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An e-zine on lobbying, lobbyists, and transparency in public influence

O.R.L. office of the registrar of lobbyists
BRITISH COLUMBIA

Transparent Lobbying. Accountable Government.

INSIDE THIS ISSUE:

REGISTRAR'S MESSAGE

Since we published our last issue, in addition to our regular business, we've been busy moving our legislative reform project forward.

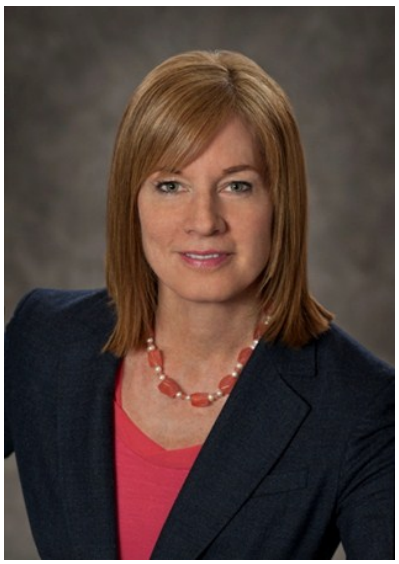
I was appointed as the Registrar of Lobbyists for B.C. just after the 2010 amendments to the *Lobbyists Registration Act* (*LRA*) were passed. These last three years have been a time of learning for my office and for members of the B.C. lobbying community.

The 2010 amended *LRA* gave us a good start for enhancing transparency in lobbying. For one thing, it made registration mandatory for those whose activities fit the law's definition of lobbying, once they reached the threshold for registering.

In 2010, we also launched the online Lobbyists Registry, which allows anyone to search the registry and see who is attempting to influence which public decision-maker regarding what decision. The ORL just invested in an upgrade to our online system that allows easier and more comprehensive searching. We're doing what we can to fulfill our mandate to enhance transparency and provide public accountability for public sector decisions.

The 2010 amendments got us started, but there's still room for improvement. For instance, now, the law says that consultant lobbyists must register as soon as they have an undertaking to lobby, whether they have lobbied or not. It also says that organizations that lobby do not need to register before they have carried out 100 hours of lobbying. I don't believe that the goal of transparency is well served by requiring individuals to register lobbying that has not taken place or by permitting organizations to omit registering a considerable amount of lobbying that has taken place.

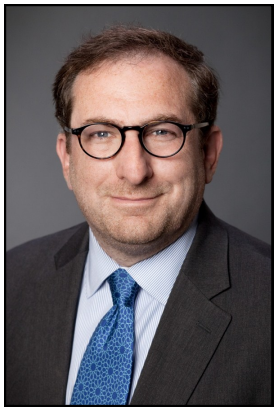
In the fall, I will present my final recommendations for *LRA* reform to the Legislature. I believe that we can do better, and I look forward to working with government in the months to come to realize our shared goal of making government accessible to British Columbians.



Elizabeth Denham
Registrar of Lobbyists for B.C.

Reflections on Codifying Conduct

By Lorne Sossin



Lorne Sossin

Lorne Sossin is Dean and Professor, Osgoode Hall Law School. Dean Sossin is a former Integrity Commissioner for the City of Toronto (2008-2009) and is presently the City of Toronto Open-Meeting Investigator.

There has been an accountability wave sweeping through Canada and other democratic governments. A central focus of this wave is, of course, lobbying. While recognizing the functional and principled rationales for lobbying in a democratic context, Canadian jurisdictions have also struggled with how to address the concern that those with resources gain access to political decision-making in a way that is proportionate to the size of their wallet rather than the significance of their ideas.

Attempts to regulate lobbying in Canada have featured three main strategies : 1) limiting the contexts within which lobbying may take place; 2) requiring transparency in lobbying through the use of lobbying registries; and 3) issuing rules regarding how lobbying must take place where it is permitted, usually through codes of conduct. The observations below relate primarily to this third goal.

There are many reasons why Canadian governments have chosen to regulate lobbying, but it is fair to say most of these measures have been responses to scandals which are attributed, at least in part, to the failure to adequately or appropriately regulate lobbying. For example, in the City of Toronto, the Lobbyist Registry and Code of Conduct followed the MFP Inquiry into computer leasing, which revealed a culture rife with behind-closed-door lobbying. A number of federal regulations involving lobbying formed part of the Conservative Government's accountability agenda in 2006 following the "sponsorship scandal" and resulting Gomery Inquiry.

