
REPORT TO COUNCIL

**ON AN INQUIRY: LOBBYING IN RELATION TO A
PROCUREMENT PROCESS FOR THE BENEFICIAL
USE OF BIOSOLIDS – CONNECT CONSULTING
SOLUTIONS AND LYTEK INTERNATIONAL INC.**

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INTRODUCTION

This is a report by the Lobbyist Registrar on an inquiry under s. 169 of the *City of Toronto Act, 2006* and § 140-35B of the Lobbying By-law to determine whether Connect Consulting Solutions (CCS) lobbying on behalf of Lystek International Inc. (Lystek) and Lystek lobbied in relation to a Request for Proposal for the beneficial use of biosolids generated at Ashbridges Bay, Request for Proposal 9155-11-7185 (the RFP), contrary to § 140-41A of the Lobbying By-law. Section 140-41A provides:

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

The Lobbyist Registrar found that CCS and Lystek lobbied about the RFP during the period when lobbying was prohibited by the RFP document and City policy.

The Registrar also found that CCS consultant lobbyists and Lystek lobbied public office holders without being registered, contrary to § 140-10, which 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.

CCS consultant lobbyists arranged meetings with councillors on behalf of Lystek; and both CCS consultant lobbyists and a Lystek official met with members of Council when they were not registered to lobby.

CCS also failed to report lobbying activities on behalf of Lystek when registered, contrary to § 140-17.

In addition, CCS failed to advise its client Lystek of its obligations under the Lobbying By-law, contravening § 140-43A, which provides:

- Lobbyists shall inform their client, employer or organization of the obligations under this chapter.

The Registrar suspended the registrations related to the RFP during the period when lobbying was prohibited under § 140-41A. In the interest of transparency, the Registrar has permitted and requested CCS and Lystek to register and report all of their lobbying activities before June 30 and after October 27, 2011.

The Registrar has cautioned CCS and Lystek that they must comply with the Lobbying By-law; and has requested that CCS and Lystek attend training sessions on the Lobbying By-law offered by the Office of the Lobbyist Registrar (OLR).

Lystek and CCS received the findings and disposition in this report. The parties do not dispute the findings or disposition. CCS is scheduled to attend a training session, has updated its

registrations and has submitted a new registration to report lobbying activities in 2011. Lystek has registered its lobbying activities.

FINDINGS

1. CCS consultant lobbyists and a Lystek official communicated with public office holders in relation to a procurement process, contrary to § 140-41A of the Lobbying By-law.
2. The following communications were related to RFP 9155-11-7185 for beneficial use of biosolids generated at Ashbridges Bay. These communications were prohibited by the RFP document and the City's Procurement Processes Policy, and therefore breached § 140-41A:
 - On July 8, 2011, Frederick (Rick) Mosher, President of Lystek, and CCS consultant lobbyists Steve Strauss and Ron Gersh met with a councillor.
 - On July 11, 2011, Mr. Mosher and CCS consultant lobbyists Steve Strauss and Luke Nicholas met with a councillor.
 - On July 12, 2011, Mr. Strauss emailed another councillor to request that a meeting be rescheduled on behalf of Lystek.
 - On July 12, 2011, Mr. Strauss left a voicemail with a councillor's Executive Assistant requesting a meeting on behalf of Lystek.
 - On July 12, 2011, Mr. Strauss followed up his voicemail with an email to the councillor's Executive Assistant requesting a meeting on behalf of Lystek.
3. Unregistered CCS consultant lobbyists and a Lystek official breached § 140-10 by communicating with public office holders when they were not registered.

CCS consultant lobbyists Steve Strauss, Luke Nicholas, Rudy Barell, Ron Gersh, and Lystek President Rick Mosher were not registered to lobby for Lystek when they communicated with members of Council and their staff, as set out below:

- Mr. Nicholas was not registered to lobby on behalf of Lystek when he met with a councillor on May 5, 2011.
- Mr. Strauss was not registered to lobby on behalf of Lystek when he met with councillors on May 5, July 8 and July 11, 2011; and when he emailed councillors and their staff to arrange meetings for Lystek on July 12, 2011.
- Mr. Barell was not registered to lobby on behalf of Lystek when he sent an email to councillors on June 21, 2011.

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- Mr. Gersh was not registered to lobby on behalf of Lystek when he met with a councillor on July 8, 2011.
 - Mr. Mosher was not registered to lobby on behalf of Lystek when he met with councillors on May 5, July 8 and July 11, 2011.
4. Registered consultant lobbyists for Lystek breached § 140-17 by failing to report their communications within three business days.
 - Luke Nicholas registered as a consultant lobbyist for Lystek on June 6, 2011. He failed to report his meeting with a councillor on May 5, 2011. The OLR suspended this registration on July 13, 2011 because it appeared to be related to RFP 9155-11-7185.
 - Rudy Barell registered as a consultant lobbyist for Lystek on June 22, 2011. He failed to report emails on June 21, 22 and 29, 2011 to five councillors to arrange meetings for Lystek. The OLR suspended this registration on July 13, 2011 because it appeared to be related to RFP 9155-11-7185.
 5. CCS breached § 140-43A by failing to advise their client, Lystek, of its obligation to register; and by failing to properly advise Lystek regarding the restrictions on communications in relation to procurements under § 140-41A.

