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

INVESTIGATION REPORT 15-06

LOBBYIST: Blair Lekstrom

September 24, 2015

SUMMARY: During an environmental scan, Office of the Registrar of Lobbyists ("ORL") staff discovered a consultant lobbyist who appeared to be lobbying but had not filed a return on the Lobbyists Registry. ORL staff contacted the lobbyist, verified his lobbying activities and discussed the requirements for registration. The consultant lobbyist filed a return with the ORL on May 7, 2015. The lobbyist certified that the commencement date of his undertaking was June 17, 2013. He failed to meet his obligations under s. 3(1) when he did not file a return after entering into an undertaking to lobby on behalf of a client. An administrative penalty of $3,000 was imposed.

Statutes Considered: *Lobbyists Registration Act,* S.B.C. 2001, c. 42.

INTRODUCTION

[1] This report concerns an investigation under s. 7.1 of the *Lobbyists Registration Act* ("LRA"). This section gives the Registrar of Lobbyists ("Registrar") the authority to conduct an investigation to determine whether there is or has been compliance by any person with the LRA or its regulations. If, after an investigation under s. 7.1, the Registrar or her delegate believes that the person under investigation has not complied with a provision of the LRA or its regulations, s. 7.2 of the LRA requires her to give notice of the alleged contravention and the reasons for her belief that the contravention has occurred. Prior to making a determination under s. 7.2(2), the Registrar must, under s. 7.2(1)(b), give the person under investigation a reasonable opportunity to be heard respecting the alleged contravention.

[2] The LRA recognizes two types of lobbyists. This report focuses on "consultant lobbyists", individuals who undertake to lobby for payment on behalf of a client.

[3] Under the LRA, filers must submit returns to the Lobbyists Registry if they meet the criteria for registration and the returns must be submitted within specific timeframes. As explained in more detail below, the requirement to file and the timeframes for filing are not mere technical requirements. They are solemn legal obligations that are tied to the key purposes of the LRA.

[4] This report and determination are issued under the authority delegated to me by the Registrar under s. 7(4)(d) of the LRA.

ISSUES UNDER CONSIDERATION

[5] The questions that must be considered are:

(a) whether the lobbyist filed a return within the timelines set out in s. 3(1) of the LRA, and

(b) if the lobbyist did not comply, what, if any, administrative penalty is appropriate in the circumstances?

RELEVANT SECTIONS OF THE LRA

"client" means a person or organization on whose behalf a consultant lobbyist undertakes to lobby;

"consultant lobbyist" means an individual who, for payment, undertakes to lobby on behalf of a client;

"in-house lobbyist" means an employee, an officer or a director of an organization

(a) who receives a payment for the performance of his or her functions, and

(b) whose lobbying or duty to lobby on behalf of the organization or an affiliate, either alone or together with other individuals in the organization,

(i) amounts to at least 100 hours annually, or

(ii) otherwise meets criteria established by the regulations;

"lobby", subject to section 2 (2), means,

(a) in relation to a lobbyist, to communicate with a public office holder in an attempt to influence

(i) the development of any legislative proposal by the government of British Columbia, a Provincial entity or a member of the Legislative Assembly,

(ii) the introduction, amendment, passage or defeat of any Bill or resolution in or before the Legislative Assembly,

(iii) the development or enactment of any regulation, including the enactment of a regulation for the purposes of amending or repealing a regulation,

(iv) the development, establishment, amendment or termination of any program, policy, directive or guideline of the government of British Columbia or a Provincial entity,

(v) the awarding, amendment or termination of any contract, grant or financial benefit by or on behalf of the government of British Columbia or a Provincial entity,

(vi) a decision by the Executive Council or a member of the Executive Council to transfer from the Crown for consideration all or part of, or

> any interest in or asset of, any business, enterprise or institution that provides goods or services to the Crown, a Provincial entity or the public, or
>
> (vii) a decision by the Executive Council or a member of the Executive Council to have the private sector instead of the Crown provide goods or services to the government of British Columbia or a Provincial entity,
>
> (b) in relation to a consultant lobbyist only, to arrange a meeting between a public office holder and any other individual…
>
> **"undertaking"** means an undertaking by a consultant lobbyist to lobby on behalf of a client, but does not include an undertaking by an employee to do anything…
>
> **Requirement to file return**
>
> 3(1) Within 10 days after entering into an undertaking to lobby on behalf of a client, a consultant lobbyist must file with the registrar a return in the prescribed form and containing the information required by section 4.