Broader rationales for registries and codes of conduct are well-recognized and include transparency, predictability, ethics accountability, impartiality in oversight, generating a culture of professionalism in lobbying, and deterring corrupt practices, among others.

Establishing a registry and/or code of conduct, however, really just raises a series of important questions rather than resolving them. For example, design questions will include (but not be limited to) the following:

- What should the scope of the registry rules and code of conduct be?
- Should these rules be in the form of legislation or a guideline?
- Should the rules govern the activities and conduct of public officials, lobbyists or both?
- Should the rules be binding?
- If binding, who should enforce the rules and with what powers, regulatory tools and resources?
- Who can make complaints under the registry and/or code if the rules are broken or alleged to be broken, and what investigation/reporting powers should follow?
- What staffing is necessary and who bears the cost?

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Reflections on Codifying Conduct (Cont'd.)

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Many of these questions have been addressed recently by the B.C. Office of the Registrar of Lobbyists in its report, *Lobbying in British Columbia: The Way Forward* (January 2013). As British Columbia already has a legislated registry through the *Lobbyists Registration Act* (*LRA*), the focus of *The Way Forward* is on whether a code of conduct should be added to the existing reporting and disclosure rules governing provincial lobbying activity in British Columbia, and whether such a code ought to apply to public office holders as well as lobbyists.

The Registrar, Elizabeth Denham, concludes that a stand-alone code is not optimal and recommends instead that certain conduct related rules governing lobbying of the kind usually included in codes of conduct be added directly to the *LRA*. For example, the Registrar recommends that lobbyists declare to public office holders that they are lobbying, on whose behalf, and the existence of any other third party funders or directors of the lobbying. Additional conduct based rules would prohibit lobbyists from providing gifts or making knowingly false or misleading statements to public office holders. The Registrar does not recommend including conduct based rules dealing with public office holders themselves (apart from a 24 month "cooling off" period during which former public office holders cannot engage in lobbying).

While the preference for legislative provisions over a code of conduct at first glance appears to reflect a simpler and more streamlined approach to the regulation of lobbying, the exclusion of any provision imposing obligations on public office holders is more difficult to justify. The regulation of lobbying implies accountability for ethical behavior by both lobbyists and public office holders. While principles and rules governing the conduct of each party do not have to be contained in a single document, nor does that document need to be a stand-alone code of conduct, a patchwork quilt approach to accountability also has its downsides. The City of Toronto *Lobbyist Code of Conduct,* for example, serves as a comprehensive document covering both the conduct of lobbyists and public office holders, even if other accountability mechanisms also deal with lobbying. (The Toronto *Code of Conduct for Members of Council* also covers conflicts of interest by councilors who are lobbied.)

The inclusion of a prohibition relating to "improper influence" on public office holders is also, in my view, a desirable aspect of any regulatory scheme. Lobbying should not be and should not be seen as a collection of technical rules. It reflects, rather, a set of principles and values intended to limit the ability of those with resources to deploy them in order to obtain influence over decision-making. Consider Rule 8 of the Canadian *Lobbyist Code of Conduct.*

Rule 8. Improper influence:

"Lobbyists shall not place public office holders in a conflict of interest by proposing or undertaking any action that would constitute an improper influence

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The regulation of lobbying implies accountability for ethical behavior by both lobbyists and public office holders.

Reflections on Codifying Conduct (Cont'd.)

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on a public office holder."

Currently, in British Columbia, there is an asymmetry in the regulation of improper influence. As the B.C. Registrar of Lobbyists observed:

> "[T]he current lobbyist oversight system in British Columbia does not include a code of conduct. Public office holders are prohibited from improperly disclosing documents or other confidential information, from accepting cash or other gifts of value and from operating in a conflict of interest situation. Nevertheless, there is nothing prohibiting lobbyists from receiving and using confidential insider information; attempting to influence by providing gifts or other benefits; or from actively pursuing an outcome in a way that could put a public office holder in a potential conflict of interest position. As a result, British Columbia lacks an important tool in minimizing the exercise of undue influence."

