
REPORT TO COUNCIL
ON AN INQUIRY INTO LOBBYING
ABOUT TENDER CALL
Nos. 67-2013 AND 152-2013

LINDA L. GEHRKE
LOBBYIST REGISTRAR

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INTRODUCTION

In this inquiry, the Lobbyist Registrar has found that Jamie Besner of Sussex Strategy Group (“Sussex”), a registered consultant lobbyist, breached the Lobbying By-law by failing to report communications with public office holders and by communicating about two procurement processes when this was not permitted. In addition, Mr. Besner lobbied a public office holder after the related registered subject matter (SM18869) had been suspended. As a result, the Lobbyist Registrar has revoked SM18869 pursuant to § 140-36B; and requests Mr. Besner to attend a training session provided by the Office of the Lobbyist Registrar.

The Lobbyist Registrar has also found that Jeremy Bailey of Citygreen Urban Landscape Solutions (“Citygreen”), Mr. Besner’s client in SM18869, breached the Lobbying By-law by communicating with public office holders about his company’s soil cell products when he was not registered as a lobbyist and by communicating about a procurement process when this was not permitted. This was Mr. Bailey’s first contact with the City’s lobbyist registry. He co-operated fully with this inquiry and attended an Office of the Lobbyist Registrar (OLR) training session on the Lobbying By-law. In the interest of transparency, the Lobbyist Registrar has permitted Mr. Bailey to register and report all of his lobbying activities on behalf of Citygreen in SM19868.

The Registrar refers this report to the Director, Purchasing and Materials Management Division (“PMMD”) for information.

FINDINGS

As a result of this inquiry, the Registrar finds that:

1. Jamie Besner, consultant lobbyist with Sussex, breached §§ 140-15 and 140-17 of the Lobbying By-law by failing to report lobbying activities in SM18869 within three business days.
2. Mr. Besner breached § 140-41A by communicating with City staff about Tender Call No. 67-2013 and Tender Call No. 152-2013 when this was not permitted by the applicable procurement policies and documents.
3. Mr. Besner breached § 140-10 by lobbying City staff when SM18869 was suspended.
4. Jeremy Bailey of Citygreen breached § 140-10 by lobbying public office holders when he was not registered as a lobbyist.
5. Mr. Bailey breached § 140-41A by communicating about Tender Call No. 152-2013 when this was not permitted by the applicable procurement policies and documents.

DISPOSITION

1. The Registrar revokes SM18869 pursuant to §140-36B.
2. Mr. Besner is requested to attend training provided by the Office of the Lobbyist Registrar.
3. Mr. Bailey and Citygreen are permitted to register in order to report all of Citygreen's communications with the City's public office holders regarding the use of its soil cell product.
4. This report is referred to the Director, PMMD, for information.

INQUIRY PROCESS

On July 23, 2013, the Lobbyist Registrar received a report from the Director, PMMD of lobbying during a procurement process, when this was prohibited by the City's Procurement Processes Policy and the procurement document. The alleged lobbyists were Jamie Besner of Sussex and his client Jeremy Bailey of Citygreen. Inquiries and Investigations Counsel ("OLR Counsel") gathered information from the Lobbyist Registry and Purchasing and Materials Management Division, and prepared an assessment of the allegations.

On August 2, 2013, the Registrar commenced this inquiry and directed OLR Counsel to send Notices of Inquiry to Mr. Besner and Mr. Bailey. The Notices of Inquiry set out the allegations and provided an opportunity to respond to the allegations. On the same date, the OLR suspended SM18869, advising Mr. Besner that the registration was suspended because it appeared to relate to a tender call that had not yet been awarded, and that the suspension was effective until the award of the procurement.

On August 13, 2013, Michael Binetti of Affleck Greene McMurtry LLP informed OLR Counsel that Mr. Besner had retained his services regarding this inquiry. On September 5, 2013, Mr. Bailey provided a written response to the Notice of Inquiry. On September 26, 2013, Mr. Binetti, on behalf of Mr. Besner, requested an extension to reply to the Notice of Inquiry.

On September 30, 2013, OLR Counsel summonsed, and interviewed under oath, the Director, PMMD.

On December 20, 2013, OLR Counsel requested further information and clarification from Mr. Bailey. On January 3, 2014, Mr. Bailey requested, and was granted, an extension to reply to the letter of December 20, 2013. On January 22, 2014, Mr. Bailey provided the information requested in the letter of December 20, 2013.

During the period from October 2013 through June 2014, OLR Counsel obtained information from PMMD and Parks, Forestry and Recreation Division (“PF&R”); from the Deputy City Manager, Cluster B; and from the Mayor’s Office.

On January 10, 2014, further information was requested from Mr. Besner, through Mr. Binetti. On January 23, 2014, Mr. Binetti requested and was granted an extension to respond. On February 24, 2014, Mr. Binetti responded in writing, on behalf of Mr. Besner, in reply to OLR Counsel’s letter of January 10, 2014.

On April 7, 2014, OLR Counsel requested clarification of certain facts from Mr. Bailey. On April 23, 2014, Mr. Bailey spoke to OLR Counsel and provided oral clarification of the requested facts. On May 9, 2014, Mr. Bailey provided written confirmation of the matters clarified on April 23, 2014.

