

It Takes Two to Tango — Exempt Staff and the Lobbying Act

Canada's federal Lobbying Act is focussed on the lobbyist rather than the lobbied. However, the lobbied can play an important role in contributing to a culture of compliance. Given lobbying rules focus on the lobbyists, the lobbied do not have a strong incentive to learn about lobbying regulations. Furthermore, training from the Commissioner of Lobbying's office is not mandatory. Thus, it is expected that a knowledge gap on the Lobbying Act exists. A survey sent to ministerial Chiefs of Staff revealed such a knowledge gap – although factors like experience as a lobbyist have a positive correlation to knowledge of lobbying regulations. This gap is concerning and speaks to challenges with training in the unique context of the Hill.

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Contrary to its negative public perception, lobbying is a legitimate and regulated channel through which organizations and individuals influence policy in a Parliamentary democracy. It requires two parties: the lobbyist who is asking for something and the public office holder who is being asked. Parliament created lobbying regulations which focus almost exclusively on the former. Although the public office holder being lobbied is an integral party to the act of lobbying, there is very little research on the participation of the lobbied in the Canadian federal context. A study of one such category of public office holders, chiefs of staff in Ministers' offices, demonstrates some of the challenges with regulating lobbying in a Parliamentary democracy and areas where further research is essential.

Despite a rigorous public debate in Ottawa around lobbying, there is still confusion around basic definitions and concepts. Lobbying is any direct or indirect communication, for payment, with a federal

public office holder regarding making or changing any policies, programs, legislation, regulations or funding. Canada's *Lobbying Act* and associated regulations and interpretations are based on the premise that access to and lobbying of decision makers is an important part of democracy.

Parliament designed Canada's lobbying regulatory system to frame the burden of compliance on the lobbyists. At Westminster, in contrast, it is the Members of Parliament who are subject to lobbying oversight through the Registrar of Members' Interests¹. In Canada, federal lobbying was first addressed through legislation in 1989 with the *Lobbyists Registration Act*. Since the responsibility for compliance was first placed on the lobbyists, subsequent legislation, regulations and interpretations have predominantly reinforced this as a defining feature of the Canadian lobbying regulatory system.

Within the category of designated public office holders (DPOH) who are on the receiving end of lobbying, exempt staff make up a unique sub-category that includes all political staff appointed at the Minister's discretion in their office. Chiefs of staff are a particularly interesting category of exempt staff because they serve both a strategic policy role and a management role in a minister's office². They are a key player in lobbying as they are gate keepers to the minister and are also lobbied themselves. Furthermore, they are usually responsible for training

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in a minister's office and hire the rest of a minister's staff. There is little recent academic literature in Canada on the demographics of ministerial staff and especially on chiefs of staff³.

These public office holders are affected by the *Act* in two ways: first, they are subject to a five-year ban on lobbying after leaving their position and, second, they must verify communication reports. The current Commissioner of Lobbying, Karen Shepherd, highlighted that DPOH are not required to keep records in a public letter in 2011: "The *Lobbying Act* does not specify that DPOHs must keep records, only that they confirm, if requested by my Office, the information provided by a lobbyist."⁴ This is a serious weakness in Canada's regulations.

Despite this weakness, DPOHs have an incentive to verify communication reports; if they fail to do so, they face "naming and shaming". This means the Commissioner can publish their name and explain that they failed to comply with the *Act*. However, according to a policy advisor in the Commissioner's office, as of 2016 no DPOH has ever failed to verify a communication report. The quality of their verification, given they are not required to keep records, is another question.

With the change in government and ensuing staffing turnover on the Hill, the *Lobbying Act* has become politically salient and subject to considerable debate. In particular, the five-year ban on lobbying after working as an exempt staff has been subject to criticism in several articles and opinion-editorials⁵.

