

No. D-1-GN-15-001031

TEXAS DISPOSAL SYSTEMS, INC.,	§	IN THE DISTRICT COURT OF
and JENNIFER THOMAS,	§	
Plaintiffs,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
	§	
CITY OF AUSTIN, TEXAS,	§	
Defendant.	§	<u>98TH</u> JUDICIAL DISTRICT

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

Come now Plaintiffs Texas Disposal Systems, Inc. ("Texas Disposal") and Jennifer Thomas ("Ms. Thomas"), sometimes referred to herein collectively as "Plaintiffs," and file this lawsuit under the Texas Public Information Act seeking to compel the City of Austin (the "City") to release public information that the City has refused to supply, via writ of mandamus pursuant to Section 552.321(a) and petition for declaratory judgment pursuant to Section 552.3215, Texas Government Code.

DISCOVERY, PARTIES, AND VENUE.

1. Discovery in this matter shall be conducted under Level 3, Tex. R. Civ. P. 190.3.
2. Plaintiff Texas Disposal Systems, Inc. is a Texas corporation with its principal place of business in Travis County, Texas. Texas Disposal is the employer of Plaintiff Jennifer Thomas. Ms. Thomas made the Texas Public Information Act request that is the subject of this action. Her request was made in the course and scope of her employment with Texas Disposal.
3. Defendant City of Austin is a Texas home-rule municipal corporation. It may be served with service of process pursuant to Section 27.024(b) of the Texas Civil Practice and

Remedies Code by serving the Mayor, Stephen Adler, or the City Manager, Marc Ott, at 301 W. 2nd St., Austin, Texas.

4. This Court has venue and jurisdiction under Tex. Gov't Code § 552.321(b) because the main offices of the defendant governmental body, the City of Austin, are in Travis County, Texas.

FACTS.

A. The improper investigation and conclusions of the City Auditor.

5. This lawsuit has its origin in a series of improper and unauthorized actions taken by the Office of the City Auditor (the "Auditor"). At some point before April 18, 2014, the Auditor allegedly received an anonymous complaint contending that Daniela Ochoa Gonzalez, a volunteer citizen member of the City's Zero Waste Advisory Commission, had violated City ethics rules.

6. The City's ethics rules are located in Chapter 2-7 of the Austin City Code, which is titled "Ethics and Financial Disclosure." The City Code specifically gives jurisdiction over Chapter 2-7 to the City's Ethics Review Commission. Austin City Code § 2-7-26 ("The Ethics Review Commission has jurisdiction over this chapter [2-7]"). The Code further provides that the Ethics Review Commission "shall hear and rule on sworn complaints alleging violations of the provisions within the committee's jurisdiction." *Id.* Nowhere does Chapter 2-7 confer authority upon the City Auditor to "investigate" alleged violations of Chapter 2-7.

7. Despite the clear language of the City Code, the anonymous complaint against Ms. Ochoa Gonzalez was not turned over to the Ethics Review Commission for investigation. Rather, the Auditor's Office arrogated to itself the authority to "investigate" the allegations,

despite the absence of any such authority in the City Code – which, again, plainly gives that authority to the Ethics Review Commission, not the Auditor.

8. Even more remarkably, the Auditor went far beyond just “investigating.” On April 18, 2014, the Auditor publicly issued a document titled “Report on Allegations Involving a Zero Waste Advisory Commissioner” (copy attached hereto as Exhibit A). The document purports to be a report “of a recent investigation conducted by the City Auditor’s Integrity Unity (CAIU) regarding alleged integrity violations” on the part of Ms. Ochoa Gonzalez. This report will be referred to as the “Auditor’s Report.”

9. The Auditor’s Report, in its summary of findings, states – in boldface type – that “[t]he evidence gathered through our investigation substantiated the allegation that Ochoa Gonzalez violated the City’s conflict of interest requirements.” More specifically, the Auditor’s Report alleges that:

Ochoa Gonzalez’s actions appear to constitute violations of:

- City Code § 2-7-63 *Prohibition on Conflict of Interest*
- City Code § 2-7-64 *Disclosure of Conflict of Interest*

10. The Auditor’s Report received widespread publicity, including prominent media coverage. Despite the lack of authority for the Auditor to determine whether ethics rules had been violated, the Auditor’s Report was widely received as a finding that Ms. Ochoa Gonzalez had violated those rules. As a result of the Auditor’s Report, Ms. Ochoa Gonzalez was forced to resign from both her volunteer position on the Zero Waste Advisory Commission, and from her job at the University of Texas.

11. The Auditor’s Report was unequivocally, 100 percent wrong. The Auditor failed to apply the proper legal standards required by the City’s ethics ordinances. Ms. Ochoa Gonzalez

did not violate the City's ethics rules. The City's Ethics Review Commission – the body with the actual authority to investigate ethics rules and to determine if they have been violated by a City Official such as Ms. Ochoa Gonzalez – refused to take action against Ms. Ochoa Gonzalez based on the Auditor's Report.

12. The City Council went even further, passing a resolution (a copy of which is attached hereto as Exhibit B) confirming that the Ethics Review Commission “has sole jurisdiction to rule on sworn complaints alleging violations of the Code of Ethics” and noting that the Auditor's report “failed to demonstrate how the alleged conduct might constitute a conflict of interest.” The Council's resolution also explicitly refused to accept the Auditor's Report, apologized to Ms. Ochoa Gonzales, and directed that any copy of the Auditor's Report “shall contain on the first page a conspicuous notice in bold type which shall read: ‘Notice: This Report has not been accepted by the Austin City Counsel and is subject to Resolution No. 20141016-024, passed on October 16, 2014.’”

B. The Public Information Act request, and the City's response.

13. Ms. Thomas submitted a Public Information Act request to the City on May 6, 2014. A copy of this request is attached hereto as Exhibit C. The subject of the request was “CAIU [City of Austin Integrity Unit, a division of the Auditor's Office] investigation into alleged conflict of interest violation by Daniela Ochoa Gonzalez.” Ms. Thomas requested copies of the following:

All documents, notes, and communications relating to and including: the initial conflict of interest allegation filing/report, City Auditor's Office investigation report and supporting documentation, Ethics Review Commission hearing documents, hearing transcripts, video and/or audio recordings, interviews, working papers, notes, email communications, written correspondence, and all other documents or media relating to the investigation of the conflict of interest

allegation against Daniela Gonzalez[,] the Ethics Review Commission hearing, and any follow-on investigations or reporting following the Commission hearing.

14. In response to the PIA request, the City produced only the Auditor's Report and a few pages of emails to third parties, primarily media outlets. The City produced no internal documents. Rather, the City claimed that *all* other responsive documents were subject to exemptions from disclosure under the Public Information Act ("PIA"). In a letter dated May 19, 2014, the City requested an opinion from the Attorney General as to whether the documents were exempt from disclosure under the attorney-client privilege, or under the "audit working paper" exemption in the PIA, Tex. Gov't Code § 552.116. A true and correct copy of the City's letter to the Attorney General is attached hereto as Exhibit D.

15. To qualify for the Section 552.116 exemption, a document must be "[a]n audit working paper of an audit" conducted by a governmental entity. Tex. Gov't Code § 552.116(a). The relevant section of the PIA defines "audit" as "an audit authorized or required by ... the charter or ordinance of a municipality." *Id.* § 552.116(b)(1). The PIA does not define "audit," but the generally accepted meaning is a "[s]ystematic inspection of accounting records involving analyses, tests, and confirmations." Black's Law Dictionary at 131 (6th ed. 1990). An investigation regarding alleged nondisclosure of potential conflicts of interest is not a systematic inspection of accounting records, and therefore is not an "audit."

16. The investigation of Ms. Ochoa Gonzalez that led to the issuance of the Auditor's Report was not an audit authorized or required by the City of Austin's charter or ordinance; in fact, it was not an "audit" at all. Therefore, the requested documents are not exempt from disclosure as "audit working papers."

17. As set forth above, the Austin City Code authorized only the Ethics Review Commission – not the City Auditor – to investigate allegations of ethics rules violations, and to make findings regarding alleged violations. Nothing in the City Code gives this authority to the Auditor. Thus, the Auditor’s “investigation” does not fall within the definition of “audit” in the PIA, and the audit working papers exception of Section 552.116 is not applicable.

18. The City argued to the Attorney General that an entirely different chapter of the City Code authorized the City Auditor’s “investigation.” A portion of Chapter 2-3, titled “City Auditor,” was cited by the City as alleged authorization. Section 2-3-5 sets forth the powers and duties of the City Auditor. Not once does that section mention the word “ethics” (or any variation thereof) or the term “conflict of interest,” nor does it confer authority upon the City Auditor to investigate alleged violations of Chapter 2-7’s provisions.

19. Section 2-3-5 specifically sets out the Auditor’s duties if it believes that a City official may have violated the law. The Auditor “shall” consult with the city attorney and “immediately report the suspected violation to the appropriate authority” – here, the Ethics Review Commission. The City Code does not authorize the Auditor to conduct investigations other than those specifically set out in Section 2-3-5, or to reach conclusions regarding alleged conflict of interest violations.

20. In its letter to the Attorney General, the City quoted the entirety of Subsection D of Section 2-3-5, which provides that the Auditor may conduct certain specified types of “audit work,” and then alleged in conclusory fashion that “[t]he City Auditor’s authority to conduct this investigation is found in the City’s Charter and Code provisions outlined above.” Ex. B at 4. Such a conclusory allegation is insufficient to meet the City’s burden of overcoming the

presumption of openness established by the PIA. *Thomas v. Cornyn*, 71 S.W.3d 473, 480-81 (Tex. App. – Austin 2002, no pet.) (“A governmental body seeking to withhold information bears the burden of establishing to the attorney general that the requested information falls within an exception from disclosure under the Act.”).

21. The City’s mere quotation, in full, of six subsections of an ordinance – without explaining which provisions (some of which include sub-subsections) allegedly confer any authority on the City Auditor to investigate purported conflicts of interest by volunteer members of City commissions – is alone sufficient to support a ruling that the City has not met its burden to show applicability of the “audit working papers” exception. Further, the City’s failure to adequately address the substance of its own claims operates as a waiver of its reliance on those City Code provisions. Even if the substance of the cited City Ordinance sections is examined, the same conclusion applies: Subsection D of Section 2-3-5 nowhere authorizes the City Auditor to conduct ethics investigations of City volunteers. Such authorization simply does not exist anywhere in the City Code.