The Lobbyist Registrar sent her proposed findings, disposition and facts upon which they were based to Mr. Besner and his counsel on June 23, 2014, and to Mr. Bailey on June 24, 2014. The Registrar requested that Mr. Besner respond to her proposed findings and disposition by July 15, 2014 and that Mr. Bailey respond by July 16, 2014. The Registrar gave Mr. Binetti an extension to July 31, 2014 to respond on behalf of Mr. Besner. Mr. Binetti responded by email in a letter dated July 31, 2014 to OLR Counsel.

To date, no submission in response to the Lobbyist Registrar’s proposed findings, disposition and facts upon which they were based has been received from Mr. Bailey.

FACTS

1. On January 24, 2013, the Office of the Lobbyist Registrar (OLR) approved subject matter registration SM18869, registered by consultant lobbyist Jamie Besner of Sussex, to lobby on behalf of Citygreen about the Environment, specifically “Options for Increasing the Tree Canopy”.

2. On February 25, 2013, Mr. Besner and his client, Jeremy Bailey of Citygreen, attended a meeting with the Deputy City Manager, Cluster B, City Manager's staff, Director of Urban Forestry and General Manager, PF&R, staff of the Mayor's Office and staff of Waterfront Toronto. The February 25, 2013 meeting was set up by the Waterfront Project Director at the request of the Deputy City Manager. In the months before this meeting was scheduled, Citygreen had communicated its concerns about the City's use of a competitor's soil cell products. City staff wrote regarding the scheduling of the February 25, 2013 meeting (in part):

. . . We want to ensure that these individuals go through the proper procurement process. City staff and WT [Waterfront Toronto] have reviewed this with them before. . . .
3. The subject of the February 25, 2013 meeting was the choice of tree soil cells by the City and Waterfront Toronto in its procurements and contracts. Citygreen was concerned that the City and Waterfront Toronto were biased in favour of the soil cell product marketed by a competitor.
4. The February 25, 2013 meeting was not reported by Mr. Besner in SM18869, although an email to the Deputy City Manager on February 26, 2013 and a phone call with the Mayor's Deputy Chief of Staff on February 28, 2013 were reported.
5. On March 25, 2013, PMMD issued Tender Call No. 67-2013 for Nathan Phillips Square Revitalization Project – Phase 3 (“the Nathan Phillips Square Tender Call”). On July 17, 2013, the City's Bid Committee awarded the Nathan Phillips Square Tender Call to Four Seasons Site Development Limited ([BD133.2](#))¹.
6. On May 22, 2013, PMMD issued Tender Call No. 152-2013 for Improvements and Upgrades to Cawthra Square Park (“the Cawthra Square Park Tender Call”). On July 31, 2013, Bid Committee awarded the Cawthra Square Park Tender Call to TBG Landscape Inc. ([BD135.2](#))².
7. Both tender call documents listed a Buyer with PMMD as the contact person for all matters related to the tender call process and stated:

7. Questions

All questions concerning this Tender Call should be directed in writing to the Buyer as designated on the Tender Call Cover Page.

No other City representative, whether an official, agent or employee, is authorized to speak for the City with respect to this Tender Call, and any Bidder who uses any information, clarification or interpretation from any other representative does so entirely at the Bidder's own risk.

¹ <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.BD133.2>

² <http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.BD135.2>

Not only shall the City not be bound by any representation made by an unauthorized person, but any attempt by a Bidder to bypass the Tender Call process may be grounds for rejection of its Bid.

8. Section 5.0 of the City's [Procurement Processes Policy](#)³ restricted all communications about the tender calls to the Chief Purchasing Official or designated official point of contact named in the procurement documents.
9. On June 14, 15 and 19, 2013, Mr. Besner wrote to the General Manager, PF&R and to staff of the Mayor's Office, requesting another meeting to discuss continued "resistance from Forestry staff on the utilization of their [soil cell] as an alternative to the [competitor's product]." These emails were not reported in SM18869. In the email of June 15, 2013, responding to a request for specifics from the General Manager, PF&R, Mr. Besner stated in part: "Recently the issue seems to have happened with the Nathan Phillips Square revitalization project, but they are also encountering problems with Cawthra Park revitalization." In response to Mr. Besner's June 2013 emails, City staff scheduled a meeting for July 23, 2013.
10. When Mr. Besner sent emails to City staff in June 2013, both tender calls had been issued but not yet awarded. As a result, both procurements were subject to a "blackout period" during which all communications were restricted to the staff contact named in the call document.
11. On July 23, 2013, a meeting was held concerning the efforts of Citygreen to have a fair opportunity to market its structural soil cell product to the City of Toronto. Present at the meeting were the Acting Supervisor, Forestry Policy and Standards and the Director, Urban Forestry, PF&R; the Director, PMMD, Mr. Besner and his client, Jeremy Bailey of Citygreen.
12. During the July 23, 2013 meeting, Mr. Besner and/or Mr. Bailey raised and discussed the issue of the Cawthra Square Park Tender Call. This tender call had been issued but not yet awarded. The Director, PMMD asked if the tender call was "live". When it was determined that the tender call was in a period of restricted communications, the conversation ended. The conversation was described as lasting "a couple of minutes".
13. The Director, PMMD immediately reported communications by Sussex (Mr. Besner) and Citygreen (Mr. Bailey) on July 23, 2013 about the Cawthra Square Park Tender Call to the Lobbyist Registrar.