BACKGROUND

[6] As part of our environment scanning program, ORL staff noted a number of newspaper articles indicating the lobbyist had been hired by several municipalities to lobby the Province on their behalf. On April 27, 2015, ORL staff sent the lobbyist a letter to determine if he was required to register with the B.C. Lobbyists Registry. The lobbyist contacted the ORL by phone on May 1, 2015 to seek clarification about the registration requirements as he stated that he believed that he was an in-house lobbyist and did not need to register until he had lobbied 100 hours. ORL staff indicated that he met the criteria of a consultant lobbyist and not an in-house lobbyist for an organization. Therefore, the 100 hours criteria did not apply in this situation. The lobbyist discussed his work on behalf of two other clients and came to the conclusion that he should have registered for those clients as well. He identified Duz Cho Construction as one of the clients.

[7] On May 7, 2015, the lobbyist filed a return, Registration ID 23797506, certifying he entered into an undertaking to lobby on behalf of Duz Cho Construction. The lobbyist entered and certified an undertaking start date of June 17, 2013.

[8] ORL staff received an automatic system alert indicating the lobbyist's registration was potentially non-compliant.

[9] On June 16, 2015, ORL staff sent the lobbyist a formal compliance investigation letter under s. 7.1 of the LRA to determine whether the lobbyist had or had not complied with s. 3(1) of the LRA. The lobbyist was asked to explain the "…discrepancy between the timeline for registration in the LRA and the date on which [he] actually completed and submitted your registration." ORL staff also asked the lobbyist to clarify if he set up any meetings with public office holders on behalf of his client, if he attended any

meetings with public office holders on behalf of his client and to provide any written agreement he had with his client.

[10] The lobbyist responded by email on June 18, 2015 to advise that he had not registered as he understood that if he were to undertake any lobbying efforts on behalf of his client, he would be working as an in-house lobbyist. The lobbyist explained "Under the in-house lobbyist I understood that unless the amount of time that I was engaged in a job amounted to at least 100 hrs annually (all clients time inclusive) which was lobbying work, I was not in a position to have to file."

[11] The lobbyist advised that he had met with BC Hydro staff on several occasions on behalf of his client and had arranged meetings between his client and BC Hydro staff.

[12] The lobbyist also provided a copy of his Consulting Agreement with this client dated June 17, 2013, which confirmed the undertaking start date he entered in his registration.

INVESTIGATION

[13] On June 25, 2015, pursuant to s. 7.2(1) of the LRA, I sent a notice to the lobbyist informing him that I believed he had not complied with s. 3(1) of the LRA. In the notice I set out the basis for my belief. Based on the above facts, it appeared that the lobbyist had registered his undertaking nearly two years past the timelines stipulated in s. 3(1) of the LRA. It also appeared that the lobbyist had been lobbying without being registered and did not register with the Lobbyists Registry until he received an inquiry from ORL staff. I invited the lobbyist to respond in writing to the alleged contravention and provide any information or documentation pertinent to the alleged contravention. I also asked him to comment on any administrative penalties that may arise from a finding that he contravened the LRA.

[14] On July 2, 2015, the lobbyist replied to the notice. The lobbyist reiterated his explanation that that he had misinterpreted the LRA and believed he was an in-house lobbyist and not a consultant lobbyist and therefore did not have to register with the ORL. He advised that he never intended to bypass any legislative requirements and registered as soon as ORL staff alerted him to the error.

[15] The consultant lobbyist produced an agreement signed by himself and his client showing he entered into an undertaking to lobby on behalf of his client on June 17, 2013. The Agreement clearly stipulated that the lobbyist was not an employee of the client.

DISCUSSION

[16] As I noted above, the lobbyist stated that he believed that he was not required to file a return as he considered himself to be an in-house lobbyist and not a consultant lobbyist. Under the LRA, the designated filer for an organization must register the

organization and identify all in-house lobbyists once the collective lobbying activity of all in-house lobbyists combined reaches 100 hours within a 12-month period. The lobbyist advised he had not lobbied for 100 hours.

[17] The definition of "in-house lobbyist" is clear and unambiguous when it states that it refers to "an employee, officer or director of an organization". The lobbyist did not assert or explain why he believed he was an "employee, officer or director" of the organization. In short, the lobbyist took the position that he believed he was an "in-house lobbyist" without any legal or factual basis to support that claim.

[18] In this case, the Consulting Agreement clearly states "For the purposes of this Agreement, Blair Lekstrom Consulting Ltd shall be an independent contractor and not the employee or agent of Duz Cho." There is nothing in the nature of this retainer or any other evidence to plausibly support the view that the lobbyist was an "employee, officer or director" of the organization on whose behalf he was lobbying. I find that he was clearly a consultant lobbyist – an individual who, for payment, undertook to lobby on behalf of a client.

