



**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

ANY REPLY OR SUBSEQUENT REFERENCE TO THIS COMMUNICATION SHOULD BE ADDRESSED TO THE DIRECTOR OF PUBLIC PROSECUTIONS AND **NOT TO ANY OFFICER BY NAME** AND THE FOLLOWING REFERENCE QUOTED:-

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**P.O. BOX 633**

**KINGSTON**

**JAMAICA**

Ref. \_\_\_\_\_

**April 23, 2015**

**Mr. Dirk Harrison**  
Contractor General  
Office of the Contractor General  
PIOJ Building  
16 Oxford Road  
Kingston 5



Dear Mr. Harrison,

**RE: Special Report of Investigation forward to the Director of Public Prosecutions conducted into the Circumstances Surrounding Allegations of Nepotism, in the Award of Government Contracts at the Hanover Parish Council to Persons Affiliated with the then Mayor of Hanover Parish Council.**

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Reference is made to the captioned matter and your letter dated 24<sup>th</sup> March, 2015.

**Background**

1. On the 25<sup>th</sup> of March, 2014 your office initiated an investigation into the alleged acts of nepotism, favoritism, irregularities and/or conflict of interest surrounding the award of contracts by the Hanover Parish Council to relatives and/or persons affiliated with the

then Councillor for the Green Island Division, Mayor and Chairperson at the Hanover Parish Council **Miss Shernet Haughton**.

2. This investigation was prompted by an anonymous document that was forwarded to the OCG listing a number of persons to whom Miss Haughton is purportedly related and/or affiliated, and for whom she made recommendations for the award of contracts. On the 24<sup>th</sup> of March 2014, the OCG in its report noted that an RJR news article stated that Miss Haughton awarded fifteen million dollars (\$15M) worth of contracts to eleven (11) family members and seven (7) close friends.<sup>1</sup>
3. Miss Haughton held the afore-mentioned post between March 29, 2012 and August 28, 2014. **In reality the sums identified by the OCG's investigation revealed Three Million Four Hundred and Fifty Nine Thousand, Four Hundred and Forty-Six Dollars (\$3,459,446.00.)**

#### **OCG FINDINGS**

4. According to your report, your office conducted investigations and unearthed the following findings which were referred to the Office of the Director of Public Prosecutions (ODPP) for consideration.<sup>2</sup>
5. The OCG concluded that the sum of **Three Million Four Hundred and Fifty Nine Thousand, Four Hundred and Forty-Six Dollars (\$3,459,446.00)** represented approximately twelve percent (12%) of the allocation of funds to Miss Haughton for the period March 2012 to April 2014.<sup>3</sup> At the Judicial Hearing by the Contractor- General Miss Haughton admitted her family relationships with the persons stated.<sup>4</sup> She also admitted that she had recommended members of her family for contracts of varying amounts, all under five hundred thousand dollars (\$500,000.00)<sup>5</sup>

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<sup>1</sup> Page 3 – OCG Report

<sup>2</sup> Page 57 & 58 - OCG Report

<sup>3</sup> Page 59 – OCG Report

<sup>4</sup> Page 64 –100 of OCG Report; Exhibits 14& 15- Transcript of Judicial Hearing for Shernet Haughton

<sup>5</sup> Page 64 –100 of OCG Report; Exhibits 14& 15- Transcript of Judicial Hearing for Shernet Haughton

6. With regard to her conduct, Miss Haughton said that she had a copy of The **Councillor's Handbook**, but she had never gone through all of it. Interestingly, she further stated that she had never heard of the **Code of Conduct for Jamaican Councillors** notwithstanding the fact that this formed a part of the said Handbook.<sup>6</sup>