The practical reality of lobbying is not only governed by legislation. The government elected in October 2015 reinforced the role that public office holders have in verifying information about lobbying through the Open and Accountable Government document. Published a month into its mandate, the document states: "The Commissioner of Lobbying may ask designated public office holders, including Ministers and Parliamentary Secretaries, to verify information about lobbying communications that has been registered by lobbyists. Every effort should be made to meet this responsibility using routine records."⁶ However, though this change reflects one government's potential desire for an increase in responsibility for DPOH, it is merely symbolic as it is not enforceable by the Commissioner.

Many lobbyists have criticized the *Lobbying Act* and, in particular, the Lobbyists' Code of Conduct. They have complained that the rules are ambiguous and over-burdensome⁷. The Commissioner's interpretations around some of these rules have also been called confusing⁸. Based on the confusion amongst lobbyists, who have the strongest incentive to understand the regulations, it seems probable that the lobbied, with even less incentive, are likely not fully literate in Canada's lobbying rules.

To address this question, an electronic survey was distributed to chiefs of staff, who make up a small (at the time, N=30) but significant population. The survey tested knowledge of the *Act* and asked about hiring practices in terms of potential staff knowing about the five-year post-employment lobbying prohibition. The survey contained 17 questions. Five of these questions tested knowledge of the *Act* and were developed in consultation with staff from the Commissioner's office. The survey concluded with two open ended questions asking respondents for their perception on how lobbying regulations can be improved. Due to turnover it was possible to send the bilingual survey to only 28 chiefs of staff. Seven chiefs of staff responded although one answer was incomplete resulting in a response rate of 21 per cent. In addition to the survey, a conversation was conducted with the Commissioner and informal fact checking was done with staff in the Commissioner's office and an exempt staff. Interviews were sought with a sample of chiefs of staff, none of whom were willing to be interviewed. Finally, primary documents such as the training presentation given to ministers' offices, the feedback survey after the presentation, a letter of offer to an exempt staff and the conflict of interest paperwork were also analyzed.

Though the results must be considered in the context of the small sample size, the answers to some questions were both alarming and informative. One respondent scored perfectly on the test and the rest had only one or two questions incorrect. These results give the impression that chiefs of staff consistently have some basic knowledge of the *Lobbying Act*. There was a strong positive correlation between respondents who had been a registered lobbyist and a higher score on the knowledge test.

Respondents were asked to list all the sources of training/information they had received:

