

**ACTING ETHICS DIRECTOR'S REPORT ON
COMPLAINT REGARDING SCOTT KUBLY'S
CONFLICTS OF INTEREST**

July 6, 2016

I. INTRODUCTION AND SUMMARY OF FINDINGS.

On February 10, 2016, after news articles regarding concerns about the City's purchase and planned expansion of the underperforming Seattle Bike Share program known as PRONTO, the Seattle Ethics and Elections Commission (SEEC) received a formal complaint about the participation of Scott Kubly, the Director of the Seattle Department of Transportation (SDOT), in negotiations with his former employer and bike share management entity Alta Bicycle Share (Alta), later renamed Motivate, to provide services under a new contract with SDOT.

On February 20, 2016, I was engaged to investigate whether the actions of Kubly violated Seattle Ethics Code provisions and, if so, to recommend whether proceedings on said violations should be brought before the SEEC.

During the investigation I interviewed current and former SDOT employees, including Scott Kubly, former PRONTO employees, the current President of Motivate and board members of Puget Sound Bike Share (PSBS). I reviewed numerous news articles and blogs regarding the Seattle Bike Share Program and the bike share program in Chicago as well as a formal bid protest that followed the award of the Chicago Department of Transportation (CDOT) contract for bike share to Alta. I also requested and reviewed numerous City of Seattle e-mails and documents produced by SDOT.

Bike share is a relatively new idea in public transportation and the number of persons with in depth understanding of the issues, mechanics and benefits of such programs is relatively small. The idea of publicly funded bike share programs is not universally embraced and even what constitutes a successful program may be subject to heated debate. When ethical missteps are brought into the debate the impact on careful and considered analysis of the issues can be distorted. It was with those considerations in mind that I examined the available evidence. The parties with whom I spoke were cooperative and, I believe, for the most part, forthcoming. The employees of SDOT are dedicated public servants who take legitimate pride in their commitment to the transportation needs of Seattle.

Requirements of Seattle's Ethics Code are intended to prevent not only the reality of corruption but also the appearance of unfairness. Violations of the Seattle Ethics Code can occur without any malicious intent on the part of a violator. Requiring scrupulous adherence to the requirements provides not only a necessary safeguard against actual

corruption but also supports the public's belief in the integrity of city departments and their employees.

Finding 1: From July 28, 2014 to October 28, 2014, while in the position of Director of Seattle Department of Transportation, Scott Kubly participated in matters in which his former employer, Alta, had a financial interest, without submitting a proposed waiver to his appointing authority for approval by the SEEC Executive Director as required by SMC 4.16.070 A.2.

Finding 2: From January 1, 2014 to August 31, 2015, while in the position of Director of Seattle Department of Transportation, Scott Kubly performed official duties when it could appear to a reasonable person, having knowledge of the relevant circumstances, that his judgement was impaired because of a business or personal relationship, without completing a formal disclosure of his conflict of interest as required by SMC 4.16.070 A.3

Between the dates of January 1, 2015, and August 31, 2015, Kubly performed official duties in City matters involving Motivate (nee, Alta), including proposing and presenting a plan to the executive to expand and modify the bike share system through a renegotiated contractual agreement with Motivate, actual negotiation of contractual terms for an expanded and modified contract with Motivate (nee Alta) as well as obtaining funding for expanding the contract with Motivate and participating in the dissolution of the City contract with PSBS.

Based upon the investigation, and Kubly's acceptance of the factual information above a Settlement Agreement was signed by the parties setting out the above violations and imposing a \$10,000 fine with \$5000 suspended upon no additional violations of the Seattle Ethics Code for a period of two years.

II. FACTS

A. Background

1. Seattle Bike Share

In 2012 the City of Seattle collaborated with non-profit Puget Sound Bike Share (PSBS), to launch a bike share system for the region and to apply for a Federal Transit Administration (FTA) grant to acquire 17 bike share stations for the City of Seattle. The City agreed to purchase the bike share stations by advancing \$1 million to PSBS with the expectation they would be repaid through the FTA grant. SDOT was the direct recipient of the grant funds but intended to transfer the ownership of the stations to PSBS once the \$1M advance was repaid through the grant. SDOT as the grant recipient was and is responsible for daily administration, management and compliance with grant

requirements. The terms of the agreement between the City and PSBS were set forth in the Procurement and Grant Agreement Between Puget Sound Bike Share and the City of Seattle For Bike Share Stations signed by Holly Houser, as Executive Director of PSBS and Nancy Locke, City Purchasing and Contracting Director and Goran Sparrman, as Interim Director of Seattle Department of Transportation.

