



PRACTICE

CONFIDENTIALITY ORDERS

See also: Ethics

Motion by Office of Commissioner of Lobbying of Canada pursuant to *Federal Courts Rules*, SOR/98-106, rr. 151, 318, 369 for: (1) order that Commissioner be precluded from providing certain confidential investigative materials in Certified Tribunal Record (CTR) it is required to produce, or in alternative, (2) confidentiality order for anonymization of portions of Court's file, creation, filing of redacted public version of CTR, along with confidential version of CTR for Court, parties, necessary extension of time — Lobbying Commissioner tabled two reports before Parliament regarding investigation by her office into whether Mr. Benjamin Bergen, Ms. Dana O'Born, respectively, both registered in-house organization lobbyists employed by Council of Canadian Innovators (CCI), contravened Lobbyists' Code of Conduct — Applicant filed initial requests asking Lobbying Commissioner to investigate, rule on whether actions of Mr. Bergen, Ms. O'Born violated Code, rr. 6, 7, 8 or 9 — Lobbying Commissioner conducted its assessment pursuant to Code, rr. 6, 9 — Reports concluded neither Mr. Bergen nor Ms. O'Born contravened Code — Mr. Bergen previously volunteered for Honourable Chrystia Freeland's by-election campaign in 2013; acted as co-campaign manager of her re-election campaign in 2015 — Lobbying Commissioner conducted investigation on whether Mr. Bergen contravened rule 6 or rule 9 (Political Activities) of Code by lobbying Honourable Chrystia Freeland, members of her ministerial staff after undertaking political activities on behalf of Ms. Freeland — Investigation found no evidence of lobbying Ms. Freeland but found that while Ms. Freeland was Minister of International Trade, Mr. Bergen attended meeting with Honourable David Lametti (then Parliamentary Secretary to Minister of International Trade), with member of his constituency (MP) staff — Pursuant to Code, r. 9, Lobbying Commissioner not finding Mr. Lametti in his capacity as Parliamentary Secretary constituting "staff" in Ms. Freeland's office for purposes of Rule 9; therefore, Mr. Bergen not contravening rule 9 — Lobbying Commissioner also found no basis to conclude Mr. Bergen placed Ms. Freeland in real or apparent conflict of interest contrary to Code, rule 6 — Report finding similar conclusions regarding Ms. O'Born — Lobbying Commissioner's previous motions to dismiss both Bergen, O'Born applications dismissed — Both reports subject of judicial reviews — Next step involving filing of CTR but parties unable to agree on what to include in CTR — As result, agreeing that Lobbying Commissioner would apply for Order withholding from CTR all material not already public, or in alternative, apply for confidentiality Order — Alternative order drafted by Lobbying Commissioner providing for Public CTR, Confidential CTR — Whether Order should be granted — Under *Lobbying Act*, R.S.C., 1985 (4th Supp.), c. 44, Parliament decided Lobbying Commissioner (officer of Parliament) must conduct her investigations in private, not disclose any information that comes to her knowledge in course of investigation, subject to narrow exceptions — Thus, in part to maintain trust, confidence in investigation process, *Lobbying Act* requiring confidentiality subject to exceptions in ss. 10.4(6)(a),(b),(c) — General importance of confidentiality to exercise of Lobbying Commissioner's duties, functions also reflected in *Access to Information Act*, R.S.C., 1985, c. A-1, s. 16.2(1) — Quite different from ongoing statutory requirement for confidentiality in Act, *Federal Court Rules*, rr. 317, 318 requiring "tribunal" (such as Lobbying Commissioner) to produce CTR containing all "relevant" materials before Lobbying Commissioner when Commissioner making her decision — Rules 317, 318 embodying principle that judicial review premised on review of record before tribunal — However, rule 317(1) uses word "relevant" which triggers obligation to produce CTR in rule 318 — In preparing CTR in response to request under rule 317, no requirement to produce all material, only all material relevant to application that is in

possession of tribunal — Statutory exemption in *Lobbying Act*, s. 10.4(6)(a) permitting Lobbying Commissioner to disclose information “establishing the grounds for any findings or conclusions contained in a report under section 10.5.” — Without such exemption, Lobbying Commissioner could not in her report set out grounds for her findings, conclusions — Therefore, exemption intended to allow Lobbying Commissioner to set out grounds for her findings, conclusions in her report to Parliament — Without doing so, any such report could be less than useful — Purpose of allowing present judicial review to proceed being to look at questions arising out of Lobbying Commissioner’s observations in relation to rules 6 (Conflict of Interest), 9 (Political Activities) of Code of Conduct — Other rules raised by applicant (rules 7, 8) should not be added to judicial review in absence of being first determined by Lobbying Commissioner — Therefore, issues for this judicial review are findings of no real or apparent conflict of interest under rule 6 of Code, issue of who is, who is not “staff of Minister” under rule 9 — Such questions determinants in each of Lobbying Commissioner’s Reports to Parliament — Despite applicant’s claim to wider ranging judicial review, present judicial review should not become public inquiry or Royal Commission — Alternative relief Order, extension of time granted.

DEMOCRACY WATCH V. CANADA (ATTORNEY GENERAL) (T-915-20; T-916-20, 2021 FC 1417, Brown J., reasons for order dated December 14, 2021, 22 pp.)