### **ISSUES FOR DETERMINATION**

7. The matter was referred to the Director of Public Prosecutions for a determination to be made as to whether Miss Haughton, former Mayor and Chairman of the Hanover Parish Council and Councillor for the Green Island Division, breached the provisions outlined below and if so did these breaches reveal the commission of offences contrary to any criminal law which would provide a basis for a viable prosecution.
8. The following provisions were the basis of the referral from the Contractor General to the DPP:
  - a. Section 4(1) of the Contractor Generals Act in relation to award of government contracts;
  - b. Code of Ethics for Councillors in relation to failing to declare a personal or prejudicial interest in a government contract;
  - c. Section 4.2 "Conflict of Interest of the GoJ Handbook of the Public Sector Procurement Procedures (May 2012);
  - d. Section 4.3 "Unethical Conduct" of the GoJ Handbook of Public Sector Procurement Procedures (May 2012);
  - e. Section 99 and 100 of the Parish Councils Act; and
  - f. Section 40 of the Public Sector Procurement Regulations.

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<sup>6</sup> Page 106-107 of OCG Report; Exhibit 1 of Attachments

## **THE APPLICABLE LAW**

9. Section 4(1) of the Contractor General Act does not create a criminal offence. Furthermore, the offence creating sections under the Contractor- General Act **do not** apply to the issues raised in this referral.
  
10. Similarly, Sections 99 and 100 of the Parish Council Act does not give rise to the creation of any criminal liability. *(These sections prescribe the voiding of contracts between a councillor and the parish council in certain circumstances as well as precluding councillors from voting upon contracts from which they are interested).*
  
11. The **Code of Ethics for Councillors** contained in chapter 6 of the Councillors Handbook as well as the **GoJ Handbook of Public Sector Procurement Procedures** (which contains general guidance in relation to ethical principles governing the procurement process) do not have the force of legislation and therefore **cannot** create criminal offences. **They speak to provisions which regulate administrative/governance issues and seek to ensure transparent and ethical conduct surrounding the issuance of government contracts.**
  
12. Having perused the contents of the documents submitted by the OCG to the ODPP, the following in my view represent the laws applicable for consideration by the ODPP of this matter:
  - *Section 94 of the Constitution*
  - *Public Sector Procurement Regulations, (2008)*
  - *The Corruption Prevention Act 2000*
  - *Common Law – Conspiracy to Defraud, Misconduct in Public Office*
  
13. **Section 94 of the Constitution of Jamaica**

The functions of the Office of the Director of Public Prosecutions (ODPP) *inter alia* are:

- To institute and undertake criminal proceedings;
- To take over criminal proceedings initiated by others;
- To discontinue criminal proceedings; and
- To consider any referral which has been transmitted to the ODPP for a determination of whether there is any basis in fact or law for the initiation criminal proceedings.

***Section 94 (6) of the Constitution states that the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority in the exercise of the powers conferred upon the Office by this section.***

**14. Public Sector Procurement Regulations, (2008)**

See sections 5(1), section 8 (2) & (3), section 36 (1) & (2) and section 40 as listed below:

*Section 5(1)*

*‘These Regulations do not apply to the tendering and other procurement activities in relation to contracts that are below the approval thresholds lawfully prescribed from time to time including special thresholds prescribed for specific entities’*

*Part V*

Procurement Methods for Contract for General Services, Goods and Works

*Section 8 (2) & (3)*

(2) *‘The following procurement methods apply to the procurement of general services goods and works – (a) open tendering (the default method); (b) selective tendering; (c) limited tendering (d) direct contracting or sole source’.*

(3) *Each method shall be utilized in accordance with the threshold and established criteria through circulars by the Ministry responsible for*

*Finance and as prescribed in the Handbook. (Please see extract in paragraph 16 of circular no.16 as outlined below.)*

***Circular No. 16 (Ministry of Finance and Planning) Increased Approval Threshold for Public Sector Procurement. Dated May 14, 2012 (Extract)***

*“Procurement of Goods, Works and General Services*

<u><b>Contract Value Threshold</b></u>	<u><b>Procurement Method</b></u>	<u><b>Approval Requirements</b></u>
<b><i>Up to \$500,000.00</i></b>	<b><i>Direct Contracting</i></b>	<b><i>Head of Procuring Entity”</i></b>

