

OHIO ETHICS COMMISSION

Ann Marie Tracey, *Chair*
Ben Rose, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

June 2, 2008

Informal Opinion 2008-INF-0602-3

Hearcel F. Craig
Columbus City Council
City Hall

Dear Mr. Craig:

On February 6, 2008, the Ethics Commission received your request for an advisory opinion. In your letter, you explained that you are a council member for the City of Columbus. (City). You asked whether the Ohio Ethics Law and related statutes prohibit you from seeking and accepting employment from the Scioto Concrete Company (Scioto) as Development Manager in the Marketing Department.

You stated that Scioto currently does not seek contracts with the City. However, you also stated that one of the two owners of Scioto is also the principal owner of a road construction company that does bid on City contracts. You further stated that Scioto is not a subsidiary of the road construction company.

Brief Answer

As explained below, you are prohibited from seeking or accepting employment with Scioto, unless you can comply with significant restrictions in the Ethics Law and related statutes that are discussed in this opinion.

For example, if you want to seek or accept employment with Scioto, you are prohibited from participating as a council member in any matter that would provide a definite and direct pecuniary benefit or detriment for Scioto, its owners, or the construction company. You are prohibited from receiving compensation to represent Scioto by appearing before or submitting documents, reports, or plans that you personally prepared to any City agency even if the City council is not required to act on the matter. You are prohibited, while you serve on City council, and for one year after leaving the position, from representing any person before any public agency on any matter in which you personally participated as a City council member.

General Restrictions upon Private Employment

R.C. 102.03(D) and (E) prohibit a public official or employee from engaging in private employment if a conflict of interest exists between his public and private positions. Ohio Ethics Commission Advisory Opinion No. 2004-03. In 1996, the Ethics Commission issued a comprehensive opinion, detailing the application of the conflict of interest law to outside employment situations. A copy of Advisory Opinion No. 96-004, which explains these restrictions, is enclosed.

Soliciting, Accepting, and Securing Things of Value—R.C. 102.03(D) and (E)

As a member of City council, you are subject to R.C. 102.03(D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

R.C. 102.01(B) and (C).

The Commission has explained that a "thing of value" is of such a character as to have a substantial and improper influence on a public official if it could impair the official's objectivity and independence of judgment because: (1) it is of a substantial nature or value; and (2) it is from a source that is doing or seeking to do business with, regulated by, or interested in matters before the agency the official serves. Adv. Ops. No. 2001-03 and 2004-03. Compensation for private employment is within the definition of "anything of value" for R.C. 102.03(D) and (E). R.C. 102.01(G) and Adv. Op. No. 89-008. Because compensation for private employment or business activity provided by any of these sources is of such a nature as to have a substantial and improper influence on a public official, R.C. 102.03(D) and (E) prohibit a public official from using his or her position to secure, and from accepting, compensation from these sources.

The compensation that you would receive from your employment with Scioto will be of a substantial nature or value. While Scioto itself does not do business with the City, one of its two owners is the principal owner of a road construction company that does. The owner of Scioto is, therefore, an improper source of anything of value provided to City officials or employees. For that reason, R.C. 102.03(D) and (E) would prohibit you from using your position to secure, and from accepting, employment from Scioto.

However, a public official may be able to accept compensation for employment with an otherwise prohibited source if he or she can withdraw from consideration of matters that definitely and directly affect his outside employer. Adv. Op. No. 96-004. A member of a public board can withdraw from matters before the board, because it is the board itself that is empowered to make decisions. Adv. Op. No. 92-009.¹

In order to accept employment with Scioto, you must be able to fully withdraw from consideration of matters before the City that definitely and directly affect Scioto, and the individual owners of Scioto. In other words, you can only accept compensation from Scioto if you are able to fully withdraw from matters affecting Scioto and its owners, including matters that affect the construction company owned by one of Scioto's owners. You would be required to remove yourself from council votes, deliberations, and formal and informal discussions on these matters. Even if you are able to withdraw, you must also abide by the specific outside employment application of the prohibition in R.C. 102.03(D).

Securing a Benefit for an Employer—R.C. 102.03(D)

R.C. 102.03(D) prohibits a public official from using the authority or influence of his position to secure anything of value for himself. In addition, R.C. 102.03(D) prohibits the official from using his position to secure a benefit for others with whom he has a close familial, economic, business, or other relationship, including an outside employer. Adv. Op. No. 97-002. Any financial benefit or detriment that Scioto, its owners, or any other companies in which they are principal owners would realize as a result of City decisions is a thing of value. Adv. Op. No. 2007-01.

