for the TTC to properly conduct site tours and pre-bid meetings; and that the July 2011 meetings could be viewed as analogous to or a type of site tour or pre-bid meeting, just later in the process.

I agree with the TTC's submission that site tours and pre-bid meetings are permitted by the TTC's procurement documents. Appendix "A" is a procurement document that permits site tours and pre-bid meetings. If the meetings of July 2011 had been site tours or pre-bid meetings, I would find that they were permitted under § 140-41A.

However, the July 2011 meetings were not site tours or pre-bid meetings. They were meetings with TTC Commissioners held at the request of ACS in relation to the RFP, in the context that the TTC had now conditionally adopted the Presto electronic fare collection system and at the same time had extended the ACS RFP until November 23, 2011.

There is no evidence that the July 2011 meetings with TTC Commissioners were site tours or pre-bid meetings. Rather, the evidence indicates that the meetings fell within the definition of "lobbying" as communications about a procurement process. The meetings were described in the proponent's lobbyist registration as discussing "services ACS can provide to TTC or Metrolinx to include supply of a fare collection system, based on Open Payment technology that can also address the regional requirements of acceptance of Presto". The meetings occurred after the Commissioners had decided on June 8, 2011 to proceed with Presto and also to extend the ACS RFP. There is no evidence that the Commissioners who attended the July 2011 meetings were providing technical advice or information, providing site tours, attending pre-bid meetings or otherwise administering the procurement process. Their role in the procurement was that of the final decision-maker regarding the RFP.

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In my respectful view, an interpretation of “single point of contact” in the TTC procurement policy so as to permit the meetings that occurred in July 2011 would not be consistent with the provision of the RFP that prohibited lobbying of any kind in relation to the RFP, the purpose of § 140-41A or Recommendation 107 of Madam Justice Bellamy in her Report on the Toronto Computer Leasing Inquiry.

I have concluded on the basis of the evidence available to me that the July 2011 meetings with TTC Commissioners constituted “lobbying” as this is defined in the Lobbying By-law, since they involved discussions in relation to the RFP. They were therefore prohibited by the provision in the RFP that prohibits all lobbying by the proponents and its representatives in relation to the RFP. Since the meetings were prohibited by the RFP document, they were prohibited by and contravened § 140-41A.

In conclusion, the July 2011 meetings by ACS and Paul Christie with TTC Commissioners were prohibited by section 3.2 in the RFP document, which provides in part:

A proponent, including its employees, officers, directors, representatives and agents are prohibited from engaging in any form of Lobbying with respect to this Request for Proposal, or any part thereof.

The meetings fell squarely within the definition of "lobbying" in § 140-1. They were therefore prohibited by section 3 of the RFP and consequently by § 140-41A.

I accept the submissions of ACS and Paul Christie that they relied upon the advice of the TTC about whether meetings with the TTC Commissioners about the RFP were permitted. Mr. Christie submitted: “In no instance did the designated point of contact indicate that either my client or I had violated the spirit or the letter of the procurement” during meetings that were held with the TTC Commissioners. These submissions were supported by the position taken by the TTC in its submissions.

I find, based upon the correspondence at the time, that all parties believed that the July 2011 meetings were permitted. I note that the history and circumstances of this RFP were unusual, as a result of the intervening decision by the TTC to adopt the Presto fare collection system. In these circumstances, I closed the registrations of ACS and Paul Christie that were related to the RFP, but decided that no further action should be taken other than to make this report to Council. I have made two recommendations for consideration by the TTC.

2. Did three other corporations lobby about the RFP? No.

I found that the subject matter registrations of three other lobbyist corporations and one consultant lobbyist were not related to the RFP. Therefore, I permitted these registrations to remain open. I found these lobbyists were not proponents in the RFP in question, their

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subject matter registrations did not relate to the RFP and they did not lobby about the RFP.

One corporation and its consultant lobbyist registered and communicated about the Presto System, and not about the RFP. The corporation was not a proponent in the RFP. Their lobbying activities were not related to the RFP.

A second corporation registered to lobby about payment method options in May 2010, before the RFP was issued and during the bid validity period about payment method options in general, but did not communicate about the RFP. The corporation was not a proponent in the RFP and was neutral as to its outcome. Their lobbying activities were not related to the RFP.

A third corporation registered and communicated with public office holders before the RFP was issued about credit card acceptance on the TTC with their card, but not about the RFP. The corporation was not a proponent in the RFP. Their lobbying activities were not related to the RFP.

Therefore, § 140-41A did not prohibit lobbying under these registration.

CONCLUSIONS

I conclude that communication about the RFP by the proponents ACS and their consultant lobbyist Paul Christie with TTC Commissioners and staff other than the point of contact were prohibited by and contravened § 140-41A.

I conclude that three other registrations to lobby the TTC were not prohibited by § 140-41A.

DISPOSITION

My dispositions in this inquiry are as follows:

1. Registrations SM16184 (Xerox Corporation) and SM16839 (Paul Christie) related to RFP P39PN10902 were revoked (closed) under §140-36B., effective September 14, 2011.
2. The registrations of three other corporations and one consultant lobbyist were permitted to remain open.

RECOMMENDATIONS

1. The TTC should review its procurement policies, documents and procedures in light of this report.
2. As a best practice, the TTC should seek advice from the Lobbyist Registrar before giving advice about the Lobbying By-law, or refer the parties directly to the Registrar for advice.

All of which is respectfully submitted to Council this 3rd day of April, 2012.

Linda L. Gehrke
Lobbyist Registrar