



## ADVISORY OPINION

**TO:** Scott Sellers, City Manager, City of Kyle

**FROM:** Doug Montgomery, Ethics Compliance Officer

**DATE:** May 6, 2022

**RE:** City Manager's consulting business

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**Question presented:** Whether your personal consulting company, Municipal Consulting, LLC, may do business with other municipalities by assisting them in contracting with a transportation firm to provide transportation services to residents and to what extent might the business conflict with the City of Kyle Code of Ethics.

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**Executive Summary:** There is no inherent ethics violation in MC working with other municipalities to enhance services to their citizens. However, conflicts of interest may arise if a neighboring municipality uses those services to the detriment of the City of Kyle, or one of the third-party transportation network companies uses their relationship with MC to gain an upper hand in future contract negotiations with the City of Kyle.

**Factual background:** Scott Sellers, the City Manager for the City of Kyle was authorized by the City Council to engage in outside employment (consulting). As a result, Mr. Sellers created a company called Municipal Consulting, LLC (hereinafter "MC") and ultimately began marketing Transit Ridesharing Inclusive Public Private Partnership (TRIPPP) which is based off the City of Kyle's Uber \$3.14 ridesharing program. Mr. Sellers hired a former council member named Rick Koch as an independent contractor to contact various municipalities across the State of Texas in order to promote the TRIPPP idea and ultimately profit off consulting with those municipalities regarding the same.

The purpose of this advisory opinion is to strictly determine whether a violation of the Code of Ethics has occurred and generally describe possible scenarios where ethics violations could occur. The purpose is not to provide policy advice to the City Council nor opine on whether Mr. Sellers breached any conditions precedent in exchange for Council approval of his request to engage in outside employment.

**Issue one:** Is consulting with other municipalities a violation of Sec. 2-176 of the Code of Ethics governing conflicting outside employment?

The general rule under Sec. 2-176 is based on a reasonableness standard. The section states that the city employee cannot “engage in concurrent outside employment which could be reasonably expected to impair independence of judgment, or faithful performance of, official duties.”

The alleged purpose of MC is to assist municipalities in creating a program similar to one already in use within the City of Kyle. Under these current facts, it is difficult to see how the promotion of this program, or programs very similar, in other municipalities could reasonably be expected to interfere with Mr. Sellers’ independence of judgment or faithful performance of his official duties. This conclusion is based on the fact that promotion of programs similar to Kyle’s Uber \$3.14 program is directly aligned with Kyle’s current utilization of the program.

However, it is conceivable that the facts could change which may lead to a problem. For example, if the City of Kyle’s Uber \$3.14 program ceased to be a program that was in the best interests of the City, then Mr. Sellers’ involvement in actively promoting a similar program for other municipalities could reasonably be expected to interfere, if not impair, his judgment as it applies to the program’s use in the City of Kyle. In other words, he may feel compelled to defend a program that is no longer viable or financially the best option for the City because he will have a financial interest in the success of similar programs in other municipalities.

If such a scenario were to occur, then the best course of action would be for Mr. Sellers to recuse himself from the decision-making process on whether to cancel the program in Kyle. A recusal would not interfere with the “faithful performance” prong of his official duties under Sec. 2-176 because he cannot be “unfaithful” in the performance of a duty in which he has recused himself. If the City Council believes that recusal by the City Manager is a *de facto* failure in the performance of his duties, then it should reconsider whether to allow Mr. Sellers to engage in outside employment at all.

**Issue two:** Will the act of MC working with transportation network companies (TNCs) result in an improper economic benefit (Sec. 2-171), or unfair advancement of private interest (Sec. 2-172) if/when Kyle’s Uber \$3.14 program needs modification or renewal?

Section 2-171 of the Code of Ethics prohibits a city employee from taking an official action that he or she knows is likely to affect the economic interests of the employee. The issue here is very analogous to the scenario above. The Uber \$3.14 program is already in place so Mr. Sellers’ promotion of the program or ones like it are directly aligned with the goals of the City of Kyle. However, if those goals were to change or if the City entered into contract negotiations with Uber, then there could be a potential for a violation of this section.

