

Response to OCL's Consultation on Future Changes to the Lobbyists' Code of Conduct

December 11, 2020

Commissioner of Lobbying of Canada
Office of the Commissioner of Lobbying of Canada
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Ottawa, Ontario
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Dear Commissioner:

These comments are jointly submitted by the Government Relations Institute of Canada (GRIC) and the Public Affairs Association of Canada (PAAC), who are pleased to respond to your office's consultation on future changes to the *Lobbyists' Code of Conduct*. Our recommendations that follow are designed to inform your consultation and we hope that before any elements are actioned, a draft revised Code will be presented to stakeholders for another round of consultation.

Overall, the principles of the *Lobbyists' Code of Conduct* (the Code) remain valid, and are reflective of GRIC's own *Code of Professional Conduct*¹, and PAAC's *Statement of Principles*², which require members of our organizations to conduct their affairs in accordance with the highest standards of integrity, honesty, openness, and professionalism.

Experience has shown since the Code was put in place in 1997, the overwhelming majority of those who participate in lobbying in Canada follow the rules and practice in a conscientious, professional, and ethical manner. The Code is built around ensuring transparency and preventing actions that would create a sense of obligation for a public office holder. These are undeniably the right principles to enforce as Canadians need to know that public policy decisions are being made on their merits after informed discussions held in a transparent manner.

The purpose of the Code is appropriately, to assure the Canadian public that when lobbying of public office holders takes place, it is done ethically and with the highest standards, with a view to enhancing public confidence and trust in the integrity of government decision-making. To achieve this, the Code should (i) identify the principles we need for a free and open dialogue between government and its stakeholders, (ii) permit interpretation in a way that is consistent with the *Charter of Rights and Freedoms*, (iii) not create undue red tape for stakeholders, and (iv) above all else, ensure public confidence in the framework administered by the Office of the Commissioner of Lobbying (OCL). The

¹ <https://www.gric-irgc.ca/code-of-professional-conduct/>

² <https://www.publicaffairs.ca/who-we-are/ethical-principles>

Code needs to contain common sense, logical rules, that will stand the test of time and assure Canadians of the integrity of the system for years to come.

The current format and structure of the Code itself generally remains appropriate. It should be as straightforward as possible. Too many sections and sub-sections and sub-sub-sections detract from efficiency of interpretation and application. However, the Code as it stands necessitates, in some cases, pages of guidance, to help lobbyists understand how to meet their obligations under several different rules. This poses a bit of a conundrum in that the Code itself must be straightforward and practical, but the rules need detailed guidance to be meaningful, so lobbyists know how to meet their obligations. One consideration could be to give current guidances greater standing by examining the possibility of including them as commentaries to the relevant rules within the Code. This is exemplified by some other professional codes of conduct such as the Law Society of Ontario's, "Rules of Professional Conduct" and its "Paralegal Rules of Conduct".

The scope of the Code is sufficient and does not need to be expanded. Clients who are not lobbyists, and who are not subsequently captured under the *Lobbying Act* in their role as lobbyists, should not be subject to the provisions of the Code.

The clarity of the Code could be improved by providing more concrete guidance around certain concepts like 'use of information', 'conflicts of interest', 'preferential access', 'political activities', and 'gifts and hospitality'.

Bearing in mind this general overview, the following represents GRIC and PAAC's joint views and recommendations to strengthen and modernize the *Lobbyists' Code of Conduct*.

Introduction

GRIC was founded in 1994 by government relations professionals in response to the growth and maturing of the industry over the previous several decades. GRIC fosters high standards of practice through professional development and adherence to a code of professional conduct. GRIC also speaks on behalf of Canada's government relations community on matters pertaining to the relationship between the lobbying industry and government. GRIC's membership includes consultant and in-house lobbyists from non-governmental organizations (NGOs), national trade associations, charities, universities, and private companies (both domestic and multi-national), extending across the breadth and depth of the Canadian economy.

PAAC is a national, not-for-profit organization founded in 1984. Its principal objective is to help public affairs professionals succeed in their work by providing them with forums for professional development, the exchange of new ideas and networking. PAAC's membership represents a cross-section of the many disciplines involved in public affairs including policy development, government relations, lobbying, communications, opinion research and public relations. PAAC's members come from both the private and public sectors, in areas such as industrial and financial companies, crown corporations, consulting firms, small business, ministries and municipalities, PR organizations, trade associations, educational institutions, law and accounting firms.

The wide-ranging activities of GRIC and PAAC's members reflect the fact that governments remain an integral presence in today's economy. The current pandemic has only emphasized this fact more. Whether as legislators, regulators, or customers, governments interact constantly with every sector of the economy, and vice versa. Efforts to ensure that these interactions are carried out in a transparent

and ethical fashion are to be applauded. Efforts to curtail or limit interactions between stakeholders and government should be avoided. Rules that limit individual Canadians' involvement in the democratic process that chooses governments are unconstitutional and should be addressed on a priority basis in this proceeding.