³http://www1.toronto.ca/City%20Of%20Toronto/Purchasing%20and%20Materials%20Management/Selling%20to%20the%20City/Purchasing%20&%20Material%20Management/Policies-Legislation/policy_procurement_process.pdf

14. The Director, PMMD wrote to OLR Counsel on July 29, 2013, describing the discussion about the Cawthra Square Park Tender Call at the July 23, 2013 meeting in part:

The meeting was called by Citygreen and Sussex with PF&R to follow up on earlier discussions on why Citygreen's . . . product was not allowed to be used in City call documents and to reiterate the concern they had with respect to their competitor's . . . product being specifically specified in tender calls . . .

. . .

The topic then moved to Tender 152-2013 for Cawthra Park where they indicated that it was a good situation as the City in the Tender allowed [Citygreen's product] as an approved alternative to [their competitor's product]. They raised a concern though that the Contractor was not confirming whether their product could be used and that the Contractor was checking with the City. I clarified who the Contractor was and they said it was a Landscape Architect. I then asked if the tender had been awarded and they indicated it was closed but they didn't know if it was awarded. I then said we would not discuss that further as the blackout period was still in effect. . . .

15. In an interview under oath on September 30, 2013, the Director, PMMD confirmed that the lobbyists, Mr. Besner and Mr. Bailey, raised the issue of the Cawthra Square Park Tender Call at the July 23, 2013 meeting and discussed it for a couple of minutes until they were advised by City staff that the tender call was live. The Director, PMMD stated:

[OLR Counsel]: . . . So in terms of raising the tender, . . . tender call 152-2013, how long was that conversation, . . . from like the moment they raise it, to the moment you say "Is this live?" and then it's shut down?

[Director, PMMD]: I think it was a couple of minutes, because the way that they were discussing it, it sounded like they were in conversation with the contractor on hand, and when they said a couple more things, I had to follow up and say "Are you talking about a consultant who helped design the scope of the work for the tender, or the person who won the tender themselves?" and then that's when they realized they had meant the consultant who had helped design the scope of the work, and they kept saying they "hadn't heard whether their product could be used", and it was in part because the City was still evaluating the call as a whole.

. . . the ideal perspective when an active call is in place and they are concerned about the specs, that they do it through the question period, the question time, to see if a change can be made.

[OLR Counsel]: So once you said "This is a live tender, we can't speak about it", they immediately stopped talking about it, they agreed?

[Director, PMMD]: Yes, they agreed to stop talking about it.

16. The Director, Urban Forestry, stated to OLR Counsel on December 2, 2013, in answer to the question whether Mr. Besner and/or Mr. Bailey raised the topic of the Cawthra Square Park Tender Call (in part):

I do recall that one of them (I can't remember which one) did bring up the topic of tender that was possibly live. . . .

17. The Acting Supervisor, Forest Policy and Standards, provided the following statement to OLR Counsel on December 12, 2013 that he recalled either Mr. Besner or Mr. Bailey raising the issue of the Cawthra Square Park Tender Call:

This topic was initiated by either Mr. Besner or Mr. Bailey stating that they had been in recent discussions with the 'lead' for a project taking place at Cawthra Park regarding potential use of [Citygreen's soil cell product]. They further indicated that the 'project lead' had stated that prior to [Citygreen's soil cell product] being used the City would need to acknowledge that this product was equivalent to [the competitor's soil cell product].

[The Director, PMMD] advised both Mr. Besner and Mr. Bailey that the tender relating to this project may still be open and therefore could not be discussed. At this point, conversation specifically relating to work at Cawthra Park ceased. [The Director, PMMD] later confirmed that the tender in question was still open and therefore could not be discussed.

18. On July 26, 2013, Mr. Besner or his delegate submitted an update for SM18869 to the OLR, reporting the July 23, 2013 meeting.
19. On August 2, 2013, the OLR suspended SM18869, advising Mr. Besner that the registration was suspended because it appeared to relate to a tender call that had not yet been awarded, and that the suspension was effective until the award of the procurement in question.
20. On August 2, 2013, Mr. Besner wrote to the OLR in response to the suspension of SM18869:

This registry is not related to the specific tender, but Forestry Dept policies surrounding the accepted use of our client's products.

21. On August 8, 2013, Mr. Besner sent an email to the General Manager, PF&R objecting to the City's specification of the competitor's soil cell product in a City publication on tree planting.
22. On September 5, 2013, Mr. Bailey provided the following account of the discussion of the Cawthra Square Park Tender Call at the July 23, 2013 meeting:

Regarding section 140-41A and Tender Call 152-2013, communication was very briefly discussed regarding this Tender Call and others, as a general discussion regarding these and the processes that pertain to them being awarded. Upon it being noted during the conversation that Tender Call 152-2013 was not closed it was immediately ceased being included in the discussion. As I mentioned on the

phone, we had tried to connect with the contact person of this Tender Call but we did not receive a response.