[T]he utility of a code of conduct is as much educative and oriented to preventing breaches rather than punishing them.

If there is one apparent advantage to inserting such obligations in a code of conduct, it is that a code may serve as the point of departure for information, education and training. While the goal of a legislative provision may be enforcement, the utility of a code of conduct is as much educative and oriented to preventing breaches rather than punishing them. For example, some lobbyist registrars have considered the provision of "advance rulings" where lobbyists or public office holders want assurances that a particular course of action is consistent with a code; others may simply call a registrar for advice based on a code and a body of decision-making under the code.

For these reasons, I believe a stand-alone code of conduct remains a valuable tool. Ultimately, though, it is the substance of good outreach, information and regulation that is vital, not the form through which those goals are reached. However the debate about codes of conduct is resolved, there remain important new questions emerging for accountability officers responsible for lobbying. These include:

- What is the impact of new technologies and social media on the role of lobbyist registrars? When a lobbyist sends a tweet to followers, which include public office holders, should that constitute lobbying? Do current rules contemplate the level of connectivity (passive and active) that characterizes 21st century digital culture?
- How should lobbyist regulation be evaluated – what are the metrics of success and who should make this determination?
- What level of access is appropriate for the public regarding the activities of lobbyist registrars? Should investigations and reports on complaints be confidential or transparent? Should lobbyist or public office holders disclosure be available to the public in real time?
- Should public agencies and entities (hospitals, universities, etc.) be permitted to lobby public officials?
- Does the current system of lobbyist

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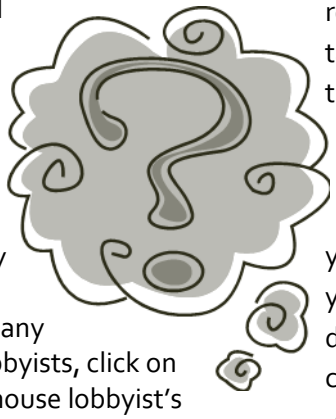
regulation enhance or undermine the policy process and democratic values?

As these questions make clear, the regulation of lobbying remains in its early days in Canada. While the goal remains clear (to recognize and legitimate lobbying where it complies with the rules, to deter and prevent non-compliance, and to enforce the integrity of the rules and principles underlying them through enforcement where necessary), the models and means best able to deliver on these goals merit continuing discussion and debate.

Ask the Registrar

Q: I'm trying to update my organization's registration. Why can't I see my lobbying details when I log in?

A: When you first log in to your existing registration, you see "Step 6 of 6," which is the final step before certifying and submitting your registration. From this page, you can review your registration and make necessary changes. To see the lobbying details for any of your in-house lobbyists, click on the appropriate in-house lobbyist's name. To see the lobbying targets listed for that in-house lobbyist, open the subject matter link. Also, if you select the "Printer Version" link at the top right of your screen, the entire registration will open in a version for printing and easier viewing.



Q. I end-dated my consultant registration. Why is it still showing as active?

A: The *Lobbyists Registration Act* gives filers approximately 30 days to report changes in their registration details. When you end-date your registration, it might appear as active for some time after, depending on the relationship between the end date you enter and when you enter it. For example, if you enter an end-date of 28 days ago, your registration will terminate in a few days, after the 30 days for reporting a change have passed. If you enter an end-date of 15 days ago, your registration will terminate approximately 15 days later. So, if you enter an end date that leaves you within the 30 days allowed for reporting changes, don't be concerned that your registration doesn't show as terminated right away.

Why does a registration still show as active after you've end-dated it?

Lobbyist Registry System Upgrades

The Office of the Registrar of Lobbyists (ORL) has implemented system upgrades to the Lobbyists Registry.

In June, 2013, the following changes were included in an upgrade to the system:

- Expanded search capabilities. This change
  - Adds a simple search similar to web search engines, allowing searchers to perform keyword searches of the Lobbyists Registry; and
  - Streamlines the advanced search function, combining six search reports into one search screen that allows searchers to choose criteria to search the Lobbyists Registry more easily.
- More detailed presentation of registrations for easier viewing. This change allows a searcher or filer to see all the registration details without having to open links.
- Expanded statistical reporting of lobbying targets. Formerly, the report brought back a table listing totals for each target contact category, e.g., "Minister," "Public Agency," "Member of the Legislative Assembly," "Ministerial Staff," etcetera. Now, searchers can also select "Minister," "Member of the Legislative Assembly," or "Public Agency" from a drop-down menu to see a list of names in each category and how many times each individual or entity was listed as a lobbying target.

