

April 28, 2014

CONCISE RESPONSE TO THE REPORT ON ALLEGATIONS INVOLVING A ZERO WASTE ADVISORY COMMISSIONER

As you may know, I am a member of the Zero Waste Advisory Commission and have been the subject of an investigation by the City Auditor's Integrity Unity (CAIU) for allegations that I have violated conflict of interest rules. I highlight I am a volunteer on the Commission, this is my first tenure in such role and have dedicated much volunteer time for the City without any expectation of gain and without any improper motive.

The CAIU investigation concluded that I violated conflicts of interest and recusal rules by participating in votes or decisions in which Texas Disposal System (TDS), a party in which I allegedly have a "substantial interest," made public comments. These findings are included in a "Report on Allegations Involving a Zero Waste Advisory Commissioner" (the "Report").

I did not learn of the outcome of the CAIU investigation until Andrew Moore, Council Member Martinez' Chief of Staff, called me on April 22, and informed me of the Report and asked for my resignation from ZWAC. I only learned that the report would be an agenda item on the Ethics Review Commission at its April 29 meeting by mere accident.

I highlight that the CAIU:

- never provided me an opportunity to defend against the accusations;
- conducted a flawed investigation and drafted an erroneous report; and
- publicly "tarred and feathered" me by widely and prematurely disseminating the report to the Mayor, City Council and many others in violation of the City's regulations regarding such matters.

All of this was done disregarding the procedure expressly established in the City Code Chapter 2-7, Article 3 for complaints of conflicts of interest.

Although this situation is truly unjust and unwarranted, I recognize that my permanence in the Zero Waste Advisory Commission will generate an unnecessary and negative distraction from the important and positive work that still needs to be performed by the Commission. For this reason, I hereby submit my resignation.

Finally, I respectfully request that: 1) the inaccurate, incomplete, improperly disseminated Report of the CAIU be publically withdrawn; 2) that my name be cleared of wrongdoing; and 3) that the City spend more time providing volunteers adequate ongoing support on the conflicts of interest rules rather than conducting one sided persecutions.

Specific shortcomings of the Report, include among other items:

1. The Report is inaccurate and misleading because it a) does not substantiate if or how I have a *substantial interest* in TDS, b) never considers if or how the matters in which I participated had a *likelihood of creating a direct economic consequence* on TDS, and c) fails to address the totality of the circumstances.

The Report prepared by the CAIU sought to “determine if Daniela Ochoa Gonzalez, Zero Waste Advisory Commissioner, violated the City Code regarding conflict of interest.” Its findings conclude that:

- my participation in discussions of agenda items of interest to TDS on April 10, 2013 constituted a conflict of interest;
- my participation in discussions and voting in February 13, 2013 and August 14, 2013 also constituted a conflict of interest; and
- these actions appear to constitute a violation of City Code § 2-7-63 [recusal] and §2-7-64 [disclosure of financial interest] of the City code.

The Report is erroneous because it fails to properly address the 2 factors that must be met for a conflict of interest to exist: *substantial interest* and *likelihood of direct economic effect*.

The City Code prohibition on conflict of interest and the obligation to disclose conflicts of interest are both triggered when a City official participates on a vote or decision on a matter *affecting* a party in which the official has a *substantial interest* (City Code § 2-7-63 and §2-7-64). Hence, a conflict of interest is triggered when 2 tests are satisfied: a) a matter *affects* a party, and b) the city official has a *substantial interest* in such affected party.

Per the City Code *affecting* or *affected* means “*reasonably likely* to be subject to a *direct economic effect or consequence*, either positive or negative, as a result of the vote or decision in question...Affected does not include those persons or entities who are subject to an indirect or secondary effect from official action.” (City Code §2-7-2)

Substantial interest is defined as “an interest in another person or an entity if: ...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 10 percent of the person’s gross income during that period, whichever is less...” (City Code §2-7-2)

The payment I received from TDS did not meet the *substantial interest* test at any time before the ZWAC meeting of April 10, 2013: I recognize that I have an agreement with TDS under which I work as an independent contractor to perform assessments and education of school waste management practices. (I did not hide this work; in fact, I verbally disclosed to City Council staff prior to my designation to the Commission and to City staff during my tenure at the Commission that I was performing this type of work for waste haulers.) The investigators concluded that I had a substantial interest without requesting or reviewing relevant financial information (such as my tax return or bank statements or the dates of the payments by TDS).