DISPOSITION

1. The registrations of Rudy Barell SM16607 and Luke Nicholas SM16526 to lobby on behalf of Lystek were related to RFP 9155-11-7185 and therefore did not comply with § 140-41A. The suspension of these registrations is confirmed, effective from the date of the issue of the RFP on June 30, 2011 until its award October 27, 2011.
2. In the interest of transparency, registrations SM16607 (Rudy Barell) and SM16526 (Luke Nicholas) are reinstated for the sole purpose of reporting all communications before June 30, 2011 and after October 27, 2011.
3. In the interest of transparency, CCS and Lystek are requested and permitted to register and report all of their lobbying activities before June 30, 2011 and after October 27, 2011.
4. CCS and Lystek are cautioned that they must comply with the Lobbying By-law.
5. CCS is cautioned that they must advise their clients of the requirements and obligations under the Lobbying By-law.
6. I request that that CCS and Lystek attend training sessions by the Office of the Lobbyist Registrar on these requirements.

THE INQUIRY PROCESS

On July 13, 2011, the OLR suspended two CCS registrations to lobby on behalf of Lystek, because they appeared to relate to a procurement process for the beneficial use of biosolids generated at Ashbridges Bay (the RFP). The RFP was awarded on October 27, 2011. CCS sought to reactivate its registrations and reported communications during the RFP “blackout period”, when communications are prohibited by § 140-41A.

On February 28, 2012, the Lobbyist Registrar authorized OLR Inquiries and Investigations Counsel to conduct an inquiry under s. 169 of the *City of Toronto Act, 2006* and § 140-35B of the Lobbying By-law, to determine whether CCS lobbied on behalf of Lystek in breach of §140-41A, in relation to Request for Proposal 9155-11-7185, during the period lobbying was prohibited by City’s Procurement Processes Policy and the RFP.

Inquiries and Investigations Counsel wrote to CCS on February 29, 2012, informing its senior officer of this inquiry and providing an opportunity to respond. OLR investigations staff gathered documentary evidence, statements and submissions from the members of Council and their staff, City staff and the alleged lobbyists. Inquiries and Investigations Counsel reported to the Registrar in May 2013 on this inquiry and on another inquiry related to the same procurement and the same consulting firm (Report on an Inquiry: Lobbying in Relation to a Request for Proposal for the Beneficial Use of Biosolids – Connect Consulting Solutions and Orgaworld Canada Ltd.).

Throughout the inquiry process, the OLR provided the lobbyists with an opportunity to respond to the evidence. The OLR provided the Registrar’s proposed findings and disposition on June 24, 2013 to CCS and Lystek for their review and response.

CCS lobbyists responded in a telephone conversation with Inquiries and Investigations Counsel on June 25, 2013 that they did not dispute the facts or disposition. They have since updated their registrations and submitted a new registration to report CCS lobbying activities in 2011 on behalf of Lystek. CCS is scheduled to attend an OLR training session in August 2013.

The President of Lystek responded on July 3, 2013:

I have no material comments on the factual summary as presented this is because a number of the statements I was unaware of at the time and some of the specific references and comments I have no direct knowledge regarding their substance. That being said I now understand that there was a breach of the City of Toronto Lobbying requirements. Let me state clearly that there was no knowledge on my behalf of any breach of policy, nor was there any desire or intent to do so. In fact, we engaged a lobbying consultant to assist with any such activities with the City to ensure that there were no such compliance issues. . . . And I would also note that the meeting discussion was entirely unrelated to any ongoing proposal process in 2011 and was in fact related to a future policy direction that the City of Toronto was pursuing with respect to its long-term biosolids management plans.

. . . I would like to confirm that we/I have reviewed and now understand the lobbying rules and requirements. We have since applied for lobbyist registration and will make no

attempt to meet with any Toronto politicians on any matter that could have any implications for any ongoing competitive process to the City in the form of any proposal, bid or quotation in any form.

FACTS

The inquiry established the facts set out in this section.

The Lobbyists and their registrations

1. Lystek International Inc. (Lystek) is a Canadian company that processes biosolids using “beneficial use” processes.
2. CCS consultants Rudy Barell and Luke Nicholas registered to lobby on behalf of Lystek in June 2011:
 - SM16607, Rudy Barell registered on June 22, 2011 regarding: “Economic Development; Environment – As part of the announcement that certain elements of the Bio-Solids Master Plan have been rejected by council, we were hoping to meet with you to discuss this with the office of partnerships and city council.”
 - SM16526, Luke Nicholas registered on June 6, 2011 regarding “Environment – Expanding the City’s knowledge base around Bio-Solid technologies and beneficial use.”
3. On July 13, 2011, the OLR suspended CCS registrations SM16607 and SM16526, because they appeared on their face to relate to a procurement process, RFP 9155-11-7185 (the RFP), for which communications were restricted. The OLR informed CCS of the suspension and advised that no lobbying under the suspended registrations was permitted.
4. On December 19, 2011, the OLR received a request from Mr. Nicholas to reactivate SM16526. The OLR permitted reactivation of the registration, since RFP 9155-11-7185 had been awarded. However, upon reactivation, Mr. Nicholas reported details of communications with councillors during the period when communications were prohibited under the RFP. As a result, the OLR again suspended the registration, pending an inquiry into the reported lobbying activities by CCS on behalf of Lystek during the procurement process.
5. In February 2013, the OLR permitted Lystek to submit a new in-house registration, SM18941, to lobby regarding “Environment; Garbage/Recycling; Technology – To discuss, Waste water/Biosolids and recycling technology”. The OLR suspended this registration on April 24, 2013, as it appeared to be related to RFP 9117-13-7098 for “Highland Creek Wastewater Treatment Plant Biosolids Management Schedule B –

Environmental Assessment”. The City cancelled this RFP in June 2013. As a result, the Registrar has permitted SM18941 to be reactivated.