Sources of Information on Lobbying

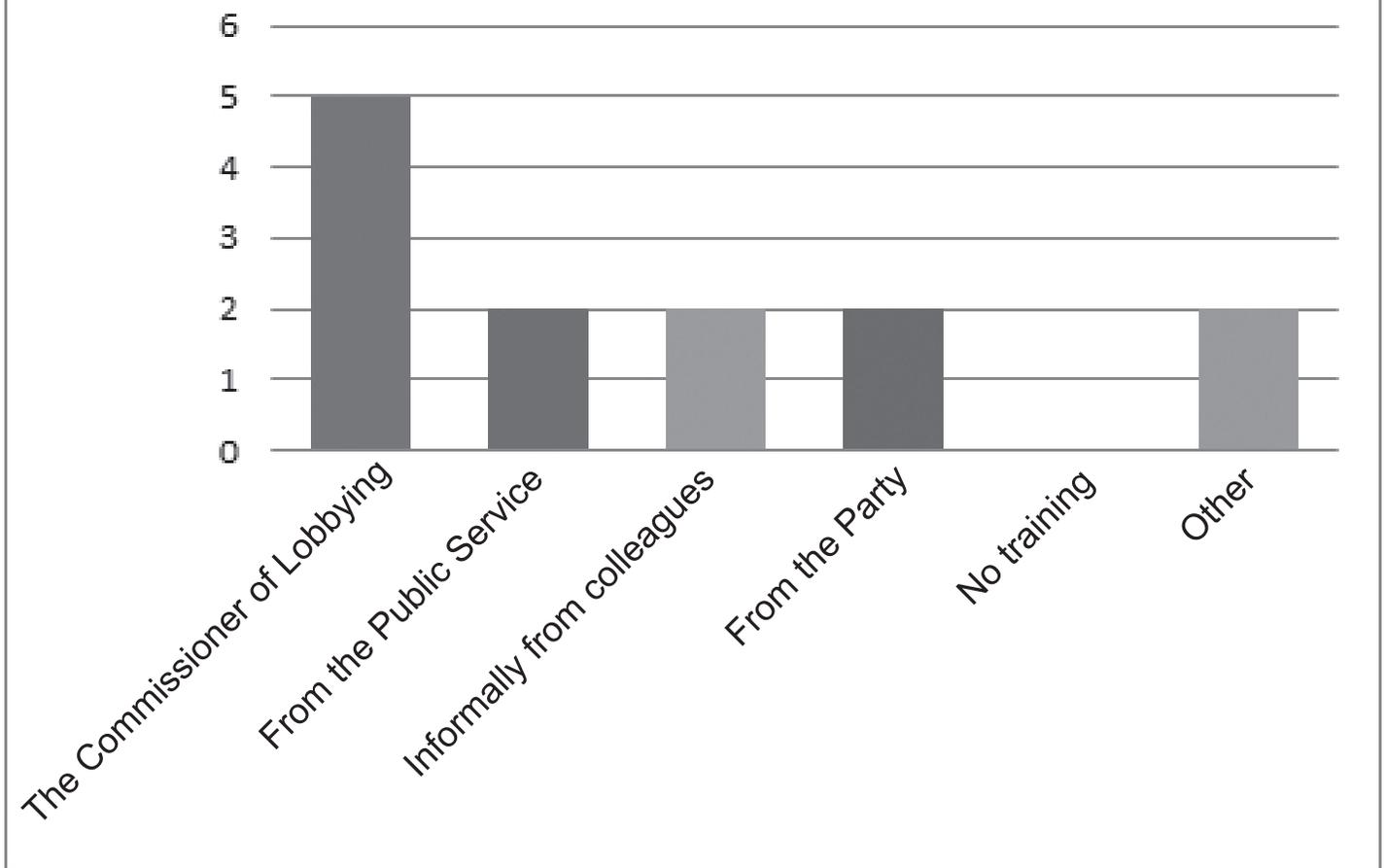


Figure 1.2

As Figure 1.2 shows although most respondents receive training or information from the Commissioner of Lobbying, many also rely on the public service, their political party and informal information from colleagues.

Surprisingly, when asked if they had been informed of the five-year post-employment lobbying ban before they were hired, two respondents said no. When asked if they had informed staff they hired about the five-year post-employment lobbying ban, two chiefs of staff again said no. Regardless of the small sample size, it is worrisome that any respondent answered no to these questions. This ban is taken seriously by the Commissioner – the few exceptions she has granted are published online⁹.

The open-ended questions about improving the system also yielded fruitful responses. When asked if there are any tools that could help them discuss lobbying with lobbyists, one respondent said “Yes... the Government should provide a simple little business card that directs Lobbyists to the registration web site and informs them of their responsibilities under the *Act*.” This idea was implemented at the municipal level in Ottawa and Toronto¹⁰.

A third respondent to this question said “The *Federal Accountability Act* is a badly written piece of legislation that requires significant amendment. The main problem for lobbyists and those they lobby is that there is little shared vernacular between the Ethics and Lobbying Commissioner’s office...”.

When asked more specifically how training on the *Lobbying Act* could be improved, one person suggested there should be an obligatory session for all new ministerial staff. Another respondent to this question said they would like to see “more formal training for political staff.” A third person suggested an online training module might be a good approach. Finally, one respondent said the *Act* needs to be amended to “make the definitions and advice more realistic [with] the situation in Ottawa and create uniformity to approach.”