PSBS hired Alta Planning and Design (Alta Planning), a separate planning consultancy owned by the same individuals who owned and operated Alta Bicycle Share, to design a structure for providing bike share services in Seattle. Alta Planning proposed that a nonprofit entity manage the bike share program but hire an outside daily service and equipment provider. PSBS members tested several applicants' proposals and ultimately selected Alta Bicycle Share as the entity best able to provide the desired level of service and equipment.

2. Scott Kubly

From March 2009 to July 2011 Scott Kubly was Associate Director of the District of Columbia Department of Transportation where he worked with Gabe Klein, the Director. During Kubly's tenure in DC his agency contracted with Alta to expand the DC bikesharing system "by a factor of 10" and increase usage "by a factor of 25". (Exhibit 1: Scott Kubly's LinkedIn profile)

After Gabe Klein was hired as the Commissioner of Transportation for Chicago he hired Kubly in September 2011 as his Managing Deputy Commissioner. During the tenure of Klein and Kubly, 2011-2013, Chicago instituted a bike share program, DIVVY, which was owned and managed by the Chicago Department of Transportation (CDOT). After a fitful bid process Alta was selected to operate the system and provide maintenance and equipment.¹ Subsequent to the award to Alta unsuccessful bidders filed a vigorous protest to the process and the selection of Alta, who bid \$8 M higher than the bid submitted by competitor Bike Chicago.² During the post award bid protest process it came to light that Gabe Klein had not disclosed a 2011 10K contractual

¹ <https://www.youtube.com/watch?v=0wjJeL9EEQ8> Edward Inlow, who would later be promoted to a VP position at Alta, worked with Kubly in instituting the DIVVY bikeshare program and later with Kubly when Kubly was acting President of Alta. Finally, having remained at Motivate, Inlow worked with Kubly after Kubly became the Director of SDOT. During the investigation I also received information that Inlow and Kubly developed a personal friendship.

<http://bytesoverbagels.com/elliott-greenberger-divvy-scott-kubly-cdot/> Kubly appeared with J. Greenberger, the Alta/ Motivate General Manager of DIVVY, CDOT's bikeshare to discuss the program as well as the collaborative and informal working relationship established between Kubly and Greenberger .

² I did not try to determine whether there were genuine conflicts that impacted the Chicago bid process since the parameters of my investigation were limited to events in Seattle.

relationship with Alta prior to becoming Commissioner of Transportation in Chicago. After leaving Chicago Klein also provided free consulting advice to Alta. (Exhibit 2: Chicago Sun Times, March 17, 2012; Bike Chicago Bid Protest, April 26, 2012; Crain's Chicago Business, January 23, 2014, <http://www.lasisblog.com/2012/05/03/public-bike-share-delays-snafus-and-improprieties/> <http://www.lasisblog.com/wp-content/uploads/sites/18/2012/05/Bikesharetimeline.pdf>)

In November 2013, three days after Gabe Klein resigned as Commissioner, Kubly resigned as well, effective on December 27, 2013. On January 1, 2014 Kubly became the Senior Advisor/Acting President of Alta. In that role he was responsible for managing the day-to-day operations of the company for all of its clients except the City of Chicago. Kubly was aware that the Chicago Ethics Code prevented him from participation at Alta with matters involving their contract with CDOT (Exhibit 3: Governmental Ethics Ordinance Chapter 2-156 of the Municipal Code of Chicago, 2-156-100(b) Post-Employment Restrictions ...) and he took care to consult with the appropriate Chicago ethics official and Alta to make certain he was in compliance with the code requirements. During the time that Kubly was the acting President of Alta he did not participate in matters involving Chicago's bike share program. He was involved in developing new business for Alta and he engaged with Puget Sound Bicycle Share regarding matters necessary to launch the initial Seattle bike share program. (see Exhibit 7). Kubly officially left employment with Alta on June 30, 2014.

B. Seattle Issues

On July 2, 2014 it was announced that Kubly had been selected by Mayor Ed Murray, to head the Seattle Department of Transportation. At the time of his appointment it was noted that Kubly was coming to the position from his most recent employment as the head of Alta. (Exhibit 4, July 2, 2014, News Release from Mayor Murray's Office) Sometime shortly after Kubly's arrival at SDOT, SEEC Executive Director Wayne Barnett and Strategic Advisor Gary Keese met with him and outlined the the Seattle Ethics and Elections Code requirements to avoid conflicts of interest and appearances of conflicts of interest.