Pursuant to my work assessing school waste management practices, on February 28, 2013, I received a payment from TDS of \$3,050.11. This payment was received after the ZWAC meeting of February 13, 2013, so I clearly did not have a **substantial interest** in TDS at such meeting. Further, based on an initial review of my financial records, I also understand this payment did not meet the **substantial interest** threshold which would have required me to make disclosures or recuse myself from the ZWAC meeting of April 10, 2013.

In any case, even if it is somehow determined that I had a substantial interest in TDS prior to the April 10 ZWAC meeting, **my participation during such meeting was very limited, irrelevant, AND I abstained from voting.**

Subsequent to the April 10 meeting, my participation in the August 14, 2013 meeting did not relate to any matter that affects TDS: During the August 14, 2013 ZWAC meeting, I participated in two votes on items of the agenda which featured public comments from TDS representatives: item 3A (Special Events Ordinance) and 3D (URO Data Collection and Reporting Contract).

On Item 3A, the Commission and I voted in favor of approving the draft of the Special Events Ordinance presented to us by City Staff with two conditions aimed at strengthening the stakeholder input process. The Commission vote was 5-1.

On item 3D, I voted in favor of authorizing the negotiation of an Agreement with Emerge Knowledge Design Inc. to develop a data collection system pursuant to the Universal Recycling Ordinance but requested that the final draft of the contract be submitted to the Commission for final approval. The Commission vote was unanimous (6-0).

My participation and votes in such agenda items promoted stakeholder input and reasonable contractual control by the Commission, all in furtherance of principles that the Commission agrees on.

I never perceived, then or now, and I do not think a reasonable person could perceive-- how any of these matters could be **reasonably likely to be subject to a direct economic effect or consequence** of TDS or myself.

The CAIU report does not address this issue at all. In short, the CAIU Report reaches a finding of "guilt" without fully considering the two factors that are required to determine if a conflict of interest existed.

In addition, the Report fails to mention significant considerations:

- I completely collaborated with the investigation and acted in good faith. While the report ignores this fact, it does take the time to thank the City Clerk and the Austin Resource Recovery Staff;
- In several instances before and during my tenure on the Commission, I sought guidance from several members of the City staff (Austin Resource Recovery and others) on the

ethics rules. In these discussions I also disclosed that I was providing consulting services on waste management issues, including waste assessment and education services to Independent School Districts under a contract to waste haulers. Based on these discussions, I was led to believe that the educational nature of my work performed at schools pursuant to the TDS contract would not subject me to disclosure or recusal requirements;

- My contract work for TDS was completely unrelated to any matter brought before the commission. Additionally, I never discussed with any TDS person any matter related to the discussions of the Commission.
- There was no improper motive in my actions and there was no harm to the City or its constituents.

2. The process conducted by the City Auditor's Integrity Unity (CAIU) did not follow the procedure expressly set forth in the City Code for the Ethics Review Commission. Instead, the CAIU conducted a flawed investigation, drafted an erroneous report and distributed it widely without ever giving me adequate opportunity to defend the allegations, all of which has caused me grave harm.

City Code, § 2-1-24, expressly states that complaints alleging a violation of conflicts of interest and recusal rules are handled according to the process established in Chapter 2-7, Article 3 (Violations; Complaint and Hearing Procedures).

Per the City Code, the Ethics Review Commission has jurisdiction over chapter 2-7 (Ethics and Financial Disclosure) and Section 2-1-24 (*Conflict of Interest and Recusal*). The Ethics Review Commission is also tasked with hearing and ruling on complaints alleging violations of the provisions within the commission's jurisdiction. (City Code, § 2-7-26).

City Code Chapter 2-7, Article 3 expressly provides a process to formalize conflict of interest and recusal complaints. This procedure includes obligations to notify the respondent, to hold a preliminary and final hearing, and other provisions, all of which seek to balance the rights of all parties involved.

None of this required process was followed. Instead, the CAIU violated my due process rights by conducting an investigation based on an anonymous tip, never providing me an adequate opportunity to defend the accusation, and never notifying the Ethics Review Commission, the one body tasked with