*Section 36*

- (1) It is the duty of any public officer directly or indirectly involved with the procurement process and particularly in the preparation of bidding documents, evaluation, contract negotiations and contract management and payments to –*
  - (a) Declare to the head of the entity or chairman of the entity’s procurement committee any potential conflict of interest in relation to a proposed Government contract*
  - (b) Declare to the head or chairman, any relationship with a bidder, supplier, contractor or consultant and refrain from taking part in either the decision making process or the implementation of any Government contract where such a relationship exists*
- (2) Every personal relationship shall be disclosed in writing or, if in a meeting orally and the minuted, and any person who has made such a disclosure of personal relationship shall not sit in any meeting while deliberations on the subject matter are being conducted.*

*Section 40*

***‘A person who-(a) contravenes these Regulations; or (b) aids, abets or otherwise knowingly facilitates or is an accessory to the contravention of these Regulations, commit an offence and is liable, on summary conviction in a***

*Resident Magistrate's Court, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding three months or to both such fine and Offences and penalties.'* [Emphasis added]

*Discussion*

These regulations only apply where the contract amount is above the approval threshold. In 2012, this threshold was five hundred thousand dollars (\$500,000.00).

The highest award that was made for a contract consequent on recommendations made by Miss Haughton was for the amount of three hundred thousand dollars (\$300,000.00). In the circumstances therefore we are of the view that section 40 of the Regulations does not apply.

15. **Corruption Prevention Act**

*Section 14*

*(1) A public servant commits an act of corruption if he -*

*(b) in the performance of his public functions does any act or omits to do any act for the purpose of obtaining any illicit benefit for himself or any other person;*

*(3) A person commits an act of corruption if he instigates aids, abets or is an accessory after the fact or participates in whatsoever manner in the commission or attempted commission of or conspires to commit any act of corruption referred to in subsection (1) or (2).*

*Discussion*

In the Jamaican case of **Dewayne Williams v R**<sup>7</sup>, Phillips J.A. examined section 14 of the Act and opined as follows:

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<sup>7</sup> Resident Magistrate's Criminal Appeal No.22 of 2010, judgment delivered on April 1, 2011 at paragraphs 40 -1.

*“... on an examination of the specific section of the Act, it is clear that the words connote an offence once a public servant purposely does an act which the **law forbids** ...” [Emphasis mine]*

In the present scenario involving Miss Haughton’s conduct and her recommendation for the award of these contracts to eleven (11) family members and other connected persons, this was nepotism of its most egregious given the fact that she was serving in high public office. **However, be that as it may, there is no law which criminalises nepotism of this kind and character without more.**

**Therefore a viable prosecution could not be mounted against Miss Haughton in a criminal court of law for having committed any offence without this conduct being part and parcel of the ingredients of the contravention of some other provision in the criminal law.**

Whilst the provisions of the **GoJ Handbook of the Public Sector Procurement Procedures (May 2012)** and the **Code of Ethics for Councillors** prohibit nepotism and unethical conduct, they provide guidance and by their very nature lack the coercive powers of the criminal law or its sanctions.

#### 16. **Common Law- Conspiracy to Defraud**

At Common Law the case of **Scott v Metropolitan Police Commissioner [1975] AC 819** states that:

*“to defraud ordinarily means to deprive a person dishonestly of something which is his or of something to which he is, or would, or might, but for the perpetration of the fraud, be entitled....a conspiracy to defraud may exist even though its object was not to secure a financial advantage by inflicting an economic loss on the person at whom the conspiracy is directed.”*

In the said case Conspiracy to defraud was defined as follows:

*“an agreement by two or more by dishonesty to deprive a person of something which is his, or to which he is, or would, or might be entitled and an agreement by*



*two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.”*

The prosecution is required to prove “dishonesty” in the mind of the guilty party which is a key ingredient of this offence.<sup>8</sup>

In the case of **R v Anthony Allsop (1977) 64 Cr. App. R. 29**, it was held that:

*“where a person intends by deceit to induce a course of conduct in another which puts that other’s economic interests in jeopardy he is guilty of fraud even though he does not intend that actual loss should ultimately be suffered by that other.”*

#### *Discussion*

According to your report, when members of the Parish Council were questioned they stated that they were unaware that Miss Haughton was related to persons who form the basis of this complaint.<sup>9</sup>

Importantly, no material was unearthed your office to contradict this assertion. Additionally, there is no evidentiary material contained in your report, from which an agreement, within the context of the ingredients of Conspiracy to Defraud with the requisite intent as previously outlined, can be grounded.