On July 11, 2014, Lorena Gonzalez, in her role as the Mayor's legal advisor, sent a detailed notice to Kubly, via his city e-mail account, outlining Seattle Ethics and Elections Code requirements to avoid conflicts of interest. As an example of the type of document he was required to submit for approval, Gonzalez attached a completed waiver request submitted on behalf of another newly appointed department director. That waiver proposed to protect the City's interests by precluding the new employee from participating in any decisions regarding his prior employer. (Exhibit 5)

After the Gonzalez e-mail was forwarded from Kubly's city e-mail to his personal e-mail account Kubly interlineated his responses to Gonzalez's questions disclosing his immediately preceding employment

with Alta, and the potential for conflicts of interest that could arise from Alta's contract with PSBS. (Exhibit 6) Kubly says that he then inadvertently returned the modified version to his own city e-mail account rather than returning it to Gonzalez. (Exhibit 7: Kubly's Statement) More than a year later, on September 1, 2015, after at least two other notifications in writing of the necessity of the conflict of interest documents, Kubly filed a written conflict of interest disclosure. (Exhibit 8) However, Kubly never submitted a waiver request, with provisions to protect the City of Seattle's interests, to his appointing authority for review and approval by the SEEC Executive Director.

Kubly became a Seattle city employee on July 28, 2014. Over the next eleven months of his employment, and thereafter, Kubly directly participated in matters in which Alta and its successor corporate entity, Motivate, had financial interests on numerous occasions.

According to Kubly between August and October of 2014, he interacted with Alta and PSBS to assess interest in e-bike applications for Seattle bike sharing as well as being involved in equipment testing prior to the PRONTO launch. In the first half of 2015 Kubly negotiated and communicated extensively with Motivate regarding Seattle's application for a TIGER grant to expand Seattle bike share utilizing Motivate's services. (Exhibit 7, Exhibit 9- documented instances of participation in negotiations with Motivate).

On March 30, after internal discussion at SDOT about how best to expand the PRONTO system, Kubly presented a detailed proposal to the Mayor that specifically called for Seattle to take over PRONTO from PSBS in order to efficiently financially stabilize and expand the Seattle bikeshare program. In the presentation Kubly stated his intent to directly interact with the vendor (Motivate) to renegotiate the contract. (Exhibit 10).

In addition to negotiating potential terms with Motivate for an expanded contract, which was to be directly with SDOT, Kubly was a strong proponent within SDOT of accomplishing the SDOT controlled expansion of PRONTO, including implementing an electric bike component³, through a "sole source" contract with Motivate, despite misgivings voiced by other SDOT employees who believed other vendors should be seriously considered. When he was specifically warned that TIGER grant compliance assumed a bid process for the proposed modification and expansion his response was there was a "low risk" that federal grant officials would notice the sole source contract with Motivate in the final TIGER grant proposal. (Exhibit 11; Interviews with former and current SDOT employees)

³ This proposal would have been beneficial to Motivate as it would provide an opportunity for Motivate to test and develop an e-bike system in Seattle that they could then utilize in other markets.

During the period in which Kubly was actively engaged with Motivate in negotiating an SDOT run expansion of PRONTO he was reminded, in writing, of the lack of a written conflict of interest disclosure and the need for a request for waiver on several occasions as follows:

On May 14, 2015 Kubly was copied in a detailed e-mail created by SEEC Strategic Advisor Gary Keese regarding the requirements under the Code for Kubly to seek a waiver and file a disclosure regarding his interactions with Motivate (nee Alta). Keese specifically advised Kubly he needed to conform to the Seattle Ethics and Elections Code Requirements. (Exhibit 12)

On May 28 and June 8, 2015 an SDOT employee prepared and forwarded drafts of a proposed conflict of interest disclosure and a request for waiver proposal first to Nunes-Ueno, then Kubly. The June 8 proposal went directly to Kubly and contained a waiver request proposal that stated in order to protect the City's interests all final decisions on existing or future contracts with Motivate would be performed by City staff other than Kubly. (Exhibit 13; 14) There is no documentary evidence of any response from Kubly to the proposals. Finally, on August 27, 2015, Gary Keese again sent the codes governing the requirements of waiver and disclosure to Kubly (Exhibit 15).

Kubly actively participated in negotiations with Motivate although it could appear to a reasonable person, having knowledge of the relevant circumstances, that his judgement was impaired because of a business or personal relationship with his former colleagues.

During the 12 months after his employment with Alta, during which time he participated in, and had final decision over, matters impacting the financial interests of Alta, and later Motivate, Kubly never submitted a request for waiver which, to conform to the requirements of the ethics code, would have required proposed measures to protect the City's interests. On September 1, 2015, after multiple notifications of the code requirements, Kubly submitted a Disclosure of Appearance of Conflict form (Exhibit 8)

C. Complainant and Investigation

On February 10 2016 a citizen complainant, unconnected to the City of Seattle, the parties, or any of the entities involved in the City of Seattle bike share program, lodged an official complaint with the SEEC that Kubly had failed to adhere to the Seattle Ethics Code. Contact with the complainant confirmed that the complainant's information came solely from news reports published about Kubly's prior connections with Alta. The complainant believed, based upon the information then available to the public, that it was possible that Kubly had used his official position to benefit his prior employer and/or former colleagues, and asked the SEEC to investigate.