23. On December 2, 2013, Mr. Bailey told OLR Counsel:

- that he learned about there being a prohibition on lobbying during the blackout period of a procurement process from Mr. Besner just prior before they entered the July 23, 2013 meeting;
- that the first time he was advised by Mr. Besner that he was required to register as a lobbyist was after the July 23, 2013 meeting; and
- that he was certain the other Directors of Citygreen were not advised of their obligation to register before lobbying.

24. On December 3, 2013, Mr. Bailey wrote to OLR Counsel in response to his questions:

When you retained Sussex Strategy Group, did they advise you at that time or on any subsequent date that you would need to register before lobbying anyone at the City of Toronto? *This is not something I recall receiving but do know that the other Directors that were involved in retaining Sussex Strategy Group and attended some of the meetings were not advised of this.*

In addition, did they advise you of the prohibition on lobbying during an active procurement process? *As I mentioned on the phone, we knew that there was a prohibition period during an active procurement process and were under the understanding that Tender Call 152-2013 was closed, as per my previous email of having tried to connect with the contact person of this Tender Call with no response. I do not know if Sussex mentioned the prohibition period right before or during the meeting we had, but do suppose they could have looked this information up prior to the meeting to confirm that it was closed for their benefit.*

What advice if any did they give you regarding the requirements of the Lobbying By-law? *I do not believe they provided us with any advice regarding the Lobbying By-law.*

25. On December 20, 2013, OLR Counsel advised Mr. Bailey that he would be permitted to register upon providing a full report of all communications by Citygreen with public office holders concerning Tender Call No. 152-2013. Mr. Bailey provided a list of communications with City staff regarding Citygreen soil cell products, including meetings on August 8 and 9, 2012; November 12, 2012; January 8 and 10, 2013; February 25, 2013; July 23, 2013 and November 28, 2013. Mr. Bailey also attended a training session on the Lobbying By-law provided by the OLR.

SUBMISSIONS

On October 10, 2013, Mr. Besner's counsel, Michael I. Binetti of Affleck, Greene, McMurtry, responded to the Notice of Inquiry as follows, in part:

1. Whether Mr. Besner communicated with a public office holder, other than the official point of contact, during a procurement process (in violation of § 140-41A of the By-law)

Mr. Besner advises that he did not communicate with a public office holder during a procurement process. He further advises that the July 23, 2013 meeting referenced in your August 2nd letter was arranged to discuss general issues related to the City's current forestry policy and a potential conflict of interest that may exist with one of the City's current consultants.

We understand that the names of two projects were raised during the July 23rd meeting: the Nathan Philips [sic] Square project and the Cawthra Park project. Both projects were closed as of July 23, 2013, but the Cawthra Park project had not been formally awarded at that time. Mr. Besner advises that as soon as the name of the Cawthra Park project was raised, . . . the City's Director of Purchasing, indicated that it was his belief, although he could not be sure, that the contract had not been awarded and that discussing it could violate lobbying rules. Mr. Besner advises that [the Director of Purchasing's] comment was raised before any substantive discussion of that project took place and that as a result of that comment, all parties did not mention that project again during the July 23rd meeting. All parties agreed not to discuss that project out of an abundance of caution.

Mr. Besner advises that the only issue that was raised on July 23rd about procurement was not related to a specific tender; rather, Mr. Besner's client made a general complaint regarding the Forestry Department's policies surrounding the accepted use of his client's products and that he favoured a system that would allow for more options to be considered by the City in terms of acceptable products to be included in a tender response. There was no lobbying on any specific procurement process. Moreover, Mr. Besner's client was not a bidder on any of those projects.

2. Whether Mr. Besner failed to inform his client about his obligation to register before lobbying and the prohibition on lobbying about an ongoing procurement process except as permitted (in violation of § 140-43A of the By-law)

Mr. Besner advises that he informed his client about his obligation to register before lobbying and about the prohibition on lobbying about an ongoing procurement process. For example, on January 24, 2013, [an associate] of Sussex Strategy Group, sent instructions to Jeremy Bailey of City Green . . . outlining the steps necessary to register as an in-house lobbyist and to register subject matters (see enclosed email).

We trust, given the above, that the suspension referenced in your August 2nd letter will be lifted forthwith and we respectfully request your prompt confirmation of

same. I understand that the Bid Committee awarded the Cawthra Park contract on July 31, 2013, which predated your suspension. We query how Mr. Besner's registration was suspended when the bid in question closed on June 19, 2013 and had been awarded by the time of your August 2nd letter (i.e., the procurement was concluded).

On February 24, 2014, Mr. Binetti wrote to OLR Counsel regarding the February 25, 2013 meeting:

Mr. Besner advises that the meeting was requested in writing by [City staff] on behalf of the City: see attached emails dated February 20 and 21, 2013 (file: 2013-02-20.pdf – all files redacted for privilege). Who scheduled the meeting is confirmed in the email dated February 26, 2013 discussed below. Any communications were in direct response to a written request from the public office holder and thus, captured by § 140-5(H) of the lobbying by-law.

On July 31, 2014, Mr. Binetti responded to the Registrar's proposed findings and disposition, together with the facts on which they were based as follows:

We respond to your letter of June 23, 2014 using the numbers associated with your findings.