[19] Importantly, there is no "100 hour exemption" for consultant lobbyists. Instead, the nature of the obligation is clearly set out in s. 3(1) of the LRA:

> 3(1) Within 10 days after entering into an undertaking to lobby on behalf of a client, a consultant lobbyist must file with the registrar a return in the prescribed form and containing the information required by section 4.

[20] Based on the information provided by the consultant lobbyist, I find that the start date for the Duz Cho Construction undertaking was June 17, 2013. Based on that start date, the consultant lobbyist was required to file his return no later than June 27, 2013. Instead, he filed a return on May 7, 2015, and only after he was approached by this Office. This is well beyond the 10 days required by the LRA.

[21] As noted above, the lobbyist advised that he had several meetings on behalf of his client with a public office holder prior to filing his returns. The fact that actual lobbying did take place during a period when the lobbyist should have been registered is in my view a relevant aggravating factor in determining the amount of administrative penalty that ought to be imposed, an issue I will consider below.

FINDING

[22] I have determined that the lobbyist contravened s. 3(1) of the LRA when he failed to file a return with the Registrar within 10 days after entering into an undertaking to lobby on behalf of his client.

ADMINISTRATIVE PENALTY

[23] Section 7.2(2) of the LRA provides that if, after giving a person under investigation a reasonable opportunity to be heard respecting an alleged contravention, the Registrar determines that the person has not complied with a prescribed provision of this Act or the regulations, the Registrar must inform the person of the Registrar's determination that there has been a contravention and may impose an administrative penalty of not more than $25,000. Such person must be given notice of the contravention determination and, if a penalty is imposed, "the amount, the reason for the amount and the date by which the penalty must be paid" (LRA s. 7.2(2)(c)(ii)).

[24] Section 7.2 of the LRA confers a broad discretion on the Registrar to impose administrative penalties. To provide a measure of structure in the exercise of that discretion, the Office has published "Policies and Procedures" (the "Policy"), whose purpose is to advise members of the public and those engaged in lobbying about what will guide the ORL in exercising its duties under the LRA and the regulations. As the Policy document makes clear, its purpose is to structure discretion. It does not fetter discretion. It is not law. I have approached the Policy as a document intended to provide a principled guide to the exercise of my discretion to determine a penalty.

[25] The Policy document seeks to operate in a principled fashion by setting out, firstly, a general financial range for particular infractions (depending on whether it is a first, second or third infraction of that nature), secondly, a list of factors that will be taken into account in determining the amount of administrative penalty, and finally, a clear statement that the Policy "does not fetter the ORL's ability to conclude that no administrative penalty is appropriate in the circumstances, or to fashion a remedy on either side of the range set out in the general policy, in special circumstances."

[26] I should state at the outset that I have considered and rejected the view that this might be a case where "no penalty" is appropriate. The current LRA provisions have now been in place for five years. The lobbyist is a former MLA and Cabinet Minister, familiar with provincial and local government and also capable of obtaining any advice he required concerning his obligations under the LRA. The contravention in this case is clear. The explanations he provided for failing to file did not have any legitimate connection to the wording of the statute. This was a case in which registration occurred only after our Office contacted the lobbyist. But for that contact, the lobbying in this case would have continued without the transparency the LRA requires for the provision of current, accurate and complete information concerning lobbying activities. If no penalty is imposed in this case, it would be difficult to imagine a case where a penalty would be imposed for a breach of s. 3(1) of the LRA. A penalty is necessary to recognize the nature and significance of the infraction in this case, and for both specific and general deterrence.

[27] Having concluded that "no penalty" would not be a proper outcome in this case, I note that the Policy sets out a first contravention range both for "registering late" ($100 to $5,000) and for "failing to register" ($500 to $7,500). Both refer to different factual types of contraventions of s. 3(1) of the LRA. Registering "late" is intended to refer to

cases where the lobbyist has initiated the registration but has been late. “Failing to register” is intended to refer to those cases where the lobbyist failed to initiate any registration during the relevant period.

[28] I recognize that there is some ambiguity in these two descriptions as applied to these facts, as the Policy does not specifically address how the situation here – where the lobbyist has registered “late” but only after being contacted by our Office – should be addressed. Because of that ambiguity, I am going to give the lobbyist the benefit of the doubt and proceed on the basis that this was a case of “late filing” where the range is between $100 and $5,000 for a first contravention.

[29] In deciding what the appropriate administrative penalty within that range is, I have taken the following factors into account:

- previous enforcement actions for contraventions by this person,
- the gravity and magnitude of the contravention,
- whether the contravention was deliberate,
- whether the registrant derived any economic benefit from the contravention,
- any effort the registrant made to report or correct the contravention, and
- whether a penalty is necessary for general and specific deterrence.

[30] I have no information that would indicate the lobbyist has had a previous contravention where we have issued a previous investigation report.