22. Ms. Thomas responded with a letter brief to the Attorney General, a true and correct copy of which is attached hereto as Exhibit E. The letter brief set forth the above arguments, with additional detail. Ms. Thomas’ letter brief also encouraged the Attorney General to examine carefully the City’s claim of attorney-client privilege, to ensure that the City was not attempting to improperly “cloak” otherwise non-privileged material simply by sending it to a lawyer. *See, e.g., Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (“[A] person cannot cloak a material fact with the privilege merely by communicating it to an attorney.”).

23. The Attorney General's office issued a letter ruling (OR2014-12644) on July 22, 2014 (copy attached hereto as Exhibit F). Without conducting any analysis or explaining its rationale, the non-precedential letter ruling (which is entitled to no deference) concluded that the documents constituted "audit working papers under section 552.116," and thus were exempt from disclosure under the PIA.

CAUSES OF ACTION

Count One

Petition for Writ of Mandamus:

The Requested Information Is Subject to Disclosure Under the PIA.

24. Plaintiffs incorporate by reference all allegations made herein.

25. Section 552.321(a) of the PIA provides that a requestor "may file suit for a writ of mandamus compelling a governmental body to make information available for public inspection if the governmental body ... refuses to supply public information."

26. Under the PIA, Plaintiffs are requestors, the City of Austin is a governmental body, the information requested by Plaintiffs is "public information" as defined in Section 552.002(a) of the PIA, and the City of Austin has refused to supply Plaintiffs with that public information. The requested information, in whole or in part, is not subject to any exemptions from disclosure under the PIA.

27. Plaintiffs seek a writ of mandamus compelling the City of Austin to make the requested information set forth herein available to Plaintiffs and the public.

Count Two

Petition for Declaratory Judgment and Injunctive Relief:

The Requested Information is Subject to Disclosure Under the PIA.

28. Plaintiffs incorporate by reference all allegations made herein.

29. Section 552.3215 of the PIA proves that an action for declaratory judgment or injunctive relief may be brought against a governmental body that has violated the PIA.

30. The City of Austin has violated the PIA by refusing to supply Plaintiffs with public information that is not subject to any exemptions from disclosure, as described herein.

31. Plaintiffs seek declaratory judgment that the requested information is public information and that the requested information, in whole or in part, is not subject to any exemptions from disclosure under the PIA.

32. Plaintiffs seek an injunction ordering the City of Austin to make available to Plaintiffs, and the public, the requested public information that is not subject to any exemptions from disclosure under the PIA.

33. In bringing this action, Plaintiffs have retained attorneys, and seek to recover costs of litigation and reasonable attorneys' fees incurred.

PRAYER

Wherefore, premises considered, Plaintiffs Texas Disposal Systems, Inc. and Jennifer Thomas seek the relief requested herein, including issuance of a writ of mandamus against the City of Austin; declaratory judgment; issuance of an injunction; attorneys' fees and costs of court; along with all such other relief to which they may show themselves justly entitled.

[signature block on following page]

Respectfully submitted,

/s/ James A. Hemphill

James A. Hemphill

State Bar No. 00787674

(512) 480-5762 direct phone

(512) 536-9907 direct fax

jhemphill@gdhm.com

GRAVES, DOUGHERTY, HEAPEN & MOODY, P.C.

401 Congress Ave., Suite 2200

Austin, Texas 78701

(512) 480-5600 phone

April 18, 2014



Investigation Highlights

Why We Did This Investigation

In September 2013, our office received information alleging a conflict of interest involving a Zero Waste Advisory Commissioner. As a result, we conducted an investigation as part of our responsibility under the Austin City Charter.

Distribution

Mayor and Council
City Manager
Assistant City Managers
Ethics Review Commission
City Clerk
Director, Austin Resource Recovery
Director, Communications and Public Information



To Report Possible Fraud, Waste, or Abuse Visit Our Website at:

www.austintexas.gov/department/integrity-investigations

REPORT ON ALLEGATIONS INVOLVING A ZERO WASTE ADVISORY COMMISSIONER

The purpose of this report is to inform you of the results of a recent investigation conducted by the City Auditor's Integrity Unit (CAIU) regarding alleged integrity violations.

OBJECTIVE

The CAIU's objective was to determine if Daniela Ochoa Gonzalez, Zero Waste Advisory Commissioner, violated the City Code regarding conflict of interest.

BACKGROUND

The Zero Waste Advisory Commission's (ZWAC) provides advice to City Council on solid waste management policies and resources. The ZWAC also reviews and analyzes policies and resources that impact Austin Resource Recovery and the City of Austin. Texas Disposal Systems (TDS) is a vendor that operates within the City of Austin as a contractor for Austin Resource Recovery, providing solid waste and recycling services to the City of Austin. TDS regularly brings items of concern to ZWAC meetings.

FINDINGS

The evidence gathered through our investigation substantiated the allegation that Ochoa Gonzalez violated the City's conflict of interest requirements. Specifically, the CAIU determined that Ochoa Gonzalez contracted with TDS, through her company SOLUSO and did not disclose this relationship as required by City Code. Ochoa Gonzalez's subsequent participation in discussions and voting related to TDS agenda items on February 13, 2013 and August 14, 2013 constituted conflict of interest violations as defined in the City Code. Ochoa Gonzalez's participation in discussions related to a TDS agenda item during the April 10, 2013 ZWAC meeting also constituted a conflict of interest.

Ochoa Gonzalez's actions appear to constitute violations of:

- City Code § 2-7-63 *Prohibition on Conflict of Interest*
- City Code § 2-7-64 *Disclosure of Conflict of Interest*

Attachment 1 contains a more detailed summary of our findings on the conflict of interest violation.

We appreciate the cooperation and assistance we received from the Office of the City Clerk and Austin Resource Recovery staff during this investigation.


for
Kenneth J. Mory, City Auditor

EXHIBIT A

**CAIU INVESTIGATION REPORT:
Report on Allegations Involving a Zero Waste Advisory Commissioner**

SUMMARY

The purpose of this report is to inform you of the results of a recent investigation conducted by the City Auditor's Integrity Unit (CAIU) regarding a conflict of interest violation by a Commissioner on the Zero Waste Advisory Commission (ZWAC).

In September 2013, the CAIU received an allegation of a conflict of interest. Specifically, the informant stated that ZWAC Commissioner Daniela Ochoa Gonzalez was employed by Texas Disposal Systems (TDS), which she had not reported as a conflict of interest, and that she was still serving as a member of the ZWAC. The informant added that many items brought to the ZWAC involve TDS. Upon receiving this information, the CAIU initiated an investigation designed to gather evidence to determine the veracity of these allegations.

The CAIU determined that Ochoa Gonzalez's contract with TDS, through her company SOLURSO, and her subsequent participation in discussions and voting related to TDS agenda items on February 13, 2013 and August 14, 2013 constituted conflict of interest violations as defined in the City Code. Ochoa Gonzalez's participation in discussions related to a TDS agenda item during the April 10, 2013 ZWAC meeting also constituted a conflict of interest.

BACKGROUND INFORMATION

City Code §2-7-63 *Prohibition on Conflict of Interest*, restricts a city official from participating in a vote or decision "on a matter affecting a natural person, entity, property in which the official...has a substantial interest."

City Code §2-7-64 *Disclosure of Conflict of Interest*, stipulates that a "City official shall disclose the existence of any substantial interest he may have in a natural person, entity or property which would be affected by a vote or decision of the body of which the City official is a member..." To comply with this requirement an "unsalaried City Official, prior to the vote or decision, either shall file an affidavit as required by Chapter 171...of the Local Government Code or, if not so required, shall publicly disclose in the official records of the body the nature and extent of such interest."

City Code §2-1-2 *Substantial Interest*, means an interest in another person or an entity if: the interest is ownership of five percent or more of the voting stock, shares or equity of the entity or ownership of \$5,000 or more of the equity or market value of the entity; or funds received by the person from the other person or entity either during the previous 12 months or the previous calendar year equaled or exceeded \$5,000 in salary, bonuses, commissions or professional fees or \$20,000 in payment for goods, products or nonprofessional services, or 10 percent of the person's gross income during that period, whichever is less; the person serves as a corporate officer or member of the board of directors or other governing board of the for-profit entity other than a corporate entity owned or created by the city council; or the person is a creditor, debtor, or guarantor of the other person or entity in an amount

of \$5,000 or more except that a home mortgage loan for the person's homestead or a loan or lease of a personal automobile shall not be deemed a substantial interest in the creditor or guarantor if entered into at a market rate with a commercial lending institution before the previous 12 months.

INVESTIGATIVE FINDINGS

Daniela Ochoa Gonzalez contracted with Texas Disposal Systems after being appointed to the Zero Waste Advisory Commission. Ochoa Gonzalez was appointed as a commissioner December 6, 2012 and attended her first ZWAC meeting January 9, 2013. Ochoa Gonzalez completed ethics training on conflict of interest requirements on January 5, 2013. The contents of the training stated that board members and commissioners were not allowed to vote or discuss any item related to their conflict of interest.

In an interview with the CAIU, Ochoa Gonzalez admitted to being a contractor with TDS. The CAIU corroborated this testimony from documentary evidence obtained from TDS. Ochoa Gonzalez signed a consulting agreement with TDS on December 15, 2012 under SOLURSO, which she stated in an interview that she owned 100% of, and which the CAIU found that Ochoa Gonzalez filed a DBA for (Doing Business As). Ochoa Gonzalez stated during an interview with CAIU that TDS is her only source of income, which meets the definition of "substantial interest" as stated in §2-7-2, subsection 10 of the City Code.

Daniela Ochoa Gonzalez did not disclose her relationship with TDS. Ochoa Gonzalez did not submit an affidavit to the City Clerk to disclose her relationship with TDS once it arose as required by City Code §2-7-64. In an interview with the CAIU, Ochoa Gonzalez stated that she met with Austin Resource Recovery (ARR) management regarding the function of her business and received assurance that as long as she did not vote on items related to her private business, she would not be in violation of conflict of interest laws. However, ARR Management was unaware Ochoa Gonzalez was a TDS contractor.