- 1. February 25, 2013 Meeting**
- 2. Emails of June 14, 15 and 19, 2013**
- 3. Finding of non-registration**

While your report indicates that the meeting of February 25, 2013 was not reported, it failed to reflect our position that the meeting was scheduled by the City as confirmed within our letter of February 24, 2014. You have made proposed Finding No. 3 without any connection to the circumstances surrounding the meeting, namely that any communications that occurred therein were in direct response to a written request from the public office holder and thus, captured by § 140-5(H) of the lobbying by-law.

The emails of June 14, 15 and 19, 2013 were contained within the registration for a subsequent string of emails that Mr. Besner attempted to register, but was prevented by doing so by your office, which were included in our letter to you of February 24, 2014. To now complain that the emails were not registered is manifestly unfair to Mr. Besner.

- 4. Communications about tender calls in emails**
- 5. Communications about tender calls during a meeting**

With great respect, neither Mr. Besner nor his client were bidders on any of the impugned tender calls. This fact was ignored within your report. It is disingenuous to find fault about enquiries made about general forestry policy for future consideration after tender calls had been decided but not yet announced. There is certainly no evidence whatsoever to suggest that Mr. Besner attempted to influence anything during any live procurement process. Simply put, there could not have been any lobbying on tender calls that had already been awarded and there are no facts to support this assertion.

As to the discussion of specific tender calls during a meeting with City staff on July 23, 2013, and in case it wasn't clear from our previous correspondence, Mr. Besner vehemently denies that he was the one who raised the Cawthra Park or Nathan Phillips Square projects during that meeting. There are no facts in your report that could survive scrutiny (which your investigation does not permit) to support this assertion. The City staff member who reported the communication referenced the fact that "they indicated," or "they raised," or "they said," certain things about those projects. There is nothing in your report that clarified who "they" were and the reader is left with the impression that that "they" must be Messrs. Besner and Bailey jointly. This is wrong.

Even Mr. Bailey's purported evidence supports Mr. Besner's contention that he was not the one who dared mention the name of projects during a meeting when he stated at para. 22 of your report:

Bailey advised that he learned about there being a prohibition on lobbying during the blackout period of a procurement process from Besner just prior to entering the July 23, 2013 meeting.

If this is true, it belies logic to think that Mr. Besner would on the one hand warn his client not to raise a project before the July 23rd meeting and then on the other hand, proceed to do so himself.

Mr. Besner is now faced with a sanction with no basis in fact and for allegedly having used "any form of expressive contact, and includes oral, written or electronic communication," to quote the bylaw itself, with respect to these two tender calls. Clearly the intent of the bylaw is to regulate lobbying activities and not to admonish a lobbyist for simply having been in the room when the name of a project is mentioned, especially on untested and questionable evidence.

Please note that the fact that we have not addressed every alleged factual finding in your report does not mean that my client accepts them as alleged. We have only addressed facts connected to your findings.

We trust our position will be included in any report to Council. Might I also suggest that it would be fairer to commence your report by listing the facts section and then concluding with the findings section.

REASONS FOR FINDINGS

Law and Policy related to Procurement Processes

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](#)⁴.

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](#)⁵, defines a "procurement process" as including a tender call. Section 5.0 restricts all communications about a procurement process to the Chief Purchasing Official or designated official point of contact named in the call "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".

The tender call documents for the two tender calls restricted all communications about them to the Buyer designated in the tender call document.

Section 140-41A prohibits all communications by lobbyists about a procurement process "except as permitted by applicable procurement policies and procurement documents". Section 5.0 of the City's Procurement Processes Policy restricts all communications about a procurement process and not just communications by vendors or bidders.

⁴http://www1.toronto.ca/city_of_toronto/lobbyist_registrar/files/pdf/interpretation-bulletin_lobbying-procurements.pdf

⁵http://www1.toronto.ca/City%20Of%20Toronto/Purchasing%20and%20Materials%20Management/Selling%20to%20the%20City/Purchasing%20&%20Material%20Management/Policies-Legislation/policy_procurement_process.pdf

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.⁶

Breaches of § 140-41A

I have found on a consideration of the evidence provided to me, on a balance of probabilities, that Mr. Besner communicated about two procurements in breach of § 140-41A; and Mr. Bailey communicated about a procurement also in breach of § 140-41A.

Mr. Besner's counsel submits that Mr. Besner did not attempt to influence any live procurement and that he and his client were not bidders. Section 140-41A applies to "lobbyists", not just to vendors or bidders. Mr. Besner was (and continues to be) a registered consultant lobbyist. Mr. Bailey was an in-house lobbyist or a voluntary unpaid lobbyist (depending on whether he was paid) acting on behalf of and in the interests of Citygreen when he communicated about the tender calls, as these terms are defined in the Lobbying By-law. See the definitions of "lobbyist", § 140-1; "consultant lobbyist", § 140-11; "in-house lobbyist", § 140-20; and "voluntary unpaid lobbyist", § 140-27.

Attempt to influence is not an element in the definition of "lobby" or § 140-41A. What is at issue in § 140-41A is whether Mr. Besner, a lobbyist, communicated about a procurement when this was not permitted.

