

FW: MOE/Ad Standards - Options, Pros/Cons

From: "Archer, Amy (MAG)" <amy.archer@ontario.ca>
To: "Berry, James (ENERGY)" <james.berry5@ontario.ca>, "MacKenzie, Rebecca (OPO)" <rebecca.mackenzie@ontario.ca>
Date: Wed, 17 Jan 2018 18:48:21 -0500
Attachments: Letter to Ad Standards - For review and sign off - Energy - 20180117 (3).docx (2.9 MB)

Please see Blakes' advice below. Sending to you for concurrent review in light of the time. Blakes recommends sending a response tonight. Happy to jump in a call if they would help.

Amy Archer
Senior Policy Advisor
Office of Hon. Yasir Naqvi, Attorney General
(416) 326-2266

From: McKenzie, Ashley (MAG) <Ashley.McKenzie2@ontario.ca>
Date: Wednesday, Jan 17, 2018, 6:45 PM
To: Archer, Amy (MAG) <Amy.Archer@ontario.ca>
Subject: FW: MOE/Ad Standards - Options, Pros/Cons

As foreshadowed in my email 5 minutes ago, below is Blakes' advice regarding next steps. The recommendation is to send the attached response tonight. This is the same version that was edited by CO Comms following PO direction.

We are also seeking instructions re: whether to call ASC tomorrow morning to explore ways of resolving the complaint. I think it would make sense to try and at least explore resolution with ASC.

Ashley McKenzie
Counsel to the Deputy Attorney General

From: Mallen, Jane (MAG) <Jane.N.Mallen@ontario.ca>
Date: Wednesday, Jan 17, 2018, 6:40 PM
To: McKenzie, Ashley (MAG) <Ashley.McKenzie2@ontario.ca>
Cc: Phan, Cathy (MAG) <Cathy.Phan2@ontario.ca>
Subject: FW: MOE/Ad Standards - Options, Pros/Cons

From: KRANE, JOSHUA [mailto:JOSHUA.KRANE@blakes.com]
Sent: January-17-18 6:30 PM
To: Murray, Maud (ENERGY/MEDG/MRIS/MOI); Thouin, Alena (ENERGY)
Subject: Re: MOE/Ad Standards - Options, Pros/Cons

Privileged and Confidential

Dear Maud and Alena,

We are in receipt of the mark-up from CO, which substantially modifies the prior draft reviewed and approved by the other agencies. You have asked us to outline options available to us and related pros and cons.

Below is the requested assessment.

Please note that I will be available until midnight to make a submission to Ad Standards. Otherwise, I will be back in the office tomorrow morning.

OPTIONS

Option	Pros	Cons
1. No response: “My client declines to respond to the complaint.”	- No admission or acknowledgment regarding the nature of the tweet - Possibility, though remote, Ad Standards declines to pursue this further - If the matter is referred to a Standards Council, our Oct. 31 submission may be included	- Inability to argue that the tweet and related communications are not reviewable - Leaves the allegation regarding a breach of MOE's undertaking on the record without response - Damages the government's relationship with Ad Standards
2. Submit revised letter	- Gives the policy context for the tweet and allows Ad Standards to assess reviewability in light of this context - Puts our Oct. 31 submission and Nov. 13 memo from Ad Standards on the record - Distinguishes the tweet from the FHP campaign in issue in the prior matter	- Ad Standards may not accept the submission if submitted Jan. 18 or later - Ad Standards may not provide the Oct. 31 submission or Nov. 13 memo to the Standards Council - Ad Standards may view a late submission negatively
3. Propose a call with Ad Standards; no letter	- Issues can be discussed in an informal manner without a written record - Allows for participation across multiple agencies - Direct communication with Ad Standards management	- Ad Standards may decline a call without a written response - No written submission to go before a Standards Council - Ad Standards may view a request for a call without a submission negatively
4. Ask for an extension	- Gives more time to consider options and refine the current draft	- Very unlikely to receive an acknowledgement on Jan 17 - Low likelihood of any material extension (beyond a day) - Ad Standards may view the request negatively

On a related note, Ad Standards does not function like a court. It operates on the basis of goodwill and participation from industry and counsel. Part of the reason why Ad Standards has afforded us flexibility is due to our relationship with its counsel. To not provide a response when we committed to doing so undermines that goodwill.

Accordingly, while we would have preferred the longer (unedited) submission which presents stronger arguments, our view is that proceeding on the basis of Option 2 – i.e., submitting the abridged letter tonight – provides the best prospect for resolution at this stage without the matter being referred to a Standards Council for adjudication and prejudicing our relationship with Ad Standards and its counsel.

Please let us know if you wish to discuss and how we should proceed.

Josh

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The logo for Blakes, featuring the word "Blakes" in a stylized, cursive script.

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