The CAIU interviewed ARR management who stated that they met with Ochoa Gonzalez on February 8, 2013 to discuss a potential conflict of interest regarding proposed training work for the City of Austin. According to ARR management, Ochoa Gonzalez was initially going to contract with the City as a composting instructor but did not sign the City contract. During their meeting, ARR management and Ochoa Gonzalez only discussed the focus (or function) of her business with the City and Ochoa Gonzalez did not disclose that she had contracted with TDS. ARR management stated that they provided advice to Ochoa Gonzalez based on the information she provided and impressed on her the importance of not discussing or voting on any items relating to the function of her business.

Daniela Ochoa Gonzalez participated (discussed and voted) on commission items involving TDS. The CAIU reviewed ZWAC meeting minutes and video recordings and determined that Ochoa Gonzalez participated in the following items of interest to TDS:

- April 10, 2013 (discussed; did not vote)
TDS requested their contract with the City to be extended before the rebid process.
- February 13, 2013 (discussed and voted)

Discussion of definition of "composting facility;" TDS representative in attendance advocated for a particular definition.

- August 14, 2013 (discussed and voted)

TDS expressed concerns about stakeholders not having input in ordinance development.

Daniela Ochoa Gonzalez's actions constitute a violation of City Code.

The evidence gathered through our investigation substantiated the allegation that Ochoa Gonzalez violated the conflict of interest requirements stipulated by the City of Austin. Specifically, the CAIU determined that Ochoa Gonzalez's involvement with TDS and her subsequent participation in discussions of agenda items of interest to TDS on April 10, 2013 constitutes a conflict of interest. CAIU also determined that her participation in discussions and voting in February 13, 2013 and August, 14, 2013 may have constituted a conflict of interest. The CAIU believes Ochoa Gonzalez's actions appear to constitute a violation of City Code §2-7-63 and §2-7-64 of the City code.

RESOLUTION NO. 20141016-024

WHEREAS, Daniela Ochoa Gonzalez, during part of her tenure as a volunteer Commissioner at the Zero Waste Advisory Commission (ZWAC), also worked as an independent contractor for Texas Disposal Systems (TDS) helping schools to reduce waste; and

WHEREAS, the Integrity Unit of the Office of the City Auditor issued a report on April 18, 2014 entitled "Report on Allegations Involving a Zero Waste Advisory Commissioner," which concluded that ZWAC member Daniela Ochoa Gonzalez "violated the conflict of interest requirements stipulated by the City of Austin" in City Code Sections 2-7-63 (Prohibition on Conflict of Interest) and 2-7-64 (Disclosure of Conflict of Interest); and

WHEREAS, prior to the publication of the City Auditor's Report, Daniela Ochoa Gonzalez was not given an opportunity to make a formal response to the claims of the City Auditor's Report; and

WHEREAS, the Office of the City Auditor plays an important role in investigating whether conflict of interest allegations may require further review by the City's Ethics Review Commission; and

WHEREAS, the Office of the City Auditor typically handles internal departmental investigations related to City employees; and

WHEREAS, the Ethics Review Commission, under authorization by City Code, has sole jurisdiction to rule on sworn complaints alleging violations of the Code of Ethics; and

WHEREAS, the City Auditor's Report concluded that Daniela Ochoa Gonzalez violated conflict of interest provisions of City Code without following

the Ethics Review Commission process expressly established in City Code for these allegations; and

WHEREAS, the Ethics Review Commission during two separate meetings, on April 29, 2014 and July 29, 2014, considered the allegations in the City Auditor's Report concerning Daniela Ochoa Gonzalez and decided not to take action; and

WHEREAS, City Code Section 2-7-2(1) states that "Affected means in the case of a person, entity or property, means reasonably likely to be subject to direct economic effect or consequence, either positive or negative, as a result of the vote or decision in question;" and

WHEREAS, City Code Section 2-7-2(i) further states that "Affected does not include those persons or entities who are subject to an indirect or secondary effect from official action;" and

WHEREAS, the City Auditor's Report characterized ZWAC agenda items as "TDS agenda items," without any explanation as to how these agenda items were "reasonably likely to be subject to a direct economic effect" on Texas Disposal Systems, and, therefore, the Report failed to demonstrate how the alleged conduct might constitute a conflict of interest; and

WHEREAS, as a result of this matter, the Office of the City Auditor and the Ethics Review Commission are collaborating in order to propose an improved process for handling conflict of interest allegations; and

WHEREAS, concerns from the community have been voiced to City Council in which opinions have been presented concerning the process followed by the City Auditor, the failure of the City Auditor to disclose evidence, the perceived

flaws in the Report and the possible chilling effects that similar reports could have on citizen participation; and

WHEREAS, it is possible that reports containing determinations of guilt can result in damage to livelihoods and reputations; and

WHEREAS, the City Council relies heavily on the recommendations of the citizen volunteers who participate on our Boards and Commissions and the critical role they have in our community; and

WHEREAS, our citizens provide expertise and a commitment to the policy areas covered by their respective Boards and Commissions; and

WHEREAS, it is critical that the integrity of the Boards and Commissions process is maintained; and

WHEREAS, the City Council believes the Ethics Review Commission process for conflict of interest allegations against Boards and Commissions members must be followed; NOW, THEREFORE,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

The City Clerk and City Auditor are directed to coordinate meetings between the Ethics Review Commission working group and the Integrity Unit of the Office of the City Auditor to discuss process clarification and improvement for conflict of interest allegations which the City Auditor receives against Boards and Commissions members, and results are to be reported back to Council within 90 days.

BE IT FURTHER RESOLVED:

Council objects to the failure to follow the Ethics Review Commission process and does not accept the City Auditor's "Report on Allegations Involving a Zero Waste Advisory Commissioner," which concerned Daniela Ochoa Gonzalez.

BE IT FURTHER RESOLVED:

Council directs that any copy, electronic or otherwise, of the City Auditor's "Report on Allegations Involving a Zero Waste Advisory Commissioner" or any reference to the report shall contain on the first page a conspicuous notice in bold type which shall read: "Notice: This Report has not been accepted by the Austin City Council and is subject to Resolution No. 20141016-024, passed on October 16, 2014."

BE IT FURTHER RESOLVED:

The City Auditor is not prohibited from filing sworn complaints with the Office of the City Clerk and following the Ethics Review Commission process outlined in City Code for allegations concerning violations of City Code's conflict of interest provisions.

BE IT FURTHER RESOLVED:

Council thanks Daniela Ochoa Gonzalez for her service to our community on the Zero Waste Advisory Commission and her commitment to helping Austin move toward its Zero Waste goals.

BE IT FURTHER RESOLVED:

Council apologizes to Daniela Ochoa Gonzalez, members of the Zero Waste Advisory Commission and our community for not following the Ethics Review Commission process for Boards and Commissions members to address conflict of interest allegations investigated by the City Auditor.

ADOPTED: October 16, 2014

ATTEST 

Jannette S. Goodall
City Clerk

Jennifer Thomas

From: Communications and Public Information Office <public.information@austintexas.gov>
Sent: Tuesday, May 06, 2014 12:23 PM
To: Jennifer Thomas
Subject: Form submission: Public Information Request

Submitted on May 6, 2014 - 12:22

Submitted by user:

Submitted values are:

To: Communications and Public Information Office

--From:--

First Name: Jennifer

Middle Initial:

Last Name: Thomas

Address (Line 1): PO Box 17126

Address (Line 2):

City: Austin

State: Texas

ZIP Code: 78760

Phone Number: 512-421-1300

Fax Number: 512-243-4123

Email: jthomas@texasdisposal.com

--Request Details--

Subject: CAIU Investigation into alleged conflict of interest violation by Daniela Ochoa Gonzalez

I am requesting the following: Copies of Record(s)

State the requested document(s) or record(s) below: All documents, notes, and communications related to and including: the initial conflict of interest allegation filing/report, City Auditor's Office investigation report and supporting documentation, Ethics Review Commission hearing documents, hearing transcripts, video and/or audio recordings, interviews, working papers, notes, email communications, written correspondence, and all other documents or media relating to the investigation of the conflict of interest allegation against Daniela Gonzalez the Ethics Review Commission hearing, and any follow-on investigations or reporting following the Commission hearing.

Comments/Additional Information (if needed):

EXHIBIT C



City of Austin
Law Department

City Hall, 301 West 2nd Street, P.O. Box 1088
Austin, Texas 78767-8828
(512) 974-2268

Writer's Direct Line
(512) 974-3588

Writer's Fax Line
(512) 974-2912

June 3, 2014

VIA FIRST CLASS MAIL

Honorable Greg Abbott
Attorney General of Texas
Open Records Division
MC-014
P.O. Box 12548
Austin, Texas 78711-2548

Re: Open Records Request from Mr. Michael Whellan received May 19, 2014. **Your ID#530718**

Dear Attorney General Abbott,

This is to supplement my May 19, 2014, request for decision concerning public information requests the City of Austin ("the City") received from Ms. Daniela Ochoa Gonzalez and Ms. Jennifer Thomas. These requests were received on May 5, 2014 and May 6, 2014 respectively. Copies of the records at issue were forwarded to you on that date, along with the City's arguments for withholding them. Please find enclosed a copy of Mr. Whellan's request for the same information as requested by Ms. Ochoa Gonzalez and Ms. Thomas in their requests. Mr. Whellan's request was received by the City on May 19, 2014. The City's administrative offices were closed on May 26, 2014, in observance of the Memorial Day Holiday. Thus, today is the tenth business day since the City's receipt of this request. The City asserts and fully incorporates the arguments it made in its May 19, 2014, request for decision that some of the requested information is excepted from disclosure under sections 552.107 and 552.116 of the Government Code.

If you have any questions concerning this matter, do not hesitate to call me at (512) 974-6463.

Sincerely,

A handwritten signature in black ink, appearing to read "Elaine Nicholson".

Elaine Nicholson
Assistant City Attorney

cer/Enc.