Through his counsel, Mr. Besner has denied communicating with a public office holder during a procurement process or raising the issue of the Cawthra Square Park Tender Call at the July 23, 2013 meeting. Mr. Bailey has not denied raising the issue or communicating about the tender call.

Mr. Besner named two live procurements in his June 15, 2013 email as subjects of concern. The Cawthra Square Park Tender Call had not been awarded when this

⁶ <http://www.toronto.ca/legdocs/mmis/2013/cc/bgrrd/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):

tender call was discussed by Messrs Besner and Bailey at the July 23, 2013 meeting. My findings are discussed in more detail below.

The June 15, 2013 email

I find that in his June 15, 2013 email to the General Manager, PF&R, Mr. Besner communicated about the Nathan Phillips Square Tender Call and the Cawthra Square Park Tender Call, during the period between the issuance and the award of these tender calls, when all communications were restricted to the single point of contact. The June 15, 2013 email provides clear, direct evidence of communication by Mr. Besner about both tender calls with public office holders when this was prohibited under the City Procurement Processes Policy.

I have considered that the June 15, 2013 email could be considered a direct response to a written request for specifics from the General Manager, PF&R; however, § 140-5H does not apply in this case, as the communication concerns a procurement process. Accepting that the communication about the tender call was a direct response to a written request from the public office holder, the communication was nevertheless subject to § 140-41A. See the discussion under ***Law and Policy related to Procurement Processes***, above at pages 12 and 13.

The July 23, 2013 meeting

I find that both Mr. Besner and Mr. Bailey breached § 140-41A by communicating about the Cawthra Square Park Tender Call at their meeting with City staff on July 23, 2013. The essential issue is whether Mr. Besner and Mr. Bailey communicated about the Cawthra Square Park Tender Call at the July 23, 2013 meeting. If they did, then § 140-41A applies to those communications. I find that they did. Mr. Besner and Mr. Bailey were both lobbyists. They both communicated about the tender call when it was issued but had not yet been awarded.

Three staff members who were present at the meeting recall that either Mr. Besner or Mr. Bailey raised the Cawthra Square Park Tender Call, but do not recall which one. All parties recall that both Mr. Besner and Mr. Bailey participated in a brief discussion about the issue, which ended when the Director, PMMD advised that the tender call may be “live”.

The Director, PMMD has provided three statements to the OLR that Sussex (Mr. Besner) and Citygreen (Mr. Bailey) communicated about the Cawthra Square Park Tender Call at the July 23, 2013 meeting. I accept the Director, PMMD’s statements as accurate, reliable and sufficient evidence for the finding that both Mr. Besner and Mr. Bailey participated in a discussion of the Cawthra Square Park Tender Call at the July 23, 2013 meeting. It may be that Mr. Bailey raised the issue. However, all accounts by City staff refer to both Mr. Besner and Mr. Bailey participating in the discussion that ensued.

Mr. Bailey provided both a written and an oral statement to OLR Counsel in this inquiry. In his statements, Mr. Bailey acknowledged that at the July 23, 2013 meeting the

Cawthra Square Park Tender Call was raised and then dropped when City staff advised that the procurement was “live” and therefore could not be discussed. Mr. Bailey’s statement is consistent with the Director, PMMD’s statement and the statements of two other City staff.

In his submission dated October 10, 2013, Mr. Binetti wrote: “Mr. Besner advises that he did not communicate with a public office holder during a procurement process.” This is clearly not the case, since Mr. Besner communicated about both tender calls before they had been awarded to public office holders in his email of June 15, 2013. Therefore, I do not accept this submission.

In his July 31, 2014 submission, Mr. Besner’s counsel submitted that Mr. Besner “vehemently denies that he was the one who raised the Cawthra Park or Nathan Phillips Square projects during that meeting”. While Mr. Besner may not have raised the issue of these tender calls at the meeting, I find, on a balance of probabilities, that he participated in the discussion of the tender calls at the July 23, 2013 meeting. The statements of City staff and Mr. Bailey indicate that both Mr. Bailey and Mr. Besner participated in the discussion about the Cawthra Square Park Tender Call. All of the statements obtained by the OLR in this inquiry (by the Director, PMMD, two other staff and Mr. Bailey) are consistent with the finding that either Mr. Besner or Mr. Bailey, raised the issue of the Cawthra Square Park Tender Call and that a brief discussion of the tender call ensued in which both Mr. Besner and Mr. Bailey participated.

Mr. Binetti submits that it “belies logic” that Mr. Besner would advise his client that lobbying during an active procurement is prohibited and then proceed to do so himself. However, Mr. Besner’s email of June 15, 2013, indicates that Mr. Besner did in fact communicate about active procurements, contrary to § 140-41A, and in fact promoted a discussion of the Cawthra Square Park Tender Call as part of the agenda for the July 23, 2013 meeting. Therefore, I do not accept this submission.

The fact that there was a larger, more general context for the meeting does not negate the application of § 140-41A to their communications about the tender calls at that meeting. The general subject of the July 23, 2013 meeting was the City’s choice of a competitor’s soil cell products in its procurements and contracts. However, within this context, Mr. Besner and Mr. Bailey communicated about two specific tender calls, one of which was the Cawthra Square Park Tender Call. The June 15, 2013 email supports the conclusion that the Cawthra Square Park Tender Call was raised by Mr. Besner as part of the agenda of the July 23, 2013 meeting.