The Lobbyist Registry has had recent upgrades to enhance searching and ease registration processes .

Québec Lobbying Commissioner "Powerless" re: Charbonneau Witnesses

A spokesman for François Casgrain, Québec's Lobbying Commissioner, says that the Commissioner has no power to sanction witnesses at the Charbonneau Inquiry who have admitted to engaging in unregistered lobbying.

In a story published April 10, 2013, the Montreal *Gazette* quoted Daniel Labonté saying that the Québec *Lobbying Transparency and Ethics Act* allows the Commissioner to impose fines for unregistered lobbying for only one year after the alleged lobbying activity takes place. Because the witnesses' testimony concerns activities that occurred more than a year previously, says Labonté, the Commissioner is powerless to pursue the matter.

Labonté notes that the Commissioner published a report in 2012 that made a number of recommendations for legislative reform. One of the recommendations was to extend this period to a minimum of three years from the discovery of an alleged breach for all disciplinary measures and penalties.

B.C. Registrar to Recommend *Lobbyists Registration Act* Reform

The B.C. Registrar of Lobbyists is planning to recommend key changes to the B.C. *Lobbyists Registration Act* (*LRA)* during the anticipated fall session of the Legislature.

The *LRA* does not include a provision for a mandatory review. However, Registrar Elizabeth Denham said, "After three years of experience overseeing, monitoring and enforcing the *LRA* , it's become clear to me that the 2010 amendments to the act were a good start, but we need to do more to increase compliance and enhance transparency. That's why I'll be making these recommendations for reform formally in the fall."

In January, 2013, the Registrar published a report that summarized the results of a public consultation conducted by her office last year on lobbying regulation in B.C. The report also included draft recommendations for reform resulting from the consultation.

Between January and May, the Office of the Registrar of Lobbyists collected feedback on those recommendations from the lobbying community, interested observers, other regulatory bodies and members of the public. "I wanted to hear from our policy community as we worked on refining these recommendations," said Registrar Denham. "In the end, I have to make those recommendations I believe need to be made, but it's important that we learn what we can about possible impacts as we continue to work through the thinking and development process."

The recommendations will address certain clauses of the *LRA* that have proven to be problematic. Registrar Denham said, "We're focussing on making a few well-founded recommendations that will give us the greatest return in enhancing both transparency in lobbying and compliance with the act."

The final list of recommendations will be published in September, 2013.

Registrar Denham said, "The 2010 amendments were a good start, but we need to do more to increase compliance and enhance transparency."

Alberta Registrar's Investigation Finds no Breach of the Alberta *Lobbyists Act*

In an April, 2013, report, Alberta's *Lobbyists Act* Registrar found that Joe Lougheed did not breach the Alberta *Lobbyists Act.*

The investigation resulted from a complaint made by an Alberta MLA alleging that Mr. Lougheed was a consultant lobbyist who had lobbied without being registered. After conducting his investigation, the Registrar concluded that Mr. Lougheed's activities on behalf of his client did not constitute lobbying as defined by the *Lobbyists Act,* so he was not a consultant lobbyist and was not required to register as such.

You can find the complete report at the Alberta Lobbyists Registry page under "Enforcement":

www.lobbyistsact.ab.ca/LRS/GeneralSettings.nsf/vwEnHTML/Welcome.htm

Corruption, Lobbyist Registries & Codes of Conduct

By Thomas Marshall, Q.C.

Thomas Marshall, Q.C.

Thomas Marshall Q.C. is a Director of Transparency International Canada, the Canadian National Chapter of the global coalition against corruption. He is a lawyer, formerly General Counsel to the Attorney General for Ontario, and lives in Toronto.

Access to politicians and other government decision makers is desirable in a democratic society. Such access may provide useful input to policy or legislative development. The development of public policy may benefit from the direct participation of "special interests." After all, aren't all interests special to those who advocate them? The democratic process is messy. Many voices, often discordant, clamour for attention. The great genius of democracy, when successful, is to level the playing field, moderate personal or financial advantages and offer a wider opportunity for participation in policy development and legislative implementation.