The City’s procurement processes

6. On January 29, 2009, the City issued Request for Pre-Qualification (RFPQ) No. 9150-10-3035 for a Mixed Waste Processing Facility. Its purpose was to pre-qualify major waste treatment operators, contractors and technology providers (or consortia thereof) capable of offering a solution regarding the proposed development of a residual waste treatment facility to help the City meet its “Getting to 70% Landfill Diversion” Plan of May 2007.
7. On November 30, December 1, 2, 4 and 7, 2009, City Council approved the Biosolids Master Plan Update Environmental Assessment regarding the Ashbridges Bay, Humber and North Toronto Treatment Plant. Council directed staff to implement the biosolids management strategies contained in the Master Plan for each of the three wastewater treatment plants at Ashbridges Bay, Humber and North Toronto; authorized the General Manager, Toronto Water, to procure additional beneficial use and landfill disposal services for biosolids from the Ashbridges Bay Treatment Plant on a sole source basis; and directed the General Manager, Toronto Water to execute one or more contracts or agreements to do so. (PW28.5)¹
8. On June 8 and 9, 2010, City Council approved both the Beneficial Use Option as the primary biosolids strategy and the Landfill Disposal Option as a contingency option, outlined in the Biosolids Master Plan Update Environmental Assessment, for the Highland Creek Treatment Plant; and directed staff to implement the recommended beneficial use biosolids management strategy contained in it. (PW33.4)²
9. On June 22, 2010, the City pre-qualified a consortium in which Lystek is a sub-contractor to bid on a Mixed Waste Processing Facility. To date, no RFP has been issued for this facility.
10. On May 17, 18 and 19, 2011, City Council re-affirmed its approval of the strategy it adopted on June 8 and 9, 2010 for the Highland Creek Treatment Plant. (See paragraph 6, above and PW3.4³).
11. On June 30, 2011, the City issued RFP 9155-11-7815 for Beneficial Utilization of Biosolids. This RFP was for the provision of specialized services to help diversify the City’s biosolids beneficial use program at the Ashbridges Bay Treatment Plant. The RFP (Section 2, Overview) noted that in 2009, City Council approved the Biosolids Master Plan for the Ashbridges Bay Treatment Plant, “directing City staff to move forward in implementing a 100% Biosolids beneficial use program”.

¹ <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2009.PW28.5>

² <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2010.PW33.4>

³ <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.PW3.4>

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12. Lystek purchased and downloaded the RFP call document on July 4, 2011 and submitted a bid on July 21, 2011, the closing date for bids.
13. On October 27, 2011, the City's Bid Committee awarded the contract in RFP 9155-11-7815 to Lystek and three other proponents.
14. On April 19, 2013, the City issued RFP 9117-13-7098 for "Highland Creek Wastewater Treatment Plant Biosolids Management Schedule B – Environmental Assessment". Lystek purchased the call document, but informed the OLR that they do not intend to bid on this RFP. The City cancelled this RFP in June 2013.

Communications by the lobbyists for Lystek with members of Council and their staff

15. On May 5, 2011, Frederick (Rick) Mosher, President of Lystek and CCS consultant lobbyists Luke Nicholas and Steve Strauss met with a councillor. The meeting was logged in the visitors book at the councillors' reception desk at City Hall. The councillor's calendar notes that the councillor was to meet with Rick Mosher, Steve Strauss and Luke Nicholas "re: treatment of sludge".
16. On June 21, 22 and 29, 2011, CCS consultant Rudy Barell sent emails to five councillors requesting meetings on behalf of Lystek. The emails state in part:

As part of the announcement that certain elements of the Bio-Solids Master Plan have been rejected by council, we were hoping to meet with you to discuss the council's goals in terms of public policy on this issue, and even expand upon your knowledge in the area.

Lystek has made major advancements in transforming biosolids into fertilizer so that it is a safe, practical and beneficial way to use the bi-product.

Let me know when you have some time available; I would like to organize a meeting between Rick Mosher, President of Lystek and Luke Nicholas, Partner and Senior Consultant at CCS.

17. On July 4, 2011, Lystek purchased RFP 9155-11-7185 and downloaded it.
18. On July 8, 2011, Rick Mosher, President of Lystek and CCS consultants Steve Strauss and Ron Gersh met with a member of Council.⁴ The councillor confirmed that the meeting occurred, and stated in a memo dated April 12, 2012 to Inquiries and Investigations Counsel:

Yes, as my staff have confirmed, this meeting did take place as you describe. The substance of the meeting, to the best of my recollection, was a technology for gasification of solid waste (or something to that regard). I did not pursue the matter further.

⁴ The visitors log book at councillors' reception, City Hall, records the attendance of Rick Mosher, Steve Strauss and Ron Gersh on July 8, 2011.

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As a matter of protocol, we typically advise anyone seeking a meeting to ensure they are following all Lobbyist registrar requirements. Clearly this was not the case in this instance.