EXHIBIT D

Letter to Honorable Greg Abbott

June 3, 2014

Page 2 of 2

cc: *(without enclosures)*
 Mr. Michael Whellan
 MWhellan@gdhm.com



GRAVES DOUGHERTY HEARON & MOODY

A PROFESSIONAL CORPORATION

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Texas Board of Legal Specialization

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401 CONGRESS AVE., SUITE 2200
Austin, TX 78701-3790

June 10, 2014

Hon. Greg Abbott
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

via first class mail

Re: Request for Opinion from the City of Austin, May 19, 2014
Re: Public Information Act requests from Ms. Jennifer Thomas (received May 6, 2014)
and Ms. Daniela Ochoa Gonzalez (received May 5, 2014)

Dear General Abbott:

This law firm represents Ms. Jennifer Thomas in connection with the above-referenced Public Information Act request made to the City of Austin on May 6, 2014 (copy attached as Exhibit A). The City of Austin, via a letter dated May 19, 2014 (copy attached as Exhibit B), requested an opinion from your office regarding whether the requested information is subject to two claimed exemptions to the Public Information Act. In that same letter, the City of Austin requested a similar opinion with regard to a May 5, 2014 request from Ms. Daniela Ochoa Gonzalez. This law firm does not represent Ms. Ochoa Gonzalez; however, her request appears to cover the same information requested by Ms. Thomas.

This letter is a response to the May 19, 2014 letter from the City of Austin. Ms. Thomas disagrees that the bulk of the information she requested falls within the two claimed exemptions from disclosure in the Public Information Act.

I. Background.

Ms. Thomas' request relates to a document titled "Report on Allegations Involving a Zero Waste Advisory Commissioner" issued by the Austin City Auditor, Kenneth J. Mory, dated April 18, 2014 (copy attached hereto as Exhibit C). The referenced "Zero Waste Advisory Commissioner" is Ms. Ochoa Gonzalez, who was a volunteer member of the City's Zero Waste Advisory Commission until forced to resign as a result of the report from the Auditor. The document purports to be a report "of a recent investigation conducted by the City Auditor's Integrity Unity (CAIU) regarding alleged integrity violations." This report will be referred to as the "Auditor's Report."

The Auditor's Report, in its summary of findings, states – in boldface type – that “[t]he evidence gathered through our investigation substantiated the allegation that Ochoa Gonzalez violated the City's conflict of interest requirements.” More specifically, the Auditor's Report alleges that:

Ochoa Gonzalez's actions appear to constitute violations of:

- City Code § 2-7-63 *Prohibition on Conflict of Interest*
- City Code § 2-7-64 *Disclosure of Conflict of Interest*

II. The City Auditor has no authority under the City of Austin's Charter and Ordinances to “investigate” alleged violations of conflict of interest ordinances; thus, materials related to the Auditor's Report are not “audit working papers” under the Public Information Act.

Section 552.116(a) of the Texas Government Code provides that “[a]n audit working paper of an audit” of the auditor of one of several specified governmental entities, including a municipality, is excepted from disclosure under the Public Information Act (“PIA”). The City claims that *all* materials in the possession of the Auditor, other than the Auditor's Report, constitute “audit working papers” and are therefore exempt from disclosure.

The relevant section of the PIA defines “audit” to include “an audit authorized or required by ... the charter or ordinance of a municipality.” Tex. Gov't Code § 552.116(b)(1). The investigation of Ms. Ochoa Gonzalez that led to the issuance of the Auditor's Report was *not* an audit authorized or required by the City of Austin's charter or ordinance. Therefore, the requested documents are *not* exempt from disclosure as “audit working papers.”

The City of Austin has adopted ordinances dealing with conflicts of interest, including provisions that require disclosure of information and prohibit certain relationships that are deemed to be conflicts. Those provisions are found in Chapter 2-7 of the Austin City Code, titled “Ethics and Financial Disclosure.” The Auditor's Report purported to find that Ms. Ochoa Gonzalez violated two provisions of Chapter 2-7. Attached hereto as Exhibit D are the relevant provisions of Chapter 2-7: Article 2, establishing the Ethics Review Commission and its duties, and Article 4, the Code of Ethics, certain provisions of which the Auditor has purported to find that Ms. Ochoa Gonzalez has violated.

The City Code specifically gives jurisdiction over Chapter 2-7 *not* to the City Auditor, but rather to the City's Ethics Review Commission. Austin City Code § 2-7-26 (“The Ethics Review Commission has jurisdiction over this chapter [2-7]”). The Code further provides that the Ethics Review Commission “shall hear and rule on sworn complaints alleging violations of the provisions within the committee's jurisdiction.” *Id.* Nowhere does Chapter 2-7 confer *any* authority upon the City Auditor to “investigate” alleged violations of Chapter 2-7.

The City contends that an entirely different chapter of the City Code authorized the City Auditor's “investigation.” A portion of Chapter 2-3, titled “City Auditor,” is cited by the City as alleged authorization. Section 2-3-5 sets forth the powers and duties of the City Auditor. Not

once does that section mention the word “ethics” (or any variation thereof) or the term “conflict of interest,” nor does it confer authority upon the City Auditor to investigate alleged violations of Chapter 2-7’s provisions.

Section 2-3-5 specifically sets out the Auditor’s duties if it believes that a City official may have violated the law. The Auditor “shall” consult with the city attorney and “immediately report the suspected violation to the appropriate authority” – here, the Ethics Review Commission. The City Code does not authorize the Auditor to conduct investigations other than those specifically set out in Section 2-3-5, or to reach conclusions regarding alleged conflict of interest violations.

The City quotes the entirety of Subsection D of Section 2-3-5, which provides that the Auditor may conduct certain specified types of “audit work,” and then makes a conclusory allegation that “[t]he City Auditor’s authority to conduct this investigation is found in the City’s Charter and Code provisions outlined above.” May 19 letter at 4. Such a conclusory allegation is insufficient to meet the City’s burden of overcoming the presumption of openness established by the PIA. *Thomas v. Cornyn*, 71 S.W.3d 473, 480-81 (Tex. App. – Austin 2002, no pet.) (“A governmental body seeking to withhold information bears the burden of establishing to the attorney general that the requested information falls within an exception from disclosure under the Act.”).

The City merely quotes, in full, six subsections of an ordinance without explaining which provisions (some of which include sub-subsections) allegedly confer any authority on the City Auditor to investigate purported conflicts of interest by volunteer members of City commissions. This failure alone is sufficient to support a ruling that the City has not met its burden to show applicability of the “audit working papers” exception.

Even if the substance of the cited City Ordinance sections is examined, the same conclusion applies: Subsection D of Section 2-3-5 nowhere authorizes the City Auditor to conduct ethics investigations of City volunteers.

Subsection D authorizes certain specific types of “performance or financial-related audit, investigation, and other *audit work*” (emphasis added). Investigation of alleged conflicts of interest by City volunteers is simply not “audit work.” An “audit” is “[s]ystematic inspection of accounting records involving analyses, tests, and confirmations.” Black’s Law Dictionary at 131 (6th ed. 1990). An investigation regarding alleged nondisclosure of potential conflicts of interest is simply not a systematic inspection of accounting records; it is not an “audit” and therefore was not authorized by Subsection D. If any accounting records are responsive, appropriate redaction would address any actual confidentiality issues.

Several of the six sub-subsections of Subsection D apply only to audits of a City “function, program, service, or policy.” City Code § 2-3-5(D)(1)-(4), (6). A conflict-of-interest investigation of a City volunteer is not an audit of a City function, program, service, or policy; it is an effort to determine an individual volunteer’s compliance with Chapter 2-7 of the City Code, which is specifically within the jurisdiction of the Ethics Review Commission, not the City Auditor. Subsection (D)(5) applies only to audits of “management for a function, program,

service, or policy.” The investigation of Ms. Ochoa Gonzalez was not an audit of management; she was a volunteer member of the City’s Zero Waste Advisory Commission, not any type of manager.

Nor do the specific sub-subsections of Subsection D authorize the City Auditor to investigate alleged conflicts of interest:

- Subsection (D)(1) authorizes audits of “a current City function, program, service, or policy” to determine if it is authorized by legal authority and “conducted to accomplish its intended objective.”
- Subsection (D)(2) authorizes audits of a “function, program, service, or policy” to determine if it is “effective in achieving its stated or intended result or benefit.”
- Subsection (D)(3) authorizes audits of a “function, program, service, or policy” to determine if it “effectively, economically, and efficiently acquires, protects, and uses its resources.”
- Subsection (D)(4) authorizes audits of a “function, program, service, or policy” to determine if it “complies with a mandate regarding efficiency, economy, effectiveness, or expenditure of public funds.”
- Subsection (D)(5) authorizes audits of “management for a function, program, service, or policy” to determine if management has adopted an appropriate “administrative and accounting control system.”
- Subsection (D)(6) authorizes audits of a “function, program, service, or policy” to determine if it is providing appropriate “financial and performance reports.”

Nowhere does the City Code authorize the Auditor to investigate individual City volunteers for alleged conflicts of interest, or any other matter.

Because the City Auditor’s investigation of Ms. Ochoa Gonzalez was not an audit authorized by the City of Austin’s charter or ordinances, documents in the possession of the City regarding the investigation are not “audit working papers” under the PIA and therefore are not exempt from disclosure.

III. The City of Austin cannot insulate otherwise public information by merely providing copies to its lawyers.

The City also claims that some responsive documents are exempt as attorney-client communications, including those “between and amongst” City attorneys and “staff in the City Council Office, Office of the City Auditor, Public Information Office, City Clerk’s Office, Department of Transportation, and all members of the City’s Ethics Review Commission.” May 19 letter at 2.

Of course, communications "amongst" non-lawyer City staff is not protected by the attorney-client privilege, with rare exceptions (such as with some communications that reveal the substance of legal advice).

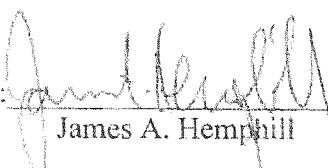
Further, the City cannot exempt a document from disclosure by merely including an attorney as a recipient. "[A] person cannot cloak a material fact with the privilege merely by communicating it to an attorney." *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). Also, a communication of a fact to a lawyer does not transform that fact into privileged information, when there was knowledge of that fact independently of the attorney-client communication. *Id.*

Ms. Thomas, the requestor, thus encourages your office to carefully examine the materials over which the City of Austin claims attorney-client privilege to ensure that the City is not attempting to improperly "cloak" non-privileged material by sending it to a lawyer.

Thank you for your consideration of this matter. Please feel free to contact me with any questions.

Sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY
A Professional Corporation

By:  _____
James A. Hemphill

JAH/ntk

Enclosures: Exhibit A (May 5, 2014 Public Information Act request)
Exhibit B (May 19, 2014 City of Austin request for opinion)
Exhibit C (April 18, 2014 City of Austin Auditor's report)
Exhibit D (excerpts from Austin City Code)

cc: Elaine Nicholson, Esq.
Assistant City Attorney, City of Austin
City Hall, 301 West 2nd Street
P.O. Box 1088
Austin, Texas 78767-2267
via first class mail

Ms. Daniela Ochoa Gonzalez
2404 Forest Avenue
Austin, Texas 78704
via first class mail

Jennifer Thomas

From: Communications and Public Information Office <public.information@austintexas.gov>
Sent: Tuesday, May 06, 2014 12:23 PM
To: Jennifer Thomas
Subject: Form submission: Public Information Request

Submitted on May 6, 2014 - 12:22
Submitted by user:
Submitted values are:

To: Communications and Public Information Office

--From:--

First Name: Jennifer
Middle Initial:
Last Name: Thomas
Address (Line 1): PO Box 17126
Address (Line 2):
City: Austin
State: Texas
ZIP Code: 78760
Phone Number: 512-421-1300
Fax Number: 512-243-4123
Email: jthomas@texasdisposal.com

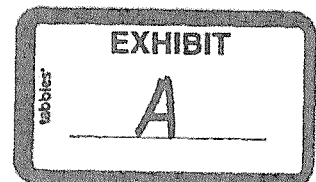
--Request Details--

Subject: CAIU Investigation into alleged conflict of interest violation by Daniela Ochoa Gonzalez

I am requesting the following: Copies of Record(s)

State the requested document(s) or record(s) below: All documents, notes, and communications related to and including: the initial conflict of interest allegation filing/report, City Auditor's Office investigation report and supporting documentation, Ethics Review Commission hearing documents, hearing transcripts, video and/or audio recordings, interviews, working papers, notes, email communications, written correspondence, and all other documents or media relating to the investigation of the conflict of interest allegation against Daniela Gonzalez the Ethics Review Commission hearing, and any follow-on investigations or reporting following the Commission hearing.

Comments/Additional Information (if needed):





City of Austin
Law Department

City Hall, 301 West 2nd Street, P.O. Box 1088
Austin, Texas 78767-8828
(512) 974-2268

Writer's Direct Line
(512) 974-6463

Writer's Fax Line
(512) 974-6491

May 19, 2014

VIA FIRST CLASS MAIL

Honorable Greg Abbott
Attorney General of Texas
Open Records Division
MC-014
P.O. Box 12548
Austin, Texas 78711-2548

Re: Open Records Requests from Ms. Daniela Ochoa Gonzalez received May 5, 2014,
and Ms. Jennifer Thomas received May 6, 2014

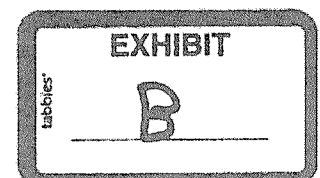
Dear Attorney General Abbott,

The City of Austin (the "City") received requests for information from Ms. Daniela Ochoa Gonzalez on May 5, 2014, and from Ms. Jennifer Thomas on May 6, 2014. Thus, today is the tenth business day since the City's receipt of Ms. Gonzalez' request and the ninth business day since the receipt of Ms. Thomas' request. The City believes some of the information responsive to both of these requests is excepted from disclosure under sections 552.107 and 552.116 of the Government Code. This letter is a request for a determination under section 552.301 of the Government Code that some of the requested information is so excepted. Copies of the requests and representative samples of the information at issue are enclosed.

By copy of this letter the City is notifying the requestors that the City is seeking to withhold the information represented by the enclosed examples and has asked for a decision from the Attorney General about whether this information is within an exception to public disclosure.

Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a



communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform your office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The submitted information consists of confidential communications between and amongst the City Attorney, the Deputy City Attorney, several assistant city attorneys and law department staff, and staff in the City Council Office, Office of the City Auditor, Public Information Office, City Clerk's Office, Department of Transportation, and all members of the City's Ethics Review Commission. These communications were made for the purpose of facilitating the rendition of professional legal services and the confidentiality of these communications has been maintained. Accordingly, the City believes that the information represented by the enclosed examples is excepted from disclosure under section 552.107(1).

Section 552.116 provides, in pertinent part:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

The Charter of the City of Austin establishes the office of the City Auditor and contains the following provisions in Article VII:

§ 17. CITY AUDITOR.

There shall be a city auditor who shall be appointed by the city council. The city auditor may be removed only by a majority of the city council. The auditor shall report to the city council through an audit committee of the council. The auditor shall have such duties, responsibilities and staff as determined by ordinance including the responsibility to conduct, or cause to be conducted, financial, performance, investigative, and other audits following government auditing standards as promulgated by the Comptroller General of the United States. The city auditor shall assist the city council in establishing accountability and in improving city system and service delivery.

The authority of the City Auditor to conduct audits and investigations is further provided for in Chapter 2-3 of the Austin City Code. Section 2-3-5 provides, in part:

(D) The city auditor may conduct a performance or financial-related audit, investigation, and other audit work to determine if:

(1) a current City function, program, service, or policy:

(a) is authorized by the council or other legal authority; and

(b) is conducted to accomplish its intended objective;

(2) a function, program, service, or policy is effective in achieving its stated or intended result or benefit, including the level of effectiveness;

(3) an audited function, program, service, or policy effectively, economically, and

efficiently acquires, protects, and uses its resources, including personnel, property, and space;

(4) a function, program, service, or policy complies with a mandate regarding efficiency, economy, effectiveness, or expenditure of public funds adopted by council or other legal authority;

(5) management for a function, program, service, or policy has adopted an administrative and accounting control system to effectively, economically, and efficiently carry on the function or program; and

(6) a function, program, service, or policy is providing financial and performance reports that accurately, fully, and fairly disclose all information required by law or other criteria necessary to:

(a) ascertain the nature and scope of the function, program, service, or policy; and

(b) establish a proper basis for evaluating the results of the function, program, service, or policy.

The submitted information consists of a representative sample of audit working papers created or utilized by the City Auditor during its investigation of a member of the City's Zero Waste Advisory Commission. The City Auditor's authority to conduct this investigation is found in the City's Charter and Code provisions outlined above. Thus, the City believes that the information represented by the enclosed records is excepted from disclosure under section 552.116 of the Government Code, and it seeks to withhold the information under this exception.

If you have any questions concerning this matter, please feel free to contact me at 974-6463.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Elaine Nicholson', with a stylized, cursive script.

Elaine Nicholson
Assistant City Attorney

aws/Enclosure

cc: (without enclosures)
Ms. Daniela Ochoa Gonzalez

Honorable Greg Abbott

May 19, 2014

Page 5 of 5

2404 Forest Avenue
Austin, Texas 78704

Ms. Jennifer Thomas
P.O. Box 17126
Austin, Texas 78760

April 18, 2014



Investigation Highlights

Why We Did This Investigation

In September 2013, our office received information alleging a conflict of interest involving a Zero Waste Advisory Commissioner. As a result, we conducted an investigation as part of our responsibility under the Austin City Charter.

Distribution

Mayor and Council
City Manager
Assistant City Managers
Ethics Review Commission
City Clerk
Director, Austin Resource Recovery
Director, Communications and Public Information



To Report Possible Fraud, Waste, or Abuse Visit Our Website at:

www.austintexas.gov/department/integrity-investigations

REPORT ON ALLEGATIONS INVOLVING A ZERO WASTE ADVISORY COMMISSIONER

The purpose of this report is to inform you of the results of a recent investigation conducted by the City Auditor's Integrity Unit (CAIU) regarding alleged integrity violations.

OBJECTIVE

The CAIU's objective was to determine if Daniela Ochoa Gonzalez, Zero Waste Advisory Commissioner, violated the City Code regarding conflict of interest.

BACKGROUND

The Zero Waste Advisory Commission's (ZWAC) provides advice to City Council on solid waste management policies and resources. The ZWAC also reviews and analyzes policies and resources that impact Austin Resource Recovery and the City of Austin. Texas Disposal Systems (TDS) is a vendor that operates within the City of Austin as a contractor for Austin Resource Recovery, providing solid waste and recycling services to the City of Austin. TDS regularly brings items of concern to ZWAC meetings.

FINDINGS

The evidence gathered through our investigation substantiated the allegation that Ochoa Gonzalez violated the City's conflict of interest requirements. Specifically, the CAIU determined that Ochoa Gonzalez contracted with TDS, through her company SOLUSO and did not disclose this relationship as required by City Code. Ochoa Gonzalez's subsequent participation in discussions and voting related to TDS agenda items on February 13, 2013 and August 14, 2013 constituted conflict of interest violations as defined in the City Code. Ochoa Gonzalez's participation in discussions related to a TDS agenda item during the April 10, 2013 ZWAC meeting also constituted a conflict of interest.

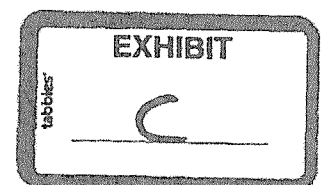
Ochoa Gonzalez's actions appear to constitute violations of:

- City Code § 2-7-63 *Prohibition on Conflict of Interest*
- City Code § 2-7-64 *Disclosure of Conflict of Interest*

Attachment 1 contains a more detailed summary of our findings on the conflict of interest violation.

We appreciate the cooperation and assistance we received from the Office of the City Clerk and Austin Resource Recovery staff during this investigation.

Jessie H. Mory
for
Kenneth J. Mory, City Auditor



**CAIU INVESTIGATION REPORT:
Report on Allegations Involving a Zero Waste Advisory Commissioner**

SUMMARY

The purpose of this report is to inform you of the results of a recent investigation conducted by the City Auditor's Integrity Unit (CAIU) regarding a conflict of interest violation by a Commissioner on the Zero Waste Advisory Commission (ZWAC).

In September 2013, the CAIU received an allegation of a conflict of interest. Specifically, the informant stated that ZWAC Commissioner Daniela Ochoa Gonzalez was employed by Texas Disposal Systems (TDS), which she had not reported as a conflict of interest, and that she was still serving as a member of the ZWAC. The informant added that many items brought to the ZWAC involve TDS. Upon receiving this information, the CAIU initiated an investigation designed to gather evidence to determine the veracity of these allegations.

