

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

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