19. On July 11, 2011, Rick Mosher and CCS consultants Luke Nicholas and Steve Strauss met with a third member of Council.⁵ The councillor's assistant wrote to OLR Inquiries and Investigations Counsel on April 12, 2012, that the councillor "had a meeting with Rick Mosher and Luke Nicholas regarding the Bio-Solids Master Plan on Monday, July 11, at 3:00 pm."
20. A joint meeting was scheduled by Mr. Barell with a fourth councillor to meet with Mr. Mosher and Mr. Nicholas. Two other councillors were invited to attend. One of the invited councillors declined the invitation. The meeting was scheduled for July 11, 2011, but was cancelled.
21. On July 12, 2011, Mr. Strauss wrote to the intended host councillor in an attempt to reschedule the cancelled meeting:

I am writing on behalf of Rick Mosher of Lystek International. We were slated to have a meeting yesterday with Councillors [three named councillors] at 1:00 pm at City Hall. We were asked to postpone the meeting with the Councillors until further notice. I just wanted to touch base briefly and put our request back in queue. . . .
22. The meeting was not rescheduled. Two of the councillors confirmed that they did not meet with the CCS lobbyists or with any representatives of Lystek. The third councillor confirmed having declined the invitation and that the councillor had never met or spoken with CCS or Lystek representatives.
23. On July 12, 2011, a seventh councillor's Executive Assistant received a voicemail from Mr. Strauss and forwarded it to the OLR, with the concern that it appeared to be related to an active procurement process. The Transcript of the voicemail is as follows:

. . . This is Steve Strauss calling at 3:10 pm in the afternoon on Tuesday, July 12th. I am calling to just follow up on a request to meet with Councillor . . . on behalf of Rick Mosher the CEO and President of Lystek International. We had put in a request a little bit ago and now we understand that City has issued a Request for Proposals, we would like to respond to the tender. We cannot meet with elected officials after the 21st of July, because that is against the rules, and we definitely do not want to mess with those. . . . Hopefully, if the Councillor has any availability – even maybe perhaps for a quick conference call or even a twenty or thirty minute face to face that would be spectacular
. . . .
24. Mr. Strauss followed up on the voicemail with an email, again requesting a meeting, on July 12, 2011.

⁵ The visitors log book, City Hall Reception, records the attendance of Rick Mosher, Steven Strauss and Luke Nicholas on July 11, 2011.

25. The councillor's Executive Assistant replied to Mr. Strauss on July 12, 2011:

. . . I received your phone message yesterday, but since it was very vague on the purpose of a meeting and your client is involved in solid waste disposal, I forwarded it directly to the Lobbyist Registrar. This message is also being CC'd to the Lobbyist Registrar.

I would like to call to your attention that Section 5 of the Procurement Processes Policy states, "Vendors, or any representatives employed or retained by them . . . 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 [RFP] call from the time of its issuance until the time of award.

Neither Councillor . . . nor staff from our office will be meeting with any businesses that deal with solid waste collection or disposal.

26. As a result of this voicemail and the concerns expressed by the councillor's Executive Assistant, the OLR conducted a procurement search and learned of RFP 9155-11-7185 for the beneficial use of biosolids, which appeared to relate to the voicemail. Under the terms of the RFP and the City's Policy on Procurement Processes, communications with councillors and their staff were prohibited from the date the RFP was issued on June 30, 2011 until it was awarded on October 27, 2011.
27. On July 13, 2011, the OLR suspended the registrations of CCS to lobby on behalf of Lystek, as they appeared to relate to the RFP.
28. Lystek submitted a bid in response to the RFP at some time before the deadline of noon on July 22, 2011.
29. On October 27, 2011, the Bid Committee awarded the RFP to Lystek and three other proponents (BD47.1)⁶.
30. In December 2011, Mr. Nicholas reactivated SM16526. The July 8, 2011 and July 11, 2011 meetings with councillors came to light as a result of the reactivation. In April 2012, the OLR again suspended SM16526 pending an inquiry to determine whether prohibited lobbying in relation to the RFP.
31. On February 28, 2012, the Lobbyist Registrar authorized this inquiry. Inquiries and Investigations Counsel wrote to Mr. Nicholas on February 29, 2012 informing him of the inquiry and providing an opportunity to respond.

The lobbyists' responses to the inquiry

32. The OLR Compliance Investigator spoke with Mr. Strauss on July 13, 2011, the day the CCS registrations were closed. The Compliance Investigator advised Mr. Strauss not to

⁶ <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2011.BD47.1>

lobby for Lystek because there was an ongoing procurement process and because he had no approved subject matters listing Lystek as a client. Mr. Strauss denied lobbying on behalf of Lystek and said that he had only arranged meetings. The Compliance Investigator advised Mr. Strauss that arranging meetings by a consultant lobbyist on behalf of a client constitutes lobbying. On October 16, 2012, Mr. Strauss confirmed by email to OLR Inquiries and Investigations Counsel that he attended meetings with councillors on July 8 and 11, 2011.