The CAIU determined that Ochoa Gonzalez's contract with TDS, through her company SOLURSO, and her subsequent participation in discussions and voting related to TDS agenda items on February 13, 2013 and August 14, 2013 constituted conflict of interest violations as defined in the City Code. Ochoa Gonzalez's participation in discussions related to a TDS agenda item during the April 10, 2013 ZWAC meeting also constituted a conflict of interest.

BACKGROUND INFORMATION

City Code §2-7-63 *Prohibition on Conflict of Interest*, restricts a city official from participating in a vote or decision "on a matter affecting a natural person, entity, property in which the official...has a substantial interest."

City Code §2-7-64 *Disclosure of Conflict of Interest*, stipulates that a "City official shall disclose the existence of any substantial interest he may have in a natural person, entity or property which would be affected by a vote or decision of the body of which the City official is a member..." To comply with this requirement an "unsalaried City Official, prior to the vote or decision, either shall file an affidavit as required by Chapter 171...of the Local Government Code or, if not so required, shall publicly disclose in the official records of the body the nature and extent of such interest."

City Code §2-7-2 *Substantial Interest*, means an interest in another person or an entity if: the interest is ownership of five percent or more of the voting stock, shares or equity of the entity or ownership of \$5,000 or more of the equity or market value of the entity; or funds received by the person from the other person or entity either during the previous 12 months or the previous calendar year equaled or exceeded \$5,000 in salary, bonuses, commissions or professional fees or \$20,000 in payment for goods, products or nonprofessional services, or 10 percent of the person's gross income during that period, whichever is less; the person serves as a corporate officer or member of the board of directors or other governing board of the for-profit entity other than a corporate entity owned or created by the city council; or the person is a creditor, debtor, or guarantor of the other person or entity in an amount

of \$5,000 or more except that a home mortgage loan for the person's homestead or a loan or lease of a personal automobile shall not be deemed a substantial interest in the creditor or guarantor if entered into at a market rate with a commercial lending institution before the previous 12 months.

INVESTIGATIVE FINDINGS

Daniela Ochoa Gonzalez contracted with Texas Disposal Systems after being appointed to the Zero Waste Advisory Commission. Ochoa Gonzalez was appointed as a commissioner December 6, 2012 and attended her first ZWAC meeting January 9, 2013. Ochoa Gonzalez completed ethics training on conflict of interest requirements on January 5, 2013. The contents of the training stated that board members and commissioners were not allowed to vote or discuss any item related to their conflict of interest.

In an interview with the CAIU, Ochoa Gonzalez admitted to being a contractor with TDS. The CAIU corroborated this testimony from documentary evidence obtained from TDS. Ochoa Gonzalez signed a consulting agreement with TDS on December 15, 2012 under SOLURSO, which she stated in an interview that she owned 100% of, and which the CAIU found that Ochoa Gonzalez filed a DBA for (Doing Business As). Ochoa Gonzalez stated during an interview with CAIU that TDS is her only source of income, which meets the definition of "substantial interest" as stated in §2-7-2, subsection 10 of the City Code.

Daniela Ochoa Gonzalez did not disclose her relationship with TDS. Ochoa Gonzalez did not submit an affidavit to the City Clerk to disclose her relationship with TDS once it arose as required by City Code §2-7-64. In an interview with the CAIU, Ochoa Gonzalez stated that she met with Austin Resource Recovery (ARR) management regarding the function of her business and received assurance that as long as she did not vote on items related to her private business, she would not be in violation of conflict of interest laws. However, ARR Management was unaware Ochoa Gonzalez was a TDS contractor.

The CAIU interviewed ARR management who stated that they met with Ochoa Gonzalez on February 8, 2013 to discuss a potential conflict of interest regarding proposed training work for the City of Austin. According to ARR management, Ochoa Gonzalez was initially going to contract with the City as a composting instructor but did not sign the City contract. During their meeting, ARR management and Ochoa Gonzalez only discussed the focus (or function) of her business with the City and Ochoa Gonzalez did not disclose that she had contracted with TDS. ARR management stated that they provided advice to Ochoa Gonzalez based on the information she provided and impressed on her the importance of not discussing or voting on any items relating to the function of her business.

Daniela Ochoa Gonzalez participated (discussed and voted) on commission items involving TDS. The CAIU reviewed ZWAC meeting minutes and video recordings and determined that Ochoa Gonzalez participated in the following items of interest to TDS:

- April 10, 2013 (discussed; did not vote)
TDS requested their contract with the City to be extended before the rebid process.
- February 13, 2013 (discussed and voted)

Discussion of definition of "composting facility;" TDS representative in attendance advocated for a particular definition.

- August 14, 2013 (discussed and voted)

TDS expressed concerns about stakeholders not having input in ordinance development.

Daniela Ochoa Gonzalez's actions constitute a violation of City Code.

The evidence gathered through our investigation substantiated the allegation that Ochoa Gonzalez violated the conflict of interest requirements stipulated by the City of Austin. Specifically, the CAIU determined that Ochoa Gonzalez's involvement with TDS and her subsequent participation in discussions of agenda items of interest to TDS on April 10, 2013 constitutes a conflict of interest. CAIU also determined that her participation in discussions and voting in February 13, 2013 and August, 14, 2013 may have constituted a conflict of interest. The CAIU believes Ochoa Gonzalez's actions appear to constitute a violation of City Code §2-7-63 and §2-7-64 of the City code.

Austin, Texas, Code of Ordinances >> TITLE 2. - ADMINISTRATION. >> CHAPTER 2-7. - ETHICS AND FINANCIAL DISCLOSURE. >> ARTICLE 2. ETHICS REVIEW COMMISSION. >>

ARTICLE 2. ETHICS REVIEW COMMISSION.

§ 2-7-26 FUNCTIONS.

§ 2-7-27 (RESERVED)

§ 2-7-28 (RESERVED)

§ 2-7-29 REPORTS; OPINIONS.

§ 2-7-30 DUTIES.

§ 2-7-31 STAFFING.

§ 2-7-32 RULES.

§ 2-7-26 FUNCTIONS.

The Ethics Review Commission has jurisdiction over this chapter, Section 2-1-24 (Conflict of Interest and Recusal), Chapter 2-2 (Campaign Finance), Chapter 4-8 (Regulation of Lobbyists), and Article III, Section 3, of the City Charter (Limits on Campaign Contributions and Expenditures). The commission shall hear and rule on sworn complaints alleging violations of the provisions within the commission's jurisdiction. The city manager shall provide funding for all necessary and reasonable functions of the commission in fulfilling its duties.

Source: 1992 Code Section 2-3-26; Ord. 731204-9; Ord. 031211-11; Ord. 20080214-012; Ord. 20120426-084.

§ 2-7-27 (RESERVED)

§ 2-7-28 (RESERVED)

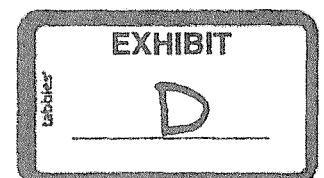
§ 2-7-29 REPORTS; OPINIONS.

The commission shall receive reports of briefings regarding this chapter of newly appointed and employed board and commission members and employees and copies of public opinions related to this chapter that have been issued by the city attorney since the last meeting.

Source: 1992 Code Section 2-3-29; Ord. 031204-9; Ord. 031211-11; Ord. 20080214-012.

§ 2-7-30 DUTIES.

- (A) The Ethics Review Commission shall, in addition to its other duties:
- (1)



- prescribe forms for reports, statements, notices, and other documents required by the provisions within the commission's jurisdiction;
 - (2) prepare and publish materials explaining the duties of individuals subject to the provisions within the commission's jurisdiction;
 - (3) review all statements and reports filed with the commission in order to obtain compliance with the provisions within the commission's jurisdiction;
 - (4) accept and file any information voluntarily supplied that exceeds the requirements of the provisions within the commission's jurisdiction;
 - (5) preserve statements and reports filed with the commission for a period of five years from the date of receipt;
 - (6) review the provisions within the commission's jurisdiction and make appropriate recommendations to the city council concerning the provisions within the commission's jurisdiction, and perform an annual review and evaluation of the dollar limits established in Chapter 2-2 (Campaign Finance) and make recommendations to the city council as to those limits;
 - (7) review all public opinions related to the provisions within the commission's jurisdiction that are issued by the city attorney;
 - (8) conduct hearings in accordance with the provisions of this chapter and the commission's rules on sworn complaints alleging violations of the provisions within the commission's jurisdiction;
 - (9) schedule and oversee the forums among candidates in City elections provided for in Chapter 2-2 (Campaign Finance).
- (B) The commission may:
- (1) prepare reports and studies to advance the purposes of the provisions within the commission's jurisdiction;
 - (2) request the city council and city manager to provide such assistance as it may require in the discharge of its duties; and
 - (3) make recommendations to the city manager concerning the role of the ombudsman concerning this chapter.

Source: 1992 Code Section 9-3-30; Ord. 031204-9; Ord. 031211-11; Ord. 20120426-084.

§ 2-7-31 STAFFING.

- (A) The Ethics Review Commission shall be assigned staff by the city attorney to assist in its duties.
- (B) When complaints are filed related to the mayor, city councilmembers, city manager, city attorney, department heads and deputies, independent legal counsel shall be utilized to advise the commission and participate in hearings.
- (C) (1) Any City official, employee or candidate for City elective office may request, and the city attorney shall thereupon promptly issue, a written opinion concerning the meaning or effect of any section, word, or requirement of this chapter as it affects such official, employee or candidate. At the request of such official, employee or candidate the city attorney shall render a confidential opinion, not subject to public disclosure.

- (2) If a complaint is subsequently filed with the commission about any specific action, omission, or alleged conflict of interest which has been the subject, whole or in part, of a city attorney's opinion, the independent legal counsel shall act as commission attorney on said complaints.
- (D) The city clerk shall make the reporting and complaint forms and information developed by the Commission available to the public and shall assist citizens in complying with filing procedures.

Source: 1992 Code Section 2-3-31; Ord. 031204-9; Ord. 031211-11; Ord. 20060209-003.

§ 2-7-32 RULES.

The Ethics Review Commission may adopt, amend, and rescind rules of procedure to carry out the provisions of this chapter. Such rules shall be consistent with this chapter and other applicable law.

Source: 1992 Code Section 2-3-32; Ord. 031204-9; Ord. 031211-11.