R.C. 102.03(D), therefore, prohibits you from voting, discussing, deliberating, recommending, or acting within the scope of your authority as a City council member in any matter that would secure a definite and direct financial benefit or detriment to Scioto, its owners, and any other concerns in which they are principal owners. You are also prohibited from formally or informally lobbying other council members or City officials, directing other City personnel, and using your City Council position to secure a particular outcome on any matter that would provide a definite and direct financial benefit or detriment to Scioto, its owners, or any other companies in which they are principals.

In Advisory Opinion No. 96-004, the Commission delineated the specific application of R.C. 102.03(D) to outside employment issues. Some of the restrictions may be directly relevant to you in your employment at Scioto. Specifically:

¹ By contrast, an individual office holder who does not serve on a governing board, and in whom decision-making power is vested by statute, cannot withdraw from matters before his or her office in order to seek outside employment. Adv. Op. No. 92-009.

- (1) You are prohibited from lending the stature inherent in your public position to promote or advocate on specific matters for your private employer, its owners and their other business interests, any of your employer's clients, or any other person in connection with your employment. For example, you are prohibited from using your title as City council member or identifying your public office on promotional materials related to your private employment or in settings where you are specifically engaged in advancing Scioto's interests or the interests of its owners. Adv. Op. No. 2004-03. However, you would not be prohibited from noting your public title or office on materials intended for general distribution, such as resumes or directories, provided that the materials are not prepared for the sole purpose of advocating or advancing Scioto's interests;
- (2) You are prohibited from using your relationship with other City officials and employees to secure favorable decisions or actions on matters that definitely and directly affect Scioto or its owners. For example, if council is considering a matter related to a contract with the road construction company that is owned by one of Scioto's owners, then you would be prohibited from discussing the matter with other City council members, or any other City officers or employees;²
- (3) You are prohibited from using your public position or authority in any other way to secure a definite and direct financial benefit for Scioto or its owners.

Advisory Opinion No. 96-004 explains other specific restrictions. For example, you are prohibited from using public time, facilities, personnel, or other resources in conducting Scioto business. You are also prohibited from participating in decisions or recommendations on matters that involve the interests of competitors of Scioto or the road construction company that is owned by one of Scioto's owners. The application of these restrictions is dependent on the facts and circumstances of the specific situation. Adv. Op No. 92-014.

Receiving Compensation of Services Rendered—R. C. 102.04(C)

As a City council member you are subject to R.C. 102.04(C), which provides that no elected city official shall:

[R]eceive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before **any agency . . . of the** entity of which he is an officer or employee.

² This activity would also be prohibited by R.C. 2921.42(A)(1). Because Scioto and its owners are your "business associates," R.C. 2921.42(A)(1) would prohibit you from voting or taking any other formal or informal action on contract matters before council or other City offices involving the road construction company that is owned by one of Scioto's owners. Adv. Op. No. 2007-01 (an employer is the "business associate" of its employees).

“Compensation,” as used in R.C. 102.04(C) is “money, things of value, or financial benefit.” R.C. 102.01(A). A matter is “before” a public agency “when it is being considered by, decided by, or in the presence of or under the official purview of” a governmental agency. Adv. Op. No. 2007-03. Therefore, R.C. 102.04(C) prohibits you from receiving compensation to represent Scioto, its owners, or any other party by appearing before or submitting documents, reports, or plans that you personally prepared to, any City agency even if City council is not required to act on the matter.

There are two exceptions to R.C. 102.04(C). The first, in R.C. 102.04(D) is inapplicable to you because it is available only to persons holding a non-elective office. Adv. Op. No. 89-016. The second, in R.C. 102.04(F), provides that the restriction in R.C. 102.04(C) “shall not be construed to prohibit the performance of ministerial functions.” “Ministerial functions” are functions “performed in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of personal judgment upon the propriety of the act being done.” Adv. Op. No. 75-017; *Trauger v. Nash* (1902), 66 Ohio St. 612, 618. Because of the exception in R.C. 102.04(F), you are not prohibited from filing applications for permits or licenses, or performing other acts that are “ministerial functions,” on matters before the City for Scioto or any of its clients. Adv. Op. No. 92-002.

Representation on Matters—R.C. 102.03(A)(1)

In addition to the restrictions in R.C. 102.03(D) and (E) and 102.04(C), you should note R.C. 102.03(A)(1), which reads:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee.

The restriction applies during government service and for one year thereafter.

“Personal participation” includes “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion,” and includes supervision or general oversight of other public officials or employees. R.C. 102.03(A)(1); Adv. Op. No. 91-009.