33. Mr. Mosher told OLR Inquiries and Investigations Counsel on July 18, 2012 that he did not know he needed to register before meeting with the councillors: “I thought I was OK because CCS registered.”
34. On March 6, 2012, Ron Gersh of CCS wrote to OLR Inquiries and Investigations Counsel in response to the letter of inquiry and a subsequent phone conversation, submitting in part:

CCS would like to submit the following for your consideration and the consideration of the Lobbyist Registrar:

- 1) At no time, during our meetings with public office holders were there any discussions regarding the Call number 8155-11-7185 [sic] (Beneficial Utilization of Biosolids). We have attached the briefing document that was sent to public office holders that demonstrate the subject matter was to discuss City of Toronto’s waste management policy in a broad context.

Specially, our goal was to speak to the benefits of Biosolid utilization for purposes of beneficial use versus the use of incineration technology. The discussion was based on a broad policy angle of environmental stewardship and economic impacts to the taxpayer (large capital costs of incineration, etc.)

CCS has provided you with the list of officials we met during this time period, we feel quite comfortable that we communicated verbally and formally (via e-mail) the parameters of the meeting when we made the request, and at no point did we engage them in any discussion outside the mandate. We would encourage the investigation to discuss this matter directly with the councillors to see if we went outside the mandate.

- 2) **Beneficial Use: A Global Term**

As discussed in our conversation on March 1, 2012 you mentioned how the link between the use of terms in registration and the procurement process was similar and that this only added to the mounting concern by the Lobbyist Registry. In particular the terminology “Beneficial Utilization of Biosolids” and the “Expand the knowledge of the beneficial use of biosolids” were the links that drew your conclusions.

It is understandable how it can be conjectured by a third party that the nature of the registered discussion was linked to the title of procurement program could be a cause for concern. However, CCS asserts that this was not the case. Beneficial Use of Biosolids or its utilization are global industry term[s] used to describe a process whereby converting Biosolids to a fertilizer product for use by the agricultural sector.

With respect to the subject matter discussed with public office holders, the context for the use of such terms were to assist our client to explain broad public policy issues related to the processing, incineration, or the landfilling of sludge.

For example, the terminology is also referred to as one of the Biosolids management options, the City of Toronto undertook to Peer Review in the Biosolids Residuals Master Plan. There are really two options when dealing with stabilized sludge referred to as Biosolids. You either:

- 1) Dispose or
- 2) Beneficial Utilization

Incineration lobby would advocate against Beneficial Use citing their arguments (which are not necessary for our purposes), we would be on the other side of the lobby advocating against disposing of this sludge and using the Biosolids for “Beneficial Utilization”.

The argument here is that the terminology “beneficial utilization of biosolids” are global industry terms and further that the context for these terms in the lobbyist registration is not linked to the procurement program.

3) As indicated during our March 1, 2012 telephone call with you, we mentioned that CCS staff member Steve Strauss worked closely with [a named] . . . Lobbyist Compliance Officer to ensure that lobbyist activities were within the scope of the Lobbyist Registration Bylaw. CCS was particularly careful to make sure during this time that the Lobbyist Registration was aware of our activities and was involved in assisting to craft our registration.

By registering and working closely with the Lobbyist Registration, it was our responsibility to be as transparent about our “mandate” and “ask” with the Registry. CCS views lobbying as a serious business and represents a number of non-for-profits and First Nations. Ethical government engagement is apart of mantra, both personally and professionally. Our commitment to laws governing lobbyist in Toronto, Ontario, and Canada are paramount.

Conclusions

CCS would like to conclude with the following:

1. In no way did CCS or Lystek speak to the procurement process with public office holders
2. Beneficial Utilization is an industry terminology that was used to convey messages issues related to broader public policy
3. CCS worked closely with [a named] . . . Lobbyist Compliance Officer to ensure all activities and our registration were in line with the Lobbyist Bylaws.

35. On April 13, 2012, Luke Nicholas of CCS wrote to OLR Inquiries and Investigations Counsel in response to a request for information sent to Ron Gersh about meetings between Lystek, CCS and City councillors. Mr. Nicholas confirmed that meetings had been held

with two councillors on July 8 and July 11, 2011; and that another meeting scheduled with three councillors was cancelled. Mr. Nicholas wrote that the subject matter of the meeting was as follows:

The facts are that we wanted to talk to the City about its overall approach to the management of biosolids, with a particular emphasis on the Highland Creek site that was originally recommended to be handled by an incinerator. The Biosolids Master Plan was in the process of attempting to get a final approval from Council to accept the Master Plan. I am not sure of the exact dates that this actually happened and would have to look for it. It happened at about this time frame in 2011. Elements of this Master Plan included the Beneficial Use approach that was approved for Ashbridges Bay and the incinerator that would be used at Highland Creek. Council did not reject the incinerator option component that was being recommended for Highland Creek and they did tell staff to relook at this item and reopen it. Lystek is now and has always been interested in Highland Creek and the overall approach that Toronto is taking with respect to its Biosolid Master Plan.

36. On July 18, 2012, Mr. Mosher spoke with OLR Inquiries and Investigations Counsel about the meetings with councillors he attended on July 8 and July 11, 2011. Inquiries and Investigations Counsel's notes of their conversation indicate the following answers by Mr. Mosher to the question, "What was the subject of the meetings?":

- Bio-solids master plan
- Beneficial use vs incineration
- Highland Creek, good decision, hope it stays that way
- Spoke of benefits of beneficial use over incineration

37. When asked, "Did you talk about the RFP for Ashbridges Bay?", Mr. Mosher replied:

No, not the point, beneficial use of incineration flip flop [was the] concern.