A portion of Section 2-172 prohibits reciprocal favors. The rule states that a city employee may not enter into an agreement or understanding with any other person that official action by the employee will be rewarded or reciprocated by the other person, directly or indirectly. Where this rule is most likely to be violated is when it comes time for the City of Kyle to revisit the agreement

with Uber. If by the time the agreement is being renegotiated or up for renewal, and Mr. Sellers has successfully consulted with multiple municipalities and built a relationship with Uber, then Mr. Sellers could, or at least appear to benefit either directly or indirectly by supporting renewal of the contract with Uber.

Again, as stated above, the remedy for this is for Mr. Sellers to recuse himself from any negotiation or recommendation of renewal of the previous contract with Uber for the \$3.14 program. The recusal process is clearly outlined in Sec. 2-171(b).

**Issue three:** Is MC's use of the City's address at City Hall for the purposes of a registered office address with the Secretary of State an improper use of public property and resources under Sec. 2-177?

To analyze whether this could possibly be a violation of the Code of Ethics, it is important to understand the purpose of a registered office address for the Texas Secretary of State. Per the Secretary of State website, the address must be the following: 1) a physical location where the registered agent may be found during business hours, and 2) a location where the agent may receive occasional mail from the Secretary of State.<sup>1</sup>

The act of Mr. Sellers listing City Hall as his registered office address comports with the requirements of the Secretary of State and would be a logical address to provide due to the fact that Mr. Sellers is likely to be at City Hall during normal business hours.

However, even though this act complies with the requirements of the Secretary of State, it may not comply with the prohibition found in Section 2-177 of the Code of Ethics. This section states that city employees shall not use, request, or permit the use of city facilities, personnel, equipment, or supplies for private purpose.

While Mr. Sellers' business is certainly a private purpose, the question is whether listing the City Hall address rises to the level of "use" of city facilities and/or personnel? A good analogy here is when an employee uses the City Hall address to receive an Amazon delivery to avoid having an expensive item sit on their porch all day. The question becomes whether the person collecting the mail on behalf of the City, or picking up the phone to see if Mr. Sellers is available in the event of a process server, constitutes use of City facilities or personnel. The answer probably depends on the amount of mail and time spent by City personnel.

From the facts available, a single letter from the Secretary of State was received at City Hall related to MC which immediately prompted Mr. Sellers to remove the City Hall address from the Secretary of State website. No process servers arrived at City Hall looking to serve Mr. Sellers with any lawsuits related to his private business. Therefore, the only "use" that occurred was with the single letter received at City Hall.

As the ethics compliance officer, I would have a very difficult time recommending a serious punishment or sanction as a result of any employee's use of the City Hall address for the collection of mail on very rare occasions. Obviously, if packages were delivered everyday which

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<sup>1</sup> <https://www.sos.state.tx.us/corp/registeredagents.shtml>

required significant staff time sorting or stacking boxes of items, then there might be a need to reprimand the employee. However, that does not appear to be the case here.

Clearly, the intent behind Sec. 2-177 is to prohibit the expenditure of taxpayer dollars, i.e. public property and resources, on private endeavors. I do not see how the receipt of a letter results in the use of taxpayer dollars amounting to a Code of Ethics violation and certainly not one warranting official reprimand or punishment.

**Issue four:** Is MC's hiring of Rick Koch as a contractor a violation of any of the provisions in the Code of Ethics relating to former City Officers and employees?

Subdivision III, encompassing Sections 2-201 through 2-204 of the Code of Ethics, outlines what former City Officials are prohibited from doing once they leave office. These prohibitions would mainly apply to Mr. Koch and not Mr. Sellers. However, there could be some duty on the part of Mr. Sellers if he knew Mr. Koch was violating an ethical rule.

Sections 2-202 through 2-204 mainly pertain to the former official's engagement directly with the City of Kyle. In the facts presented, Mr. Koch is not engaging in business directly with the City of Kyle and therefore none of those prohibitions apply in this scenario.

Section 2-201 pertains to the former official's use of confidential information that is not already available to the public. This is the one section that could apply to Mr. Koch's employment with MC and ultimately Mr. Sellers as well. For example, if Mr. Koch possessed knowledge of confidential information related to Kyle's Uber \$3.14 program and divulged that confidential information during the course of his employment with MC, then Mr. Koch would have committed a violation. If Mr. Sellers knew Mr. Koch was divulging such information, then he too would be committing a violation.

As long as Mr. Koch is not divulging any confidential information he obtained while serving on City Council, then it is not a violation of the Code of Ethics for him to be employed by MC for the purposes of this transportation program.

End of Opinion.