Governments' legislative, regulatory and spending decisions impact every Canadian, every day. Lobbyists are a fundamental part of the democratic process by which government and business, charities, NGOs, academia and civil society interact. Government relations and public relations professionals provide advice and analysis to assist government and their clients in their interactions with each other. They are translators, explaining government's needs to their clients, and their clients' needs to government.

In recognition of this relationship, GRIC and PAAC work together on numerous events and issues of interest to our members. In 2013, we signed a memorandum of understanding, committing the organizations to collaborate on a range of activities, including where possible, developing joint submissions in response to government consultations. As such, we are pleased to jointly submit the following comments in response to this important consultation.

Introduction, preamble and principles

The principles that underpin the Code remain valid. GRIC and PAAC note that the preamble to the Code (which reflects four concepts stated in the *Lobbying Act*), as well as its principles (of respect for democratic institutions, integrity and honesty, openness and professionalism) are reflective of both organizations' own guidelines for our members. As such, GRIC and PAAC submit that the current principles remain valid, and do not need to be supplemented or changed. The principles ensure that Canada has a lobbying industry that upholds high ethical standards and contributes to informing public policy following clear rules and processes.

GRIC and PAAC appreciate the efforts the Commissioner of Lobbying has made in educating public officer holders and Canadians in general about the legitimate and important role that lobbyists play in informing Canada's democratic process and ensuring transparent participation in public policy development. To further this goal, we recommend that a line be added to the introduction or preamble of the Code to explicitly state that advocacy is an integral and important part of Canada's democratic process that strengthens how public policy is developed.

In the final part of the Code's introduction, it outlines that anyone suspecting non-compliance with the Code should forward information to the Commissioner. Given recent court determinations, GRIC and PAAC submit the introduction should be revised to better detail the complaint handling process, especially when the Commissioner has a duty to investigate complaints.

Transparency and use of information

GRIC and PAAC believe that Rule 1 (Identity and purpose), Rule 2 (Accurate information) and Rules 3 and 4 (Duty to disclose) are sufficiently clear and uphold important principles that ensure the transparency and integrity of the system for lobbyists and those who interact with them.

Changes to the Code stemming from the 2013 review, laid out that the “most senior paid” employee of an organization or a corporation has the duty to ensure that those who lobby for an organization or corporation are informed of their obligations under the *Lobbying Act* and the Code. GRIC and PAAC submit that the Code must preserve the flexibility that permits the “most senior paid” employee to delegate this responsibility. GRIC and PAAC believe that the current wording that mandates that the responsible officer “shall ensure that” is sufficiently flexible and reflects the reality that the top executive of most large organizations will not perform this role themselves.

Use of information

GRIC and PAAC support the spirit of Rule 5 “Use of information”. While it is reasonable for the Code to mandate how lobbyists interact with public office holders and the information that they disclose, in our view, it is beyond the scope of the Code to direct how lobbyists use information that they obtain.

Specifically, the first part of the second sentence in Rule 5 as written, does not provide enough detail about the measure by which a lobbyist should be aware they have received a document they “should not have”. For example, are these documents that are clearly marked as secret or classified information, such as cabinet confidences?

Additionally, the last part of the second sentence, “they shall neither use or disclose it” is reasonable as it relates to documents they should not have that were received from public office holders. On the other hand, curtailing the use of documents received from clients, journalists or other sources outside of government is, in our opinion, beyond the scope of the Code. This also ties back to the need to understand that a government document is one you should not have.

Conflict of interest

GRIC and PAAC submit that following changes made stemming from the 2013 review of the Code, Rule 6 as written is now unnecessary. The changes made in the last review added four new rules to clarify the manner by which the Code addresses conflict of interest with respect to preferential access, political activities and gifts. It is our belief that Rules 7, 8, 9 and 10 and their accompanying guidances sufficiently capture conflict of interest scenarios. Rule 6 does not appear to stand on its own as a Rule and its essence is captured by the Principles of the Code; Respect for Democratic Institutions, Integrity and Honesty, Openness and Professionalism.

With respect to conflict of interest in the subsequent Rules (7, 8, 9 and 10), it is important that the standard for determining whether a lobbyist has placed a public officeholder in a conflict of interest should be consistent with the Conflict of Interest and Ethics Commissioner’s standard for determining whether a public office holder was placed in a conflict of interest by a lobbyist. The Commissioner of Lobbying’s focus should be on the lobbyists’ actions rather than the interpretation of those actions by the Ethics Commissioner. However, the fundamental tenants of justice dictate that the Code should reserve wording that ensures no lobbyist is ever found to have placed a public office holder in a conflict that the public office holder was never in as has happened in the past.