38. On October 16, 2012, Mr. Strauss answered the question from Inquiries and Investigations Counsel, what was the subject of the meeting of July 11, 2011:

The subject matter of the meeting was to voice the concerns of Lystek surrounding the incineration option under Toronto's proposed Biosolid Master Plan.

39. On July 3, 2013, Mr. Mosher responded to the proposed findings and disposition in this report (quoted above in INQUIRY PROCESS).

DISCUSSION

Law and Policy

Section 140-10 of the Lobbying By-law prohibits a lobbyist from lobbying a City public office holder unless they are registered as required by the Lobbying By-law (Chapter 140, Toronto Municipal Code):

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.

Section 1 of the Lobbying By-law defines “LOBBY” as communication with a public office holder about a range of matters requiring decision by the City or its delegates, including “[p]rocurement of goods, services or construction and awarding a contract”. The definition of “LOBBY” includes the arrangement of a meeting with a public office holder by a consultant lobbyist.

Section 140-41A of the Lobbying By-law provides:

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

The issues to be decided under § 140-41A are:

- whether there were communications by a lobbyist “in relation to” a procurement process; and
- if so, whether these communications were prohibited by City procurement policies or documents. Under the City’s Procurement Processes Policy, section 5 and the Requests for Proposal discussed in this report, no communications about the RFP were permitted from the date the RFP was issued until the contract was awarded, except with the point of contact named in the RFP.

The source of § 140-41A is Recommendation 107 of The Honourable Madam Justice Bellamy in the Report on the Toronto Computer Leasing Inquiry (2005, City of Toronto). Bellamy J. wrote in part (vol. 2, Good Government, p. 85):

107. There should be no lobbying of any kind during a City procurement process.

Public money, politics, and private interests are a volatile mix, and a source of scandal throughout history. Government procurement is one of the areas subject to the most intense lobbying, and if lobbying on behalf of commercial interest did not work, it would not continue.

Elected officials may of course be lobbied on policy matters. They may also be lobbied on the desirability of acquiring particular goods and services for which there is no ongoing tender process, broadly defined. But elected officials have no legitimate role in the details of specific procurements. Their job is to set procurement policies and

procurement priorities before a competitive bid starts, then openly debate and vote on the procurement recommendations proposed by staff after the competitive bid has ended. It is the responsibility of staff to carry out procurement by holding competitive bids and analyzing proposals based on value for the taxpayers. There should be no political component in that analysis, no involvement of elected officials, and therefore no lobbying of elected officials or staff during the tender process.

...

The City should require bidders responding to major tender documents to declare in the response whether they have used a lobbyist in any way and at any time in relation to the procurement in question, and if so, how.

The purpose of § 140-41A is to protect the integrity of the City’s procurement processes, as is apparent from the recommendation and commentary of Bellamy J., above. This provision protects that integrity by prohibiting communications that may improperly influence the award of the RFP. This prohibition is necessary to ensure that a procurement process is not improperly influenced by lobbying of councillors and other public office holders.

I interpret the phrase “communicate in relation to a procurement process” as communication that is connected to the procurement. A broad interpretation of this phrase is consistent with the history, purpose and intent of § 140-41A.

My findings are made on the balance of probabilities, which is the civil standard of proof. In assessing the credibility of the statements of interested witnesses, it is important to keep in mind that parties have an interest in persuading adjudicators to accept a particular view. The evidence of interested witnesses must therefore be assessed according to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time. It must be consistent with the surrounding probabilities and in harmony with the surrounding circumstances. See *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.); *Phillips v. Ford Motor Co. of Canada Ltd.* (1971), 18 D.L.R. (3d) 641 (Ont. C.A.). The statements of the respondent lobbyists to the OLR were made in their own interest, and so must be assessed according to their consistency with the other known facts, the probabilities affecting the case as a whole, and harmony with the surrounding circumstances.

Discussion of Findings

CCS and Lystek communicated in relation to a procurement process, RFP 9155-11-7185 contrary to § 140-41A

I find that CCS and Lystek communicated with public office holders in relation to the RFP for beneficial use of biosolids when they arranged meetings and met with councillors in July 2011. The RFP was issued on June 30, 2011. From this date until the award of the contract on October 27, 2011, communications with public office holders in relation to the RFP were prohibited, other than those which were permitted by the RFP and City policy.

I find that the descriptions of the subject matter of the meetings in the registrations themselves and in the contemporaneous email and voicemail evidence are most likely to be a reliable and accurate description of the purpose and subject for the meetings of July 8 and 11, 2011. Later descriptions are subject to inaccuracy due to the fading of memory over time. As well, the later accounts by the lobbyists of their communications with public office holders may have been influenced by a desire, whether conscious or not, to convince the OLR that lobbying in relation to the procurement did not occur.

A critical known fact and contextual circumstance of the case in existence at the time of the meetings of July 8 and 11, 2011 was that Lystek was in the course of preparing to submit a bid on the RFP for the beneficial use of biosolids generated at Ashbridges Bay (RFP 9155-11-7185). Lystek had downloaded the RFP a few days before these meetings occurred, and submitted its bid within two weeks afterward. This fact was not mentioned by the CCS lobbyists when they made submissions and statements to the OLR about these meetings.