This is further underlined by the fact that there is no evidentiary material that can successfully rebut the presumption that the work contained in these contracts were satisfactorily executed and provided value for money.

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<sup>8</sup> Scott v Metropolitan Police Commissioner [1975] AC 819, Wai Yu-Tsang v the Queen [1992] 1A.C. 269

<sup>9</sup> Page 104-105 – OCG Report

## 17. Common Law- Misconduct in Public Office

The case of R v Dytham [1979] QB 722 sets out the elements of the offence of misconduct in public office. Lord Widgery CJ at page 727 stated the elements of the offence as follows:

- i) a defendant must be a public officer;
- ii) who willfully neglects;
- iii) a duty which he is bound by common law or statute to perform;
- iv) without reasonable excuse or justification; and
- v) the misconduct impugned is of such degree as to be calculated to injure the public interest so as to call for condemnation and punishment.

The dicta of Lord Widgery was adopted in the Jamaican case of Williams v R (1986) 39 WIR 129, where Moe JA, in delivering the judgment of the Court suggested that the following must be present for the offence to exist:

- i) Accused is a public officer;
- ii) That as such he owes a duty;
- iii) That there has been a breach of that duty;
- iv) That the conduct of the Accused was calculated to injure the public's interest and was of such a nature as to call for condemnation and punishment; and
- v) That there was an oblique fraudulent motive.

### *Discussion*

It goes without saying that the assessment or analysis of this matter will always take place within the context of the fact that in mounting a viable case the prosecution always bears the burden of proving its case beyond a reasonable doubt, which is a very high threshold to overcome.

On an initial assessment of the circumstances of surrounding the award of these contracts Miss Haughton may prima facie appear to be guilty of misconduct in public office. However, when one examines the ingredients outlined in the *case of Dytham* and the *case of Williams* outlined above, it is clear that as a matter of law the prosecution would not be able to make out a viable case for the following reasons:

- i) There is no evidence that there was any willful neglect in doing her duty (strictly speaking her duty, where contracts were concerned, was to make recommendations. The problem arises where she sought to make these recommendations in respect of her relatives and other connected persons); and
- ii) There is no evidentiary material suggesting that Miss Haughton contravened any duty imposed by common law or statute. (Note that the ethical parameters of her duties were outlined in the **GoJ Handbook of the Public Sector Procurement Procedures (May 2012)** and the **Code of Ethics for Councillors** and would not have the force of the criminal law).

The fact that Miss Haughton was a public officer, her actions were egregious and did violence to the spirit of the Handbook and Code of Conduct for Councillors cannot form the basis of a viable prosecution, because critical ingredients to prove the offence are absent.

In any event in order to attempt to get the evidentiary material to ground these missing ingredients the Crown would have to rely on information from these very relatives and other connected person(s) as well as her colleagues within the parish council. It is quite clear from the circumstances outlined in your report that this information would not be forthcoming.

Whereas section 36 (1) of the Regulations (as stated above) places a duty on a public officer, at common law there is no such duty. Given the fact that the recommendations that were made by Miss Haughton were below the approval threshold, we are of the view

that there is no duty created by statute (the Public Sector Procurement Regulations) for Miss Haughton to disclose her relationship to the persons whom she recommended for awards of contracts. There is also no such compulsion at common law to do so.

This position is further buttressed by the OCG's finding that:

*“there is no documented policy or protocol at the Hanover Parish Council that stipulate the procedure for the selection and/or recommendation for the award of contracts by Councilors or Mayors.”<sup>10</sup>*

Consequently, in those circumstances the question of whether Miss Haughton breached a duty to the public in making these ‘recommendations’ becomes academic. The Decision to Prosecute, a Protocol adopted by the Office of the Director of Public Prosecutions (ODPP), suggests that a criminal prosecution should not be embarked upon where “the broad extent of criminality” has not been determined<sup>11</sup> especially in circumstances where actions are open for interpretation and no legislative guide exists.