Finally, Mr. Besner’s counsel has submitted: “It is disingenuous to find fault about enquiries made about general forestry policy for future consideration after tender calls had been decided but not yet announced.” I have found that Mr. Besner communicated about two procurements that had not yet been awarded, in breach of the City’s Procurement Processes Policy, the tender call documents and § 140-41A. I would take great exception to the characterization of my findings, which were made on the merits, on a balance of probabilities, considering all of the relevant evidence, as “disingenuous”, if that were the intent.

Mr. Besner failed to report lobbying activities in SM18869; Mr. Bailey failed to register and report his lobbying activities within three business days

The February 25, 2013 meeting

I find that Mr. Besner failed to report a meeting with City staff on February 25, 2013 and three emails he sent to City staff in June 2013, within three business days as required by §§ 140-15 and 140-17.

I also find that Mr. Bailey failed to register before the February 25, 2013 meeting, in breach of § 140-10.

On February 25, 2013, Mr. Besner and his client, Jeremy Bailey of Citygreen, attended a meeting with the Deputy City Manager, City Manager's staff, Director, Urban Forestry and General Manager, PF&R, staff of the Mayor's Office and staff of Waterfront Toronto. The purpose of the meeting was to discuss concerns that had been previously raised by Citygreen about the choice of tree soil cells by the City and Waterfront Toronto in its procurements and contracts. Citygreen had alleged that the City and Waterfront Toronto were biased in favour of the soil cell product marketed by a competitor.

I have considered Mr. Binetti's submission that § 140-5H exempted the February 25, 2013 meeting from the Lobbying By-law, because City staff invited them to the meeting. Subsection 140-5H provides as follows:

This chapter does not apply in respect of:

H. A communication to a public office holder by an individual on behalf of an individual, business or organization in direct response to a written request from the public office holder.

I do not interpret § 140-5H as applying to the discussions that occurred at the meeting to which Messrs Besner and Bailey were invited by City staff. Rather, § 140-5H applies to the response to the invitation to the meeting, accepting or declining the invitation. The exemption applies only to "a communication to a public office holder . . . in direct response to a written request from the public office holder". For example, City staff may write to the individual or business with a question to which a reply is requested. The purpose of the exemption is to enable the City to carry out its functions without unduly hindering the communications that are necessary to do so. In this case, City staff wrote to Mr. Besner, inviting him and his client to a meeting. Mr. Besner replied, accepting the invitation. Mr. Besner's reply to the invitation was exempt under § 140-5H. Subsection 140-5H exempted the response to the invitation, accepting it or not; but did not exempt the discussions that occurred at the meeting. The response to the invitation, accepting or declining it, was the "direct response". The communications that occurred at the meeting were not a "direct response to a written request from the public office holder".

I have also considered whether §140-5D, which exempts from the Lobbying By-law "a communication that is restricted to compliments or complaints about a service or

program”, would apply to exempt the February 25, 2013 meeting. While the subject of the meeting could be viewed as a “complaint”, the complaint was not with respect to a “service or program”. Rather, Citygreen’s complaint related to the City’s procurement processes and award of contracts for soil cells to competitors and not Citygreen, and its forestry policies and practices in relation to this. Since the complaint was not about a “service or program”, § 140-5D did not apply to exempt the February 25, 2013 meeting.

Finally, as discussed above under ***Law and Policy related to Procurement Processes***, § 140-41A prevails over the exemptions in § 140-5 if the discussions at the February 25, 2013 meeting related to a procurement process.

The June 2013 emails

I find that Mr. Besner failed to report three email communications in June 2013 to City staff. These emails requested a second meeting and named the two tender calls that are the subject of this inquiry. I have found that these emails breached § 140-41A of the Lobbying By-law, since both tender calls had been issued but not yet awarded. In addition, these communications constituted “lobbying”. Under § 140-1, the definition of “lobby” includes the arrangement of a meeting by a consultant lobbyist with a public office holder and any other person. Mr. Besner’s June 2013 emails were clearly intended to arrange the meeting which resulted on July 23, 2013, which was attended by Mr. Besner, his client and public office holders.

Mr. Besner did not report these emails within three business days as required. His counsel asserts that he tried to report these emails when his subject matter registration was suspended. Mr. Besner updated SM18869 on July 26, 2013. It does not appear that the June emails were included in this update. If they were, this was more than one month after the June 2013 emails. Mr. Besner and his counsel have given no reason for the delay in reporting the emails. When certain criteria are met, such as inadvertence and a lack of experience with the registry, the Registrar may permit a late registration. These criteria were not met. See [Interpretation Bulletin, Late Registrations and Updates](#).⁷

Mr. Besner breached § 140-10 by lobbying after the suspension of SM18869

Finally, Mr. Besner ignored the OLR’s suspension of SM18869 and continued to lobby public office holders on behalf of his client. On August 8, 2013, he sent an email to City staff. This was a breach of § 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.