Austin, Texas, Code of Ordinances >> TITLE 2. - ADMINISTRATION. >> CHAPTER 2-7. - ETHICS AND FINANCIAL DISCLOSURE. >> ARTICLE 4. CODE OF ETHICS. >>

ARTICLE 4. CODE OF ETHICS.

§ 2-7-61 CONDUCTING BUSINESS THROUGH PARTNERSHIPS, PROFESSIONAL CORPORATIONS, AND OTHER ENTITIES.

§ 2-7-62 STANDARDS OF CONDUCT.

§ 2-7-63 PROHIBITION ON CONFLICT OF INTEREST.

§ 2-7-64 DISCLOSURE OF CONFLICT OF INTEREST.

§ 2-7-65 SUBSTANTIAL INTEREST OF RELATIVE.

§ 2-7-66 MISUSE OF OFFICIAL INFORMATION.

§ 2-7-67 RESTRICTIONS ON PROVIDING REPRESENTATION OF OTHERS.

§ 2-7-61 CONDUCTING BUSINESS THROUGH PARTNERSHIPS, PROFESSIONAL CORPORATIONS, AND OTHER ENTITIES.

If a City official or employee is a member of a partnership or professional corporation, or conducts business through another entity, a substantial interest of the partnership, professional corporation, or entity shall be deemed to be a substantial interest of the City official or employee if:

- (A) the partnership or professional corporation has fewer than 20 partners or shareholders;
- (B) regardless of the number of partners or shareholders, the official or employee has an equity interest, share, or draw equal to or greater than five percent of the capital or revenues of the partnership, professional corporation, or other entity; or
- (C) with regard to the partnership, professional corporation, or other entity's substantial interest in a client, the official has personally acted within the preceding 24 months in a professional or fiduciary capacity for that client.

Source: 1992 Code Section 2-3-61; Ord. 031204-9; Ord. 031211-11.

§ 2-7-62 STANDARDS OF CONDUCT.

- (A) No City official or employee shall transact any business in his official capacity with any entity in which he has a substantial interest.
- (B) No City official or employee shall formally appear before the body of which the official or employee is a member while acting as an advocate for himself or any other person, group, or entity.
- (C) No salaried City official or employee shall represent, for compensation, any other person, group or entity before any department, commission, board or committee of the City.
- (D)

No salaried City official or employee shall represent, directly or indirectly, any other person, group or entity in any action or proceeding against the interests of the City, or in any litigation in which the City or any department, commission, or board or committee thereof is a party; provided, however, that nothing herein shall limit the authority of the city attorney and his staff to represent the City, its boards, commissions, committees and officers and particularly the Human Rights Commission in the discharge of their duties, including equal employment opportunity cases.

- (E) No salaried City official or employee shall represent, directly or indirectly, any person, group or entity in any action or proceeding in the municipal courts of the City which was instituted by a City official or employee in the course of official duties.
- (F) No City official shall represent any person, group or entity in any action or proceeding in the municipal courts of the City which was instituted by or arising from a decision of a board, commission, committee, task force or other body on which the official serves.
- (G) No City official or employee shall accept or solicit any gift or favor, that might reasonably tend to influence that individual in the discharge of official duties or that the official or employee knows or should know has been offered with the intent to influence or reward official conduct.
- (H)
 - (1) No City official or employee shall solicit or accept other employment to be performed or compensation to be received while still a City official or employee, if the employment or compensation could reasonably be expected to impair independence in judgment or performance of City duties.
 - (2) If a City official or employee accepts or is soliciting a promise of future employment from any person or entity who has a substantial interest in a person, entity or property which would be affected by any decision upon which the official or employee might reasonably be expected to act, investigate, advise, or make a recommendation, the official or employee shall disclose that fact to the board or commission on which he serves or to his supervisor and shall take no further action on matters regarding the potential future employer.
- (I) No salaried City official or employee shall use his official position to secure a special privilege or exemption for himself or others, or to secure confidential information for any purpose other than official responsibilities.
- (J) No City official or employee shall use City facilities, personnel, equipment or supplies for private purposes, except to the extent such are lawfully available to the public.
- (K) No City official or employee shall accept remuneration, directly or indirectly, for campaign work relating to an item placed on the ballot if that individual served on the body which exercised discretionary authority in the development of the ballot item and participated in the discussion or voted on the item.
- (L) No salaried City official and certain City employees to include the mayor, councilmembers, the city manager, assistant city managers, the city clerk, deputy city clerks, council aides, municipal court clerk, deputy municipal court clerks, municipal judges (including substitute judges), the city auditor, assistants to the city auditor, the city attorney, deputy city attorneys, assistant city attorneys, purchasing agents and those employees with the authority to purchase or contract for the City, all department heads, deputy department heads, and the spouse of each of the above,

shall solicit nor propose on a contract, enter into a contract or receive any pecuniary benefit from any contract with the City. This prohibition does not include any employment contract which may be authorized for the official, a contract of sale for real property or a contract for services which are available to all citizens.

- (M) For a period of two years after leaving office, a former mayor or councilmember may not solicit or propose on a contract with the City or enter into a contract with the City for the sale to the City of any goods or services other than real estate. This subsection does not apply to a former mayor or councilmember who had a business relationship with the City in the six months immediately preceding taking the office of mayor or councilmember if the solicitation or proposal is on behalf of the same business.
- (N) For a period of two years after leaving office, a former mayor or councilmember, members of their family, or anyone acting on their behalf, may not sell or lease any real estate to the City unless the city council has designated the property for acquisition and would otherwise have to acquire the property through its power of eminent domain.

Source: 1992 Code Section 2-3-62; Ord. 031204-9; Ord. 031211-11; Ord. 20110428-047.

§ 2-7-63 PROHIBITION ON CONFLICT OF INTEREST.

- (A) A City official or employee may not participate in a vote or decision on a matter affecting a natural person, entity, or property in which the official or employee has a substantial interest; provided, however, that this provision shall not prohibit any member of the city council from participating in a discussion relating to a petition certified to the city council by the city clerk which petition seeks the recall of said member of the city council.
- (B) A City official or employee who serves as a corporate officer or member of the board of directors of a nonprofit entity may not participate in a vote or decision regarding funding by or through the City for the entity. This subsection does not apply to a City official or employee who:
 - (1) serves as a corporate officer or member of the board of directors of a nonprofit entity that is owned by the City or created by the city council; or
 - (2) as a duty of office or as a job assignment, serves as a corporate officer or member of the board of directors of a nonprofit entity as a representative of the City.
- (C) Where the interest of a City official or employee in the subject matter of a vote or decision is remote or incidental, the City official or employee may participate in the vote or decision and need not disclose the interest.
- (D) Nothing in this chapter shall prohibit the city council from participating in a vote or decision relating to salaries, terms of office or travel budgets of city councilmembers.
- (E) If a member of the city council participates in a vote or decision on a contract for the purchase by the City of any goods or services from a person or entity in which the member has a substantial interest, the contract is voidable by the City.
- (F) A document prepared by the City that solicits bids or proposals from vendors, service providers, or other persons shall provide notice of the provisions of this section.

Source: 1992 Code Section 2-3-63; Ord. 031204-9; Ord. 031211-11; Ord. 20110428-047.

§ 2-7-64 DISCLOSURE OF CONFLICT OF INTEREST.

- (A) A City official shall disclose the existence of any substantial interest he may have in a natural person, entity or property which would be affected by a vote or decision of the body of which the City official is a member or that he serves as a corporate officer or member of the board of directors of a nonprofit entity for which a vote or decision regarding funding by or through the City is being considered.
- (B) To comply with this section, a councilmember or unsalaried City official, prior to the vote or decision, either shall file an affidavit as required by Chapter 171 (Regulation of Conflicts of Interest of Officers of Municipalities, Counties, and Certain Other Local Governments) of the Local Government Code or, if not so required, shall publicly disclose in the official records of the body the nature and extent of such interest.
- (C) To comply with this section, a City employee shall notify in writing his supervisor of any substantial interest he may have in a natural person, entity or property which would be affected by an exercise of discretionary authority by the City employee and a supervisor shall reassign the matter.

Source: 1992 Code Section 2-3-64; Ord. 031204-9; Ord. 031211-11; Ord. 20110428-047.

§ 2-7-65 SUBSTANTIAL INTEREST OF RELATIVE.

- (A) A substantial interest of a spouse of a City official or employee shall be deemed to apply to that official or employee for the purposes of Sections 2-7-63 (Prohibition on Conflict of Interest) and 2-7-64 (Disclosure of Conflict of Interest) concerning disclosure and recusal or reassignment.
- (B) If the spouse of a City official or employee does business through a partnership or other entity, the substantial interests of that partnership or entity shall not be deemed under Section 2-7-61 (Conducting Business Through Partnerships, Professional Corporations, and Other Entities) to apply to the City official or employee.
- (C) A City official or a City employee may not participate in a vote or decision affecting a substantial interest of a person to whom the official or employee is related in the first or second degree of consanguinity or affinity. This subsection does not apply to a substantial interest of a relative based on the relative's employment by a governmental body.
- (D) For the purposes of Subsection (C): A relative other than a spouse has a substantial interest if:
 - (1) the person owns 10 percent or more of the voting stock or shares of the entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the entity; or
 - (2) funds received by the person from the entity exceed 10 percent of the person's gross income for the previous year; or
 - (3) the person has a substantial interest in real property if the interest is an equitable or legal ownership in real property with a fair market value of \$2,500 or more.

Source: 1992 Code Section 2-3-65; Ord. 031204-9; Ord. 031211-11; Ord. 20110428-047.

§ 2-7-66 MISUSE OF OFFICIAL INFORMATION.

No former City official or former employee shall use any confidential information to which he had access by virtue of his official capacity and which has not been made public concerning the property, operations, policies, or affairs of the City, to advance any personal financial interest.

Source: 1992 Code Section 2-3-66; Ord. 031204-9; Ord. 031211-11.

§ 2-7-67 RESTRICTIONS ON PROVIDING REPRESENTATION OF OTHERS.