## CONCLUSION

Miss Shernet Haughton was a highly placed public officer, a Councillor and the Mayor of the Hanover Parish Council at the time of commission of these breaches. Miss Haughton's actions not only flouted the spirit of the clearly stated policies and regulatory provisions (as outlined above); they were egregious; reeked of nepotism and in our view could be deemed unethical. A cynic could not be faulted for wondering if there might not have been some sleight of hand which routed the benefit of these contracts to persons connected to Miss Haughton given the number of contracts that were awarded. This is especially so in light of the fact that all of the contracts were **just** below the five hundred thousand dollars (\$500,000.00) threshold.

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<sup>10</sup> Page 18; see also page 44- 45 – OCG Report

<sup>11</sup> See The Decision to Prosecute: A Jamaican Protocol at page 15

It is quite clear that the public interest and the credibility of the Parish Council would benefit from an objective and transparent selection process which needs to be parachuted and concretized in the governance structure of all Parish Councils.

Unfortunately although the evidence of nepotism is overwhelming, that by itself is not an offence known to the criminal law unless it forms part and parcel of the ingredients offences outlined above. Miss Haughton's actions are not deemed criminal for the purposes of the Public Sector Procurement Regulations, 2008, as the regulations as formulated exclude her actions from its ambit (none of the contracts awarded were \$500,000.00 or above).

Miss Haughton's actions therefore as revealed in the referral material from your office do not breach any applicable criminal laws. Consequent upon our analysis of the breadth of the award of these contracts to these relatives and connected persons outlined in your report, we are obliged to support wholeheartedly the recommendations stated at pages 132- 135 of the Special Report of the OCG.

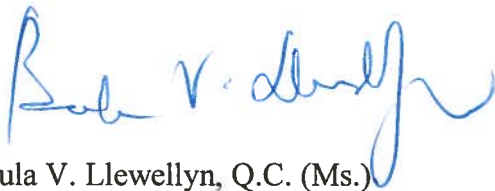
We further recommend:-

- i) That a review of the Public Sector Regulations 2008 be conducted. Such a review will necessarily involve the removal of the legislative restraint (**notably section 5(1)**) that allows for individuals like Miss Haughton to be exempted from the application of the Regulation which concerns such fundamental breaches of ethics which the Regulations specifically forbid.
- ii) That there be a review and necessary upgrade of the paltry fine of one thousand dollars (\$1000.00) which is stated at Section 40(b) of the Public Sector Procurement Regulations as the penalty for breaches under the Regulation. Such an assessment should be conducted so as to reflect the seriousness with which the Legislature views unethical conduct by a public officer, where the award is five hundred thousand dollars (\$500,000.00) and over.

- iii) Although there is no criminal prosecution that could be mounted against Miss Haughton for any offence arising from her conduct, we recommend that strong administrative action or sanction be taken against Miss Haughton by the relevant policy makers and or authority which has ultimate responsibility for the Parish Councils as is deemed appropriate.
- iv) That Parish Councils would benefit from an objective and transparent selection process which needs to be parachuted and concretized in the governance structure of all Parish Councils irrespective of the sum involved (whether below or above five hundred thousand dollars \$500,000.00). If this is not done then the loopholes that remain unplugged will encourage and fortify unethical behavior by persons so minded. Public confidence will suffer and the credibility of the Parish Council award of contracts process would also be undermined. Of course the plugging of these loopholes is a matter which falls within the remit of the policy makers and/or parliament.

I take this opportunity to express my appreciation to you and your staff for a detailed and thorough report.

Sincerely,



Paula V. Llewellyn, Q.C. (Ms.)

Director of Public Prosecutions

cc: The Honourable Mr. Noel Arscott

*Minister of Local Government*

Mrs. Dionne Jennings

*Permanent Secretary in the Ministry of Local Government*