A conversation with the Commissioner of Lobbying reinforced the notion that DPOH have very few responsibilities under the *Act*. The Lobbying Commissioner, however, has the mandate to train. At the beginning of the mandate of the new government her office reached out to the chiefs of staff to offer training. However, the Commissioner says the beginning of the mandate of a new government is a unique time and in many cases chiefs of staff had yet to be hired. For this reason, the Commissioner periodically re-contacts these offices and continuously offers training.

The Commissioner said the main impact the lobbied can have on federal lobbying is contributing to what she calls a “culture of compliance”. Staff can adopt a series of best practices, such as asking lobbyists if they are aware of the lobbying regulations and code of conduct and if they are in compliance. The survey found that all but one chief of staff had had a conversation with a lobbyist about lobbying. Finally, the Commissioner has seen a positive trend in terms of Public Office Holders wanting to help with compliance.

Though it remains to be determined why some staff know more than others about lobbying, it is clear that there is a knowledge gap among some chiefs of staff about lobbying rules. For instance, two chiefs of staff were not informed of the five-year post-employment ban prior to being hired and respondents gave varied answers to the section of the knowledge test on rules such as whether lobbyists can give gifts. Mandating that all letters of offer to exempt staff include an explicit reference to the five-year ban on lobbying is one way to ensure staff are informed. However, letters of offer do not fall under the mandate of the Commissioner of Lobbying, but rather the Treasury Board.

The diffused nature of sources of information on lobbying is a key potential source of confusion on

lobbying rules. Although Parliament established the Commissioner of Lobbying as the hub for information about lobbying, as the survey results demonstrates, chiefs of staff’s seek out a range of sources of information including “informally from colleagues” or “other” which are potentially sources of inaccurate information. These diffused sources of knowledge are problematic because misinformation on lobbying abounds in Ottawa. For instance, a *Canadian Parliamentary Review* article incorrectly states: “MPs and Senators are required to keep records about what pre-arranged oral communications they have with registered lobbyists.”¹¹ (*This article has since been corrected online.)

Training on lobbying for ministerial staff should go beyond content of the *Lobbying Act* to actually equip staff with the ability to facilitate compliance and include how and why exempt staff can contribute to lobbying oversight. As one respondent said, innovative tools for exempt staff such as a card with the Commissioner’s contact information could also better equip ministers’ staff to facilitate compliance. One respondent acknowledged they feared repercussions for reporting unregistered lobbyists. Better training could address these concerns. However, equipping staff with the ability to facilitate compliance goes beyond the responsibility DPOH have under the current *Act*.

Training must ensure political staff will use their knowledge. A thorough study on the lobbied in Quebec found that 85 per cent of Quebec’s public office holders were aware of the provincial Registry of Lobbyists; yet, there is a gap between this knowledge and concrete action by public office holders. For example, 69 per cent of respondents had never consulted the website of the Commissaire au lobbying and 72 per cent had never invited a lobbyist to register their activities or respect the Code of Conduct¹². A similar study should be conducted at the federal level to help Parliamentarians and their staff better understand the practical reality of lobbying and the limitations of the current rules.

Knowledge of the rules around lobbying is necessary but not sufficient to ensure actions to promote compliance are taken. Thus, although more training is needed to provide DPOH the knowledge to promote compliance, it is essential they also be provided the skills and tools to apply this knowledge. Finally, legislative change is possible with the *Lobbying Act* up for review every five-years.

Further research on the participation of the lobbied in federal lobbying is essential. Given the important role the lobbied can play in facilitating a culture of compliance, the gap in the literature on the lobbied is concerning. Although the sensitivities in the political environment make this a difficult topic to research, it is worth investigating. The potential for staff to serve as a check for lobbying regulation compliance could help to increase the public's confidence in our system. Furthermore, a fundamental purpose of lobbying regulation is to ensure equal access to influencing decision makers. Ensuring staffers are equipped to assist in compliance contributes to a system where people with disproportionate access are held to account.

Notes

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