⁷http://www1.toronto.ca/City%20Of%20Toronto/Lobbyist%20Registrar/Files/pdf/1/interpretation%20bulletin_late_registrations_updates.pdf

Mr. Besner sent this email after the OLR notified him of the suspension of SM18869 and after he had responded to the OLR stating his disagreement with the suspension. Clearly, he was aware of the suspension. I infer that he simply decided to ignore it.

The suspension was imposed because the OLR had received a report from the Director, PMMD, who was at the July 23, 2013 meeting, that Mr. Besner had communicated about a “live” procurement related to SM18869, in breach of the Procurement Processes Policy, the procurement documents and § 140-41A. On July 26, 2013, Mr. Besner or his delegate sought to report the July 23, 2013 meeting under SM18869. However, that report was not approved and the registration was suspended. The suspension was made in accordance with the Lobbying By-law, § 140-36B, which provides:

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

Whether Mr. Besner failed to inform his client, Citygreen of their obligations under the Lobbying By-law

The Lobbying By-law, § 140-43A, provides:

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

Mr. Besner’s delegate sent Mr. Bailey instructions for registration, but it is not clear in what context those instructions were sent or what advice Mr. Besner or his delegate gave to Mr. Bailey. Mr. Bailey told OLR Counsel that he did not believe that he received any advice about the requirements of the Lobbying By-law. Mr. Bailey also appeared to misunderstand the duration of the “blackout period”, referring to the closure date rather than the date of the award. Mr. Besner, through his counsel, refutes the allegation that he did not inform his client of the obligations under Chapter 140.

I find that Mr. Besner’s advice to his client regarding the Lobbying By-law may have been inadequate or misunderstood. However, the evidence is not clear that he failed to inform his client of his obligations to register and to comply with provisions limiting lobbying during the “blackout period” of a procurement. Therefore, on a balance of probabilities, I do not find that Mr. Besner breached § 140-43A.

CONCLUSION AND DISPOSITION

As a result of this inquiry, I have found that Mr. Besner:

- communicated with public office holders about the Nathan Phillips Square and Cawthra Square Park Tender Calls in breach of § 140-41A;
- failed to report lobbying activities in breach of §§ 140-15 and 140-17; and
- lobbied when the related subject matter registration was suspended, in breach of § 140-10.

I have found that Mr. Bailey:

- communicated about the Cawthra Square Park Tender Call in breach of § 140-41A; and
- Failed to register before lobbying in breach of § 140-10.

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.*⁸

Breach of § 140-41A is a serious matter. It is an offence under the *Provincial Offences Act*. However, the 6-month time limit for prosecution expired before the OLR could collect all of the relevant information.

In this case, an experienced consultant lobbyist and his inexperienced client breached the City's Procurement Processes Policy, the tender call document, and § 140-41A by communicating about a procurement process when this was not permitted by the City's policy and the procurement document. The procurement had been issued and not yet awarded and so was in a "blackout period" where communications were restricted to a designated point of contact.

Mr. Besner is a principal with one of the most active lobbying firms registered in the City's lobbyist registry. As of the date of this report, the registry shows 65 subject

⁸The Honourable Madam Justice Denise E. Bellamy, Commissioner, *Report, Toronto Computer Leasing Inquiry/Toronto External Contracts Inquiry*, (2005, City of Toronto) Volume 4, page 94.

matter registrations under his name. Mr. Besner must be taken to know his obligations under the Code of Conduct contained in the Lobbying By-law, including § 140-41A. Prior to the approval of each registration of a subject matter, a consultant lobbyist is required to file a declaration under § 140-15P(1) confirming:

That the consultant lobbyist has read the Code of Conduct and that the consultant lobbyist shall comply with the Code of Conduct;

Mr. Besner is obliged under the Code of Conduct as a lobbyist not to communicate about a procurement process unless this is permitted by the applicable policies and documents; and to inform his client of their obligations under the Lobbying By-law.

Given the seriousness of the breaches apparent on the face of the registration including the inaccuracies and incompleteness of the reports of lobbying activities, Mr. Besner's subject matter registration has been revoked in accordance with § 140-36B, which provides:

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

In order to ensure his full understanding of the Lobbying By-law so that future breaches of the Lobbying By-law do not occur, Mr. Besner is requested to attend a training session provided by the Office of the Lobbyist Registrar.

Mr. Bailey, the client of Mr. Besner, has co-operated fully with this inquiry. He has not been in contact with the Lobbyist Registry before and was not familiar with the City's Lobbying By-law. He meets the criteria for late registration found in the OLR [Interpretation Bulletin, Late Registrations and Updates](#)⁹. Mr. Bailey has shown good faith and intent to comply with the Lobbying By-law. He has attended an OLR training session in order to understand his obligations under the Lobbying By-law. In the interest of transparency, I have permitted Mr. Bailey to register in order to report all of his lobbying activities in the public lobbyist registry.

I have referred my report and findings to the Director, PMMD, for information. This report is made as it is in the public interest to do so.

Respectfully submitted,

Linda L. Gehrke,
Lobbyist Registrar
City of Toronto

⁹http://www1.toronto.ca/City%20Of%20Toronto/Lobbyist%20Registrar/Files/pdf/1/interpretation%20bulletin_late_registrations_updates.pdf