Lobbying can help bring useful input to decision makers. However, access unregulated can lead to undue influence and acceptance of benefits to provide services to lobbyists. This is influence peddling. It distorts the democratic process.

Lobbyist regulation is important both in itself (for reason above) but also as part of a comprehensive national, provincial or municipal anti-corruption system (an integrity system), which incorporates a broad range of anti-corruption strategies. Corruption risks from unregulated lobbying is a fact of life! That regulation is not required is no longer arguable.

The international community has condemned corruption, and this includes the exercise of undue influence or receiving benefits for influence peddling. There are three major international conventions concerned with promoting national anti-corruption programs. The most comprehensive is the United Nations Convention Against Corruption (UNCAC). The OECD Convention against Bribery of Foreign Public Officials in International Commercial Transaction and the Inter-Americas Convention Against Corruption (The Organization of American States), together with UNCAC, are part of the law of Canada and applicable to most of the world's trading nations. Canada is a signatory to all major conventions in this regard. These are obligations that Canada must follow.

There are serious social and other costs to corruption. There are victims. UNCAC in its Forward says:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.

On the political front, corruption constitutes a major obstacle to democracy and the rule of law. In a democratic system, offices and institutions lose legitimacy when misused for private advantage. This is harmful in established

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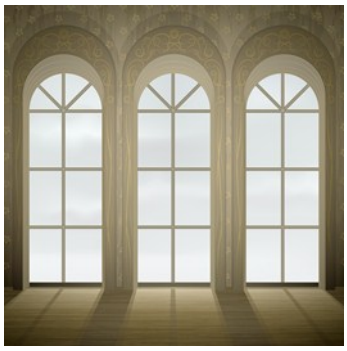
Corruption, Lobbyist Registries & Codes of Conduct (Cont'd.) Marshall

democracies but even more so in emerging ones.

Economically, corruption leads to the depletion of national wealth. It hinders development of nationally beneficial projects and fair market structures and distorts competition, thereby deterring investment. It leads to national assets being converted into personal worth. There is a direct correlation between levels of corruption and poverty in countries around the world where corruption broadly defined is prevalent.



Environmentally, projects having devastating effects are given preference in funding because they are easy targets for siphoning off public money.

The effect of corruption on the social fabric of a society is the most damaging of all. Trust in the political system to act for the benefit of the people and in its institutions and leadership is undermined. Frustration and apathy amongst a disillusioned public results in a weak civil society.

Transparency International (TI) is the global civil society organization leading the fight against corruption. Through more than 90 chapters worldwide, we raise awareness of the damaging effects of corruption, working together with partners in government, business and civil society to develop and implement effective measures to tackle it. The overall objective is to see a world in which government, politics, business, civil society and the daily lives of people are free of corruption.

Transparency International Canada (TI-C) is one of TI's chapters. The mission of TI-Canada is to be an informed voice that promotes anti-corruption practices in Canada's governments, businesses and society at large. The mission is also to encourage compliance with Canadian laws and international conventions against corruption to which Canada is a signatory and to develop and promote ethical standards of conduct for businesses, professional organizations and governments.

It is important when examining how European governments and others view lobbying— an integral part of any national integrity system and its regulation—to have a clear frame of reference for making judgments. Internationally, there is very limited regulation of lobbying. It is clear that the "old" ways of doing business seemingly "condoned" in parts of Europe are improper.

There are lessons to be learned here for Canada. Where there is the recognition by public officials (elected and non-elected) of the proper scope of their responsibilities to act in the public interest—not always a matter of easy articulation—then cultural change to promote transparency can occur rapidly.

However when, for example, there are cozy relationships between influential well-funded corporate interests and public officials, there must be questions as to the extent of the influence.

Transparency helps to alleviate concerns and when transparency is accompanied by greater public scrutiny "new ways" of doing business comfortable with transparency will develop. Transparency and accountability and the

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Transparency and accountability and the willing support of these principles by public officials will engender public confidence in the fairness and good intentions of public officials.

Corruption, Lobbyist Registries & Codes of Conduct (Cont'd.)

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willing support of these principles by public officials will engender public confidence in the fairness and good intentions of public officials.