[31] This brings me then to the gravity and magnitude of the contravention. In my view, the contravention was serious.

[32] The purpose of the LRA is to promote transparency in lobbying by requiring consultant lobbyists to disclose accurate, current and complete information about their lobbying activities. This is a solemn legal obligation. It reflects the legislative intent that while consultant lobbyists have a right to lobby, the public have a right to know about their intended activities as defined in s. 4 of the LRA, and to have that knowledge in a timely and transparent fashion. The 10 day time limit is not an optional or arbitrary administrative deadline. The failure to comply with the deadline is a contravention. The 10 day deadline is inextricably linked with the obligation to register itself, as it emphasizes the legislature’s concern that the public have a right to know not only the substance of the information set out in s. 4, but to have that information provided in a timely manner. Failing to file a return in a timely manner undermines the ability of the public to know who is attempting to influence government at any point in time, thereby defeating the LRA’s goal of transparency. The legislation disqualifies the argument that there was no harm because the public “eventually” found out.

[33] The contravention in this case persisted for almost two years. During the period of contravention, actual lobbying took place without any public registration. Nor was this

a case where "late filing" was identified by the lobbyist on his own. Filing did not happen until an ORL staff member initiated an inquiry into his potential lobbying activities in response to seeing media reports. And the objective fact of the matter is that this lobbying activity would likely never have come to light but for the contact by our Office because the lobbyist asserted the view that he was an in-house lobbyist.

[34] The next factor I have considered is whether the contravention was deliberate. I accept, on balance, that the lobbyist subjectively believed that he did not have to file. The infraction was not "deliberate" in the sense that the lobbyist actively sought to avoid the LRA.

[35] The finding that the contravention was not deliberate does not, however, conclude the matter. While the lobbyist's subjective belief is accepted, the fact is that the lobbyist provided no plausible factual or legal foundation grounded in the plain language of the LRA to support the belief that he was an "employee, officer or director" of the organization who hired him. The lobbyist is a former public office holder who was himself the target of lobbying efforts while in government. It is obvious from a plain reading of the LRA that the lobbyist did not meet the definition of an in-house lobbyist. He would have been familiar with the fact that there is a provincial law governing lobbyists. He could have sought advice from this Office or personal legal advice. Thus, while I do not make a finding that the contravention here was deliberate, it is evident to me that the lobbyist was negligent about understanding the nature of his solemn obligations under the LRA.

[36] The next factor to consider is whether the lobbyist derived any economic benefit from the contravention. I consider this a neutral factor. On one hand, the lobbyist gained an economic benefit when he received payment for lobbying when he had not filed the returns with the ORL. On the other hand, he did not obtain that payment *because* of the contravention.

[37] I have already addressed the next factor – "any effort the registrant made to report or correct the contravention." It is in the lobbyist's favour that he filed his registration after being contacted by our Office. However, as noted above, it is not in his favour that he only took this action after being contacted by our Office.

[38] As noted above, I have considered whether an administrative penalty is necessary for specific or general deterrence. In my view, the circumstances of this case call for an administrative penalty both to encourage this lobbyist to take his obligations under the LRA with the utmost seriousness, and to remind all lobbyists of their legal obligations to be diligent in keeping their registrations current and accurate.

[39] Had I concluded that the contravention was deliberate, I would have imposed a penalty at the high end of the range ($5,000). In all of the circumstances I have set out, I have decided to set the penalty at $3,000 for the contravention addressed in this Report.

[40] In settling on the $3,000 amount, I note that this Investigation Report is being released in tandem with two other investigations also involving this lobbyist.

[41] Had I been focusing on this particular report alone, I would have been inclined to levy the penalty at $4,000. However since the lobbyist is facing three separate administrative penalties which, together, will be the largest penalty issued by the ORL to date, I have exercised my discretion to set the amount in this case at $3,000.

CONCLUSION

1. The alleged contravention has been substantiated. Under s. 7.2(2) of the LRA, I find that the lobbyist contravened s. 3(1) of the LRA when he failed to file his return within the legislated timelines.

2. After considering the circumstances in this case, I impose an administrative penalty of $3,000.

3. The lobbyist must pay this penalty no later than November 5, 2015.

4. If the lobbyist requests reconsideration under s. 7.3 of the LRA, he is to do so within 30 days of receiving this decision by providing a letter in writing directed to the Registrar of Lobbyists at the following address, setting out the grounds on which reconsideration is requested:

    Office of the Registrar of Lobbyists for British Columbia
    PO Box 9038, Stn. Prov. Govt.
    Victoria, BC V8W 9A4

    Email: info@bcorl.ca

September 24, 2015

ORIGINAL SIGNED BY

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Trevor Presley
Investigator and delegate of the Registrar
Office of the Registrar of Lobbyists