Nor, apparently, did Lystek mention its interest in the RFP to the councillors who met with them. The only mention of the RFP is in the voicemail of Mr. Strauss on July 12, 2011, seeking to reschedule a cancelled meeting. In that voicemail, Mr. Strauss acknowledged that Lystek wanted to respond to the RFP and they wished to abide by the rules prohibiting communication. When interviewed by OLR Inquiries and Investigations Counsel, Mr. Mosher denied discussing the RFP with the councillors.

However, the fact that Lystek did not discuss the RFP with councillors is not a complete answer to the issue to be decided. It is apparent from the statements of CCS consultants, Mr. Mosher and the councillors that the beneficial use of biosolids was discussed. The RFP was issued in order to implement the City's Bio-Solids Master Plan, by providing specialized services for the management and beneficial use of biosolids generated at Ashbridges Bay Treatment Plant. In my view, discussions of beneficial use of biosolids constituted communication "in relation to a procurement process", considering the following factors:

- The meetings occurred during the RFP communication "blackout period";
- Lystek had downloaded the RFP and intended to bid on it when the meetings occurred. In fact, Lystek did bid and was awarded a contract;
- The subject of the meetings as well as the RFP was the beneficial use of biosolids;
- Lystek met with public office holders who might play a role in the decision to award of the RFP.

The July 8 and 11 meetings occurred during the period when City policy and the RFP prohibited communications with public office holders other than the designated point of contact in the RFP. They were connected to the RFP by subject matter, by temporal connection and by Lystek's intent to bid on the RFP. Therefore, these meetings and other communications during the "blackout period" were prohibited by § 140-41A.

Mr. Barell's emails of June 22 and 29, 2011 indicate that the meetings were about a concern that Council had rejected elements of the Bio-Solids Master Plan and also the promotion of Lystek's

expertise in the area of biosolids processes. The July 12, 2011 voicemail left by Mr. Strauss indicates that the meetings were related to the RFP, as Lystek intended to respond to the RFP.

The councillors who met with CCS and Lystek did not have a precise or detailed recollection of the meetings when contacted by the OLR in April 2012. Their general recollection was that they regarded technologies for the treatment of solid waste (gasification) and the Bio-Solids Master Plan. The purpose of the RFP was to implement the Bio-Solids Master Plan.

RFP 9155-11-7185 had been issued and communications about it were prohibited when the meetings were held with the two councillors on July 8 and 11, 2011. Lystek had downloaded the RFP in early July, a few days before it met with the councillors, and submitted a bid on July 21, 2011. Lystek clearly had an interest in the RFP, as is shown by Mr. Strauss' voicemail of July 12, 2011 stating that Lystek intended to bid on the RFP and that they were aware of the rules constraining communications.

Lystek may have had other interests prompting the meetings as well, including the City's policy on the beneficial use of biosolids generally, and a concern around the issue of incineration and Highland Creek. The registrations, councillors' notes of the meetings made at the time, contemporaneous emails and voicemail indicate that the primary concern was the processing of biosolids. The contemporaneous emails, notes and voicemail do not support the assertion that incineration and Highland Creek were the subject of the meetings; nor is such a finding supported by the recollection of the councillors who met with CCS; nor are these submissions supported by the registrations themselves. It is noteworthy in light of the later submissions made by CCS that there is no mention of incineration technology or Highland Creek in the contemporaneous communications. The subject is clearly defined as the Bio-Solids Master Plan, promotion of Lystek's expertise in biosolids and, in the voicemail of July 12, 2011, the RFP.

Additionally, when OLR Inquiries and Investigations Council asked councillors for all the documents Lystek had given them, the councillors who met with Lystek and CCS did not provide the "briefing document" on beneficial use of biosolids referred by Mr. Strauss in his March 2012 submission to the OLR. In any event, the briefing note Mr. Strauss provided to the OLR in March 2012 juxtaposes the beneficial use method employed by Lystek with various other bio-solids management approaches. The beneficial use method is the process that was the subject of the RFP. The briefing document promotes the expertise of Lystek in the area of biosolids management, which would position Lystek advantageously in any procurement related to the beneficial use of biosolids.

With respect to the assertion by Mr. Gersh in March 2012 that CCS worked closely with the OLR Compliance Investigator, it is noteworthy that the first contact between the Compliance Investigator and CCS was on July 13, 2011 to inform them of the suspension of their registrations to lobby on behalf of Lystek because of the apparent relationship between the registrations and the RFP for Beneficial Utilization of Biosolids. The Compliance Investigator spoke with Mr. Strauss by phone on that day, informing him that he should stop lobbying for Lystek because there was an ongoing procurement process and because he had no approved subject matters listing Lystek as a client. Mr. Strauss denied lobbying other than to arrange meetings in that conversation; but over a year later Mr. Strauss confirmed to Inquiries and

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Investigations Counsel that he had attended meetings on behalf of Lystek. His earlier denial of lobbying in his conversation with the Compliance Investigator on July 13, 2011, within days of the July 8 and 11, 2011 meetings, reflects poorly on Mr. Strauss' credibility.

