



GRAVES DOUGHERTY HEARON & MOODY

A PROFESSIONAL CORPORATION

James A. Hemphill
Board Certified, Civil Appellate Law
Texas Board of Legal Specialization

512.480.5762
512.536.9907 (fax)
jhemphill@gdhm.com

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.

June 10, 2014

Page 5

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).

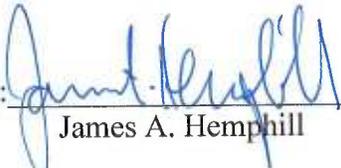
Further, the City cannot exempt a document from disclosure by merely including an attorney as a recipient. “[A] person cannot cloak a material fact with the privilege merely by communicating it to an attorney.” *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). Also, a communication of a fact to a lawyer 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 6, 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.

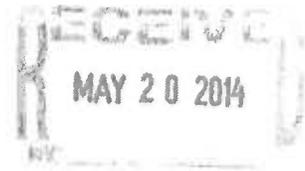
Comments/Additional Information (if needed):





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,



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 SOLURSO and did not disclose this relationship as required by City Code. Ochoa Gonzalez 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.

Jasna Hadari
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.

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 8, 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. 031204-9; 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 2-3-30; 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.

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.