Preferential access

Rules 7 and 8 generally rely on the interpretation of a “relationship that could be reasonably seen to create a sense of obligation”. These Rules require guidance for lobbyists to understand which relationships are covered and which are not. Currently, the *Guidance to mitigate conflicts of interest resulting from preferential access*, generally outlines those high-risk relationships sufficiently (family, close friends and business partnerships). GRIC and PAAC specifically recommend preserving guidance language that ensures ‘friends’ is defined by including relationships with a public office holder where you share a close bond of friendship, a feeling of affection, or a special kinship that extends beyond simple association. As well, we believe it is important to preserve, for the sake of clarity, the statement that, “This excludes casual acquaintances or members of your broad social or business circles”.

Furthermore, GRIC and PAAC believe that it would be useful for the Commissioner to help educate the Canadian public that individuals who have relationships with public office holders can still be lobbyists. The existence of a relationship does not in itself preclude lobbying generally, so long as if you have such a relationship with a public office holder, you do not lobby or arrange meetings with them.

Political activities:

The current *Guidance to mitigate conflicts of interest resulting from political activities*, revised in 2019, was a welcome update to the previous version. While seen as helpful for laying out some guardrails for our members that participated in the last federal election, GRIC and PAAC continue to hear concerns from members that the Code restricts the fundamental freedom of Canadians to participate in the political process.

The 2019 revised guidance outlined activities that carry a higher level of risk as opposed to those activities which pose lower or no risk at all. The guidance also limits the sense of obligation from political activities to the equivalent of one electoral cycle which is rational, particularly when there is a minority government which historically have not lasted the full mandates allowable under Canada’s Constitution. We appreciate that the guidance clearly outlines that political activities that are not strategic in nature and do not involve significant interaction with candidates pose a lower risk or no risk of creating a sense of obligation.

With respect to the person benefiting from the political activities (becomes a public office holder), GRIC and PAAC submit that Rule 9 sufficiently captures that, “the lobbyist shall also not lobby staff in their office(s)”. We do not believe it is necessary to expand the scope of Rule 9.

Gifts and hospitality:

On rule 10, GRIC and PAAC note from the related reports highlighted as part of the Code consultation, the Commissioner has had challenges providing guidance on what types of gifts and hospitality are appropriate since the *Lobbyists’ Code of Conduct* is directly linked to what a public office holder can receive and therefore other codes for MPs, Senators and public servants.

While we appreciate that there is rationale to unlinking what lobbyists can offer from what public office holders can accept to enable more independence of the Office of the Lobbying Commissioner to

exercise its duties, we are concerned that this could create a perverse situation whereby a lobbyist could be found guilty of offering a gift or benefit which another ethics officer deems acceptable for a public office holder to receive. We believe a linkage in some form must be preserved.

If a public office holder is permitted by the Ethics Commissioner to accept a gift, it should generally not be deemed to have created a sense of obligation based on assessment by both Commissioners as to the facts of the matter.

Furthermore, we recommend rephrasing Rule 10 as follows:

10. ~~To avoid the creation of a sense of obligation~~, A lobbyist shall not provide or promise a gift, favour, or other benefit to a public office holder, **which could reasonably be seen to create a sense of obligation, to a public office holder** whom they are lobbying or will lobby, which the public office holder is not allowed to accept.

This language, ‘reasonably be seen to create a sense of obligation’, is consistent with similar use in other Rules under the conflict of interest section of the Code. It also more clearly depicts in Rule 10 that gifts and hospitality are not prohibited.

It should go without saying that this provision of the Code should be aimed at prohibiting the offering of any sort of benefit or gift which could reasonably influence the actions of a public office holder, and not normal hospitality such as buying a cup of coffee or serving hors d’oeuvres at a reception.

The *Guidance to mitigate conflicts of interest with respect to gifts*, as revised in 2019, made clear that thank you gifts of nominal value, promotional items of minimal value and meals of minimal value during meetings are acceptable. These are elements that should be preserved as future changes are considered.

Conclusion

GRIC and PAAC believe that the *Lobbyists’ Code of Conduct* plays an important role in ensuring that our members work in an industry that adheres to the highest standards of integrity, honesty, openness, professionalism and transparency.

The Code is built around ensuring transparency and preventing actions that would create a sense of obligation for a public office holder. These are undeniably the right principles and the Code must be detailed in a manner that permits lobbyists to clearly understand their obligations. Virtually all lobbyists, since the Code has been established, have followed it and the pursuit of greater Code clarity can only ensure that continues.

We appreciate the Commissioner holding this consultation to be open and collaborative in determining how to make the Code even more effective. We are available to meet to discuss these recommendations or other practical suggestions for ensuring Canada continues to have lobbying rules and a regime of which we can all be proud.

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