Representation includes any formal or informal appearance before, or written or oral communication with, any public agency, on behalf of any person. R.C. 102.03(A)(5). R.C. 102.03(A)(1) prohibits a public official or employee from representing any person, on a matter in which he personally participated, before any public agency, and not just before the agency with which he is employed. Adv. Ops. No. 87-001 and 92-005. A “public agency” includes “the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village,

township, and the five state retirement systems, or any other governmental entity.” R.C. 102.01(C).

R.C. 102.03(A)(1) defines the term “matter” to include “any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments.” (Emphasis added.) “Matter” includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. Adv. Op. No. 2004-03. “Matter” also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Id. The term “matter” cannot be interpreted so broadly as to include a general subject matter. Id.

Therefore, R.C. 102.03(A)(1) prohibits you while you serve on City council and for one year after leaving the position, from representing Scioto, its owners, or any other person before any public agency on any matter in which you personally participated as a City council member *unless* your participation was limited to the proposal, consideration, or enactment of rules, ordinances, and resolutions. R.C. 102.03(A) *does not* prohibit you from representing Scioto, its owners, or any other person before public agencies *other than the City* on a matter if your personal participation in the matter was limited to the proposal, consideration, or enactment of City rules, ordinances, resolutions, or charter amendments even if you have personally participated in these matters as a City council member. See also R.C. 102.04(C) (discussed above) (you are prohibited from representing your employer before the City on any matter regardless of the nature of, or your participation in, the matter).

Other Matters—Public Contracts and Confidentiality

R.C. 2921.42(A)(4) prohibits you from having a personal interest in any contract between the City and Scioto. You stated that Scioto is not currently seeking to do, or doing, business with the City. However, if Scioto seeks City contracts at some point in the future, you would be prohibited from having an interest in those contracts. As a Scioto employee, you would have a definite and direct interest in Scioto’s contract if: (1) your responsibilities at Scioto include preparing, submitting, or negotiating the contract; (2) you would perform work or receive compensation under the contract; (3) your tenure, compensation, or other benefits received from Scioto would be based or dependent upon the contract; or (4) the facts otherwise indicate that you would have a definite and direct pecuniary or fiduciary interest in the contract as a result of your position with Scioto. Adv. Op. No. 89-008.

You should contact this office for further guidance if Scioto seeks to contract with the City. A separate advisory opinion would be needed to determine whether: (1) you would have an interest in the contract; and (2) any of the exceptions to R.C. 2921.42(A)(4) would apply and allow you to continue to serve both as a Scioto employee and a City council member. Adv. Op. No. 2002-02.

Finally, R.C. 102.03(B) prohibits a public official or employee from disclosing or using confidential information acquired in the performance of his public duties. You are prohibited from disclosing or using any confidential information you acquire through your service on City council. There is no time limit for this restriction. Adv. Op. No. 89-009.

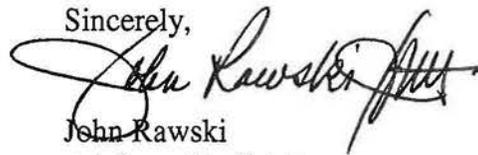
Because of the restriction on disclosure of confidential information, you should not attend the portion of an executive session of City council during which: (1) council will be discussing contracts or other matters in which Scioto, its owners, or the road construction company has a definite and direct interest; or (2) the City attorney will be giving legal advice or sharing privileged information with council regarding contracts or other matters in which Scioto, its owners, or the road construction company has a definite and direct interest. While the law does not require this, the best practice may be to isolate, from among the items to be discussed in the executive session, the items in which Scioto, its owners, or the road construction company has an interest and to designate a separate executive session for discussion of those matters. The distinct separation of matters in which Scioto, its owners, or the road construction company has an interest will facilitate your removal from the executive session.

Conclusion

As explained above, you are prohibited from seeking or accepting employment with Scioto, unless you can comply with significant restrictions in the Ethics Law and related statutes that are discussed in this opinion.

For example, if you want to seek or accept employment with Scioto, you are prohibited from participating as a council member in any matter that would provide a definite and direct pecuniary benefit or detriment for Scioto, its owners, or the construction company. You are prohibited from receiving compensation to represent Scioto by appearing before or submitting documents, reports, or plans that you personally prepared to any City agency even if the City council is not required to act on the matter. You are prohibited, while you serve on City council, and for one year after leaving the position, from representing any person before any public agency on any matter in which you personally participated as a City council member.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 29, 2008. The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,

John Rawski
Advisory Staff Attorney