- (A) For the purpose of this section, the following definitions shall apply unless the context clearly indicates or requires a different meaning.
 - (1) BEFORE THE CITY means before the city council, a board or commission, or a City official or employee.
 - (2) CASE, PROJECT OR MATTER means to refer to specific cases, projects or regulatory matters, rather than generic policies, procedures or legislation of general application. For instance, the zoning process or site plan review process is not a "case, project or matter" within the meaning of this section; however, a specific zoning case or site plan would constitute a "case, project or matter" subject to the restrictions imposed in this section. It is not the intent of this chapter, and this chapter shall not be construed, to proscribe the practice of any profession or occupation by former City officials and employees.
 - (3) REPRESENT means all communications with and appearances before the City in which the City is asked to make a decision, as that term is defined in this chapter. The term represent does not include communications and appearances involving only ministerial action on the part of the City.
- (B) A City employee in a position which involves significant decision-making, advisory, or supervisory responsibility or a City official who leaves the service or employment of the City shall not, within 12 months after leaving that employment or service, represent any other person or entity in any formal or informal appearance, if the City official or employee has received or shall receive remuneration from the person, entity or members of the entity being represented:
 - (1) before the City concerning a case, project or matter over which the person exercised discretionary authority as a City employee or official; or
 - (2) before any other agency on a case, project or matter over which the person exercised discretionary authority as a City employee or official.
- (C) A former City employee or official who is subject to the requirements of Subsection (B) shall, during the 24 months after leaving the service or employment of the City, disclose his previous position and responsibilities with the City and the work performed, if any, as a City employee or official regarding the matter for which he is appearing before the City whenever he represents any other person or entity in any formal or informal appearance before the City.
- (D) In any formal or informal appearance before the City, a person representing a person or entity which employs a former City official or employee who had discretionary authority over the project or matter for which the person or entity is appearing before the City shall disclose any former involvement of such former City official or

employee in the project or matter. This disclosure requirement shall be in effect for 24 months after the former City official or City employee leaves City service or employment.

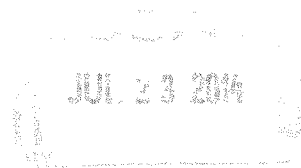
- (E) This section shall become effective from and after February 1, 1987. This section shall not apply to persons who left the service or employment of the City prior to February 1, 1987.

Source: 1992 Code Section 2-3-67; Ord. 031204-9; Ord. 031211-11.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2014



Ms. Elaine Nicholson
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767

OR2014-12644

Dear Ms. Nicholson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 530718.

The City of Austin (the "city") received three requests from different requestors for information pertaining to a named individual, including the City Auditors Investigative Unit report and all documents, notes, and communications relating to the investigation of the named individual for alleged conflict of interest. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from a representative of one of the requestors. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Section 552.116 of the Government Code provides:

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

(a) An audit, working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You assert the information you marked consists of "audit working papers created or utilized by the City Auditor during its investigation of a member of the City's Zero Waste Advisory Commission." You also state the audit was conducted under the authority granted by section 2-3-5 of the Austin City Code. Based on your representations and our review, we agree the information you marked constitutes audit working papers under section 552.116. Thus, the city may withhold the information you marked under section 552.116 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made

“for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim the information you marked is protected by section 552.107(1) of the Government Code. You state the information you marked consists of communications “between and amongst the City Attorney, Deputy City Attorney, several assistant city attorneys and law department staff, and staff in the City Council Office, Office of the City Auditor, Public Information Office, City Clerk’s Office, Department of Transportation, and all members of the City’s Ethics Review Commission.” You state the communications were made for the purpose of facilitating the rendition of professional legal services to the city. You further state these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you marked. Thus, the city may withhold the information you marked under section 552.107(1) of the Government Code.

In summary, the city may withhold the information you marked under section 552.116 of the Government Code and section 552.107(1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/tch

Ref: ID# 530718

Enc. Submitted documents

c: Three Requestors
(w/o enclosures)

Mr. James A. Hemphill
Counsel for a Requestor
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701-3790
(w/o enclosures)

CIVIL CASE INFORMATION SHEET

CAUSE NUMBER (FOR CLERK USE ONLY): _____ COURT (FOR CLERK USE ONLY): _____

STYLED TEXAS DISPOSAL SYSTEMS, INC. AND JENNIFER THOMAS V. CITY OF AUSTIN, TEXAS
(e.g., John Smith v. All American Insurance Co; In re Mary Ann Jones; In the Matter of the Estate of George Jackson)

A civil case information sheet must be completed and submitted when an original petition or application is filed to initiate a new civil, family law, probate, or mental health case or when a post-judgment petition for modification or motion for enforcement is filed in a family law case. The information should be the best available at the time of filing.

1. Contact information for person completing case information sheet: Name: <u>James A. Hemphill</u> Email: <u>jhemphill@gdhn.com</u> Address: <u>401 Congress Ave., Ste. 2200</u> Telephone: <u>512-480-5762</u> City/State/Zip: <u>Austin, Texas 78701</u> Fax: <u>512-536-9907</u> Signature: <u>/s/ James A. Hemphill</u> State Bar No: <u>00787674</u>		Names of parties in case: Plaintiff(s)/Petitioner(s): <u>Texas Disposal Systems, Inc. and Jennifer Thomas</u> Defendant(s)/Respondent(s): <u>City of Austin, Texas</u> <small>(Attach additional page as necessary to list all parties)</small>		Person or entity completing sheet is: <input checked="" type="checkbox"/> Attorney for Plaintiff/Petitioner <input type="checkbox"/> Pro Se Plaintiff/Petitioner <input type="checkbox"/> Title IV-D Agency <input type="checkbox"/> Other: _____ Additional Parties in Child Support Case: Custodial Parent: _____ Non-Custodial Parent: _____ Presumed Father: _____	
2. Indicate case type, or identify the most important issue in the case (select only 1):					
Civil			Family Law		
Contract <input type="checkbox"/> Debt/Contract <input type="checkbox"/> Consumer/DTPA <input type="checkbox"/> Debt/Contract <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Other Debt/Contract: <input type="checkbox"/> Foreclosure <input type="checkbox"/> Home Equity—Expedited <input type="checkbox"/> Other Foreclosure <input type="checkbox"/> Franchise <input type="checkbox"/> Insurance <input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Non-Competition <input type="checkbox"/> Partnership <input type="checkbox"/> Other Contract: _____	Injury or Damage <input type="checkbox"/> Assault/Battery <input type="checkbox"/> Construction <input type="checkbox"/> Defamation <input type="checkbox"/> Malpractice <input type="checkbox"/> Accounting <input type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional Liability: <input type="checkbox"/> Motor Vehicle Accident <input type="checkbox"/> Premises <input type="checkbox"/> Product Liability <input type="checkbox"/> Asbestos/Silica <input type="checkbox"/> Other Product Liability List Product: _____ <input type="checkbox"/> Other Injury or Damage: _____	Real Property <input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Trespass to Try Title <input type="checkbox"/> Other Property: _____ Related Criminal Matters <input type="checkbox"/> Rap/Action <input type="checkbox"/> Judgment Nisi <input type="checkbox"/> Non-Disclosure <input type="checkbox"/> Seizure/Forfeiture <input type="checkbox"/> Writ of Habeas Corpus—Pre-indictment <input type="checkbox"/> Other: _____	Marriage Relationship <input type="checkbox"/> Annulment <input type="checkbox"/> Declare Marriage Void Divorce <input type="checkbox"/> With Children <input type="checkbox"/> No Children Other Family Law <input type="checkbox"/> Enforce Foreign Judgment <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Name Change <input type="checkbox"/> Protective Order <input type="checkbox"/> Removal of Disabilities of Minority <input type="checkbox"/> Other: _____	Post-judgment Actions (non-Title IV-D) <input type="checkbox"/> Enforcement <input type="checkbox"/> Modification—Custody <input type="checkbox"/> Modification—Other Title IV-D <input type="checkbox"/> Enforcement/Modification <input type="checkbox"/> Paternity <input type="checkbox"/> Reciprocity (UIFSA) <input type="checkbox"/> Support Order Parent-Child Relationship <input type="checkbox"/> Adoption/Adoption with Termination <input type="checkbox"/> Child Protection <input type="checkbox"/> Child Support <input type="checkbox"/> Custody or Visitation <input type="checkbox"/> Gestational Parenting <input type="checkbox"/> Grandparent Access <input type="checkbox"/> Paternity/Parentage <input type="checkbox"/> Termination of Parental Rights <input type="checkbox"/> Other Parent-Child: _____	
Employment <input type="checkbox"/> Discrimination <input type="checkbox"/> Retaliation <input type="checkbox"/> Termination <input type="checkbox"/> Workers' Compensation <input type="checkbox"/> Other Employment: _____		Other Civil <input type="checkbox"/> Administrative / Judicial <input type="checkbox"/> Antitrust/Unfair Competition <input type="checkbox"/> Code Violations <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Intellectual Property <input type="checkbox"/> Lawyer Discipline <input type="checkbox"/> Perpetuate Testimony <input type="checkbox"/> Securities/Stock <input type="checkbox"/> Tortious Interference <input checked="" type="checkbox"/> Other: <u>Public Information Act</u>			
Tax <input type="checkbox"/> Tax Appraisal <input type="checkbox"/> Tax Delinquency <input type="checkbox"/> Other Tax: _____		Probate & Mental Health <input type="checkbox"/> Guardianship—Adult <input type="checkbox"/> Guardianship—Minor <input type="checkbox"/> Mental Health <input type="checkbox"/> Other: _____			
3. Indicate procedure or remedy, if applicable (may select more than 1):					
<input type="checkbox"/> Appeal from Municipal or Justice Court <input type="checkbox"/> Arbitration-related <input type="checkbox"/> Attachment <input type="checkbox"/> Bill of Review <input type="checkbox"/> Certiorari <input type="checkbox"/> Class Action		<input checked="" type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Garnishment <input type="checkbox"/> Interpleader <input type="checkbox"/> License <input checked="" type="checkbox"/> Mandamus <input type="checkbox"/> Post-judgment		<input type="checkbox"/> Prejudgment Remedy <input type="checkbox"/> Protective Order <input type="checkbox"/> Receiver <input type="checkbox"/> Sequestration <input type="checkbox"/> Temporary Restraining Order/Injunction <input type="checkbox"/> Turnover	
4. Indicate damages sought (do not select if it is a family law case): <input checked="" type="checkbox"/> Less than \$100,000, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorneys fees <input type="checkbox"/> Less than \$100,000 and non-monetary relief <input type="checkbox"/> Over \$100,000 but not more than \$200,000 <input type="checkbox"/> Over \$200,000 but not more than \$1,000,000 <input type="checkbox"/> Over \$1,000,000					