Thus, the fact that Lystek had an interest in discussing the general subject of beneficial utilization of biosolids, and in promoting its expertise in the area, does not contradict a finding that one of the significant reasons for the meetings was the RFP. There is a close temporal connection between Lystek purchasing and downloading the RFP for Biosolids Utilization at Ashbridges Bay and its communications with members of Council. Lystek downloaded the RFP on July 4, 2011 and met with councillors on July 8 and 11, 2011. This close temporal connection, the common subject matter of the beneficial use of biosolids and the July 12, 2011 voicemail indicating Lystek's intent to bid, persuade me that there was a significant connection between the meetings on July 8 and 11, 2011 and the RFP.

The RFP document restricted communications about the RFP to the point of contact named in it. Lystek knew or should have known that they could not communicate with councillors about the RFP before they met with them on July 8 and 11, 2011, since they had downloaded the document several days earlier.

The City's Procurement Processes Policy and the RFP document prohibited communications with members of Council by lobbyists between the date the RFP was issued and the date of its award. The RFP had been issued and had not yet been awarded at the time of the communications in July 2011.

Therefore, the meetings, emails and voicemail after June 30, 2011 (the date of issue of the RFP) contravened § 140-41A, which prohibits communications by a lobbyist in relation to a procurement process except as permitted by applicable procurement policies and procurement documents.

I find that CCS consultant lobbyists and the President of Lystek lobbied on behalf of Lystek in relation to RFP 9155-11-7185 when they met with councillors on July 8 and July 11, 2011, and when CCS lobbyists communicated with councillors and their staff in order to arrange meetings with councillors on behalf of Lystek. These meetings and other communications on behalf of Lystek during the RFP "blackout period" (June 30 to October 27, 2011) contravened § 140-41A.

I accept Mr. Mosher's explanation that he did not know he needed to register as an in-house lobbyist before meeting with councillors, and thought that compliance had been achieved by CCS.

Section 140-43A of the Lobbying By-law provides:

- A. Lobbyists shall inform their client, employer or organization of the obligations under this chapter.

CCS was required by § 140-43A to advise Lystek of its obligations under the Lobbying By-law. They did not do so. This is a further breach of the Lobbying By-law, which will be discussed below.

Lystek and CCS consultants lobbied without being registered and failed to report their lobbying activities

Lystek and CCS were required by the Lobbying By-law, § 140-10 to register before they communicated with public office holders. They were also required by §§ 140-17 and 140-24 to report their lobbying activities within three business days. (From June 30 to October 27, 2011, lobbying about the RFP was prohibited, whether or not they were registered.)

Other than Mr. Barell and Mr. Nicholas, none of the CCS consultant lobbyists registered to lobby on behalf of Lystek. And none of them, including Mr. Barell and Mr. Nicholas, reported any communications with public office holders on behalf of Lystek.

Mr. Strauss failed to register and failed to report his communications to arrange meetings and the meetings he attended. When he spoke with the OLR's Compliance Investigator, he denied lobbying except for arranging meetings. It was only in October 2012, when OLR Inquiries and Investigations Counsel put the meetings that he attended directly to him, that he admitted having attended them.

Mr. Nicholas registered on June 6, 2011, a month after he met with a councillor to lobby on behalf of Lystek on May 5, 2011. He failed to report this meeting and the subsequent meetings that he attended on July 8 and 11, 2011.

Mr. Barell registered on June 22, 2011. The day before he registered, he sent emails to councillors to arrange meetings on behalf of Lystek, in breach of § 140-10. Once he had registered, he failed to report any of the emails he sent to arrange meetings for Lystek.

Mr. Mosher did not register as an in-house lobbyist for Lystek and he did not report the meetings he attended with councillors to lobby on behalf of his firm. He later explained to OLR Inquiries and Investigations Counsel that he thought he was in compliance because CCS, his consultant lobbyists, had registered. I accept this explanation.

CCS failed to advise their client Lystek of its obligations under the Lobbying By-law

I have concluded, based on the statement of Mr. Mosher to Inquiries and Investigations Counsel, that CCS breached § 140-43A by failing to advise their client, Lystek, of the obligation of its officials to register as in-house lobbyists before meeting with councillors. CCS also failed to advise Lystek regarding § 140-41A when they arranged meetings on July 8 and July 11, 2011 for their clients in relation to RFP 9155-11-7185 during the period when communications about this RFP were prohibited by City policy and the RFP document.

Discussion of the Disposition

All lobbyists are required to comply with the Lobbying By-law. Consultant lobbyists are required by § 140-43A to advise their clients of their obligations under the Lobbying By-law.

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Breach of the Lobbying By-law is a provincial offence (§ 140-46). A non-compliant registration, including failure to provide accurate and up-to-date information, may lead to the suspension, revocation or removal of a registration (§§ 140-36, 140-37).

I have confirmed the suspension of the registrations found to be related to RFP 9155-11-7185. In the interests of transparency, I have permitted and requested CCS and Lystek to register and report all of their lobbying activities before June 30, 2011 and after October 27, 2011.

My report to Council is public and provides disclosure of the prohibited meetings and communications that occurred. The communications prohibited by § 140-41A will not appear in the registry, since they were contrary to the Lobbying By-law.

The lobbyists have been cautioned to comply with the Lobbying By-law, including its registration and reporting requirements and code of conduct. I have requested that that CCS and Lystek attend training sessions at the OLR on these requirements. CCS is scheduled to attend a training session, has updated its registrations and has submitted a new registration to report lobbying activities in 2011. Lystek has registered its lobbying activities.

All of which is respectfully submitted,

Linda L. Gehrke
Lobbyist Registrar