In turn, increasing public confidence—the foundation for the democratic process—will encourage, not discourage, the exercise of political rights. Elections become important to everyone. A public sense of discouragement, based on a distrust of public officials as self-serving representatives of an insensitive and uncaring government, is the single most disruptive consequence of a failure to pursue the public interest.

Internationally (with Europe as a close proxy for North America), Lobbyist Registries, Codes of Conduct for Lobbyists and a more robust tracking of lobbyist interactions with public officials are sought as an essential feature of a National Integrity System. These provisions need to be supported by sanctions everywhere so that integrity in public administration and adherence to the rule of law is valued.

There needs to be a corresponding understanding by the public officials as to their responsibilities and an understanding that corruption can take many forms and is damaging to the fabric of democracy. Such measures in combination with the work of other institutions and activities combat corruption, to the benefit of all citizens of the state.

These measures cannot be limited to national governments, but must be applied at state/provincial and municipal levels as well. This is self-evident in a federation such as Canada where significant economic interests are regulated at the provincial and municipal levels.

Success depends on establishing and then maintaining public confidence that the public interest will be the prevailing focus.

Internationally ... Lobbyist Registries, Codes of Conduct for Lobbyists and a more robust tracking of lobbyist interactions with public officials are sought as an essential feature of a National Integrity System.

Websites of Interest

B.C. Registrar of Lobbyists
www.lobbyistsregistrar.bc.ca

Alberta Registry of Lobbyists
http://www.lobbyistsact.ab.ca/LRS/GeneralSettings.nsf/vwEnHTML/Welcome.htm

Québec Commissioner of Lobbying
http://www.commissairelobby.qc.ca/en/commissioner/

Transparency International Canada
http://www.transparency.ca/

ORL Finds that B.C. Police Chiefs' Associations not Required to Register

The Office of the Registrar of Lobbyists (ORL) released a report finding that the B.C. Association of Chiefs of Police (BCACP) and the B.C. Association of Municipal Chiefs of Police (BCAMCP) are not required to register as lobbyists under the B.C. *Lobbyists Registration Act* (*LRA*).

In a report published on May 28, 2013, Acting Deputy Registrar Jay Fedorak concluded that members of the BCACP and the BCAMCP communicate with public office holders in their official capacity as chiefs of police. The *LRA* contains a clause exempting employees of other levels of government, such as a local government authority or the government of Canada, from the requirement to register when they communicate with public office holders in their official capacity. In his report, the Acting Deputy Registrar wrote, "It seems clear that, if an individual police chief, as a local government or federal employee, is exempt from the *LRA* when he or she communicates with public office holders, the situation does not change because police chiefs are speaking together on issues of concern that relate to legitimate questions of policing and on which an individual police chief could otherwise 'lobby' without being required to register."

Evidence collected during the inquiry indicated that the members of the two associations acted in their roles as chiefs of police and discussed matters related to policing when they met with public office holders. The Acting Deputy Registrar noted in his report that, had the evidence indicated otherwise, he might have made a different finding. He wrote that, if the organizations had "essentially taken on a life of their own and had engaged in lobbying public office holders on questions with little or no connection to federal and provincial policing… one might well question whether the participants were acting 'in their official capacity'."

The question of whether the police chiefs' associations were required to register as lobbyists arose as a result of a complaint from a member of the public. The complainant alleged that the members of these associations had been lobbying without registering. Although the *LRA* has no formal provision for complaints from the public, the Registrar has the discretion to make inquiries on the basis of public information and, in this case, she decided that the inquiry was warranted.

The complainant also made a complaint to the Office of the Information and Privacy Commissioner, after the associations refused to provide him with access to the records that he had requested under the *Freedom of Information and Protection of Privacy Act*. Ultimately, the police departments holding records relating to the BCACP and the BCAMCP agreed to process the complainant's freedom of information requests for access to the records he had originally requested from the associations.

You can find the complete report here or by visiting the ORL website, www.lobbyistsregistrar.bc.ca, under the "Investigations" tab.

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Thanks for reading this issue of Influencing B.C.

To find out more about the Office of the Registrar of Lobbyists for British Columbia, or to comment on any of the information contained in this e-zine, please visit our website or contact our office.

The views expressed in this issue by guest authors are their own, and are not necessarily those of the Office of the Registrar of Lobbyists for British Columbia.

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