The subsequent investigation shows that Kubly was advised about the specifics of the disclosure and waiver requirements, not only verbally by Wayne Barnett, the Executive Director and Strategic Advisor Gary Keese of SEEC, but also on a minimum of three occasions in writing, including being given precise examples of suggested methods designed to protect the interests of the City of Seattle. Nonetheless, Kubly failed to comply with the waiver requirement or file a required written disclosure during the time he was actively participating in decisions that impacted the financial interests of his prior employer. Additionally, it is clear that Kubly advocated within his organization for sole sourcing expansion of the bike share program to Motivate despite the advice of other SDOT employees who were also working on the expanded bike share plans.

III. CONCLUSIONS

Scott Kubly violated the requirements of SMC 4.16.070 A.2, by participating in matters involving the financial interests of his prior employer Alta, later known as Motivate, on multiple occasions between his beginning employment with the City of Seattle in July 28, 2014 and June 30 2015, the twelve month period following his employment with Alta, without obtaining an approved waiver from the Executive Director of SEEC. Arguably, when Alta became Motivate Kubly's technical responsibility to obtain a waiver approved by the SEEC Director prior to being involved in matters pertaining to a prior employer ended. However, many of the Alta people Kubly previously worked with remained in management positions with Motivate which influenced possible public perception of a conflict of interest.

Kubly violated the requirements of SMC 4.16.070 A.3.by failing to execute a written disclosure of a conflict of interest from January 1, 2015 to August 31, 2015, during which time he performed numerous official duties in a manner that could appear to a reasonable person having knowledge of the relevant circumstances that his judgement was impaired because of a personal or business relationship.

This investigation did not determine Scott Kubly's motivation for failing to conform to the Code requirements. No evidence of direct financial gain to Kubly from his actions was found. Kubly's statement about his failure to file the waiver request or the formal conflict of interest disclosure is that he "simply didn't do it." There is no reason he points to that justifies the lapse of follow through on his part. Kubly accurately notes that he has a lot of issues to deal with in his position, suggesting perhaps that this just got overlooked.

However, after spending hours talking to Kubly and his co-workers and examining his e-mails and work product, he comes across as a highly intelligent, motivated, energetic and engaged manager who is very involved in all details at SDOT-even minor personnel issues.

Furthermore, Kubly had had a recent experience with the post-employment Ethics Code requirement in Chicago. He carefully adhered to it when transitioning from his position at CDOT to interim President of Alta. And Kubly personally witnessed the negative publicity in Chicago when Gabe Klein's failure to disclose a prior contract with Alta called into question the validity of the award of the Chicago bike share contract to Alta, as well as the integrity of the parties involved.⁴ Given all of the above it is difficult to credit Kubly's failure to adhere to the Seattle Ethics and Elections Code requirement to mere carelessness. To do so would discount his prior history of being conscientious about specific ethical requirements when he left Chicago to become President of Alta, as well as detail in general. It would also ignore his leadership style of maintaining "hands on" control over all important SDOT matters, which is a more reasonable explanation of why he might reject accepting the kind of restrictions on his participation that the sample proposed waivers required.

Nonetheless, that's not the equivalent of a finding that Kubly was motivated by any personal gain, or gain for persons other than the City of Seattle. There is no evidence that contradicts Kubly's assertion that he intended to act solely in the best interests of the City of Seattle at all times. Good intentions are, however, no defense to violations of the Seattle Ethics Code, which exists not only to insure officials act solely in the interests of the City, but also to provide governmental transparency and ensure public trust in the legitimacy of governmental action.

There has been a substantial amount of public interest in SDOT's procurement of \$305,000 from the Seattle City Council in December 2015 to keep Pronto from defaulting on money owed, primarily to Motivate. However, Kubly came into compliance with the Seattle Ethics Code provisions I was asked to investigate after he filed the required disclosure on September 1, 2015. I have not undertaken any investigation of whether or not his actions surrounding this request for funds were proper. My understanding is that once the Ethics Code requirements are met it is for the Appointing Authority, in this case the Mayor, to determine the propriety of an appointee's involvement with entities that might raise appearance of fairness concerns

⁴ Only recently, on June 28, 2016, Kubly filed a Disclosure Notice that Gabe Klein was paid speaking fees as a transportation expert at a speaking series hosted by SDOT in Spring 2015 and is currently working as a sub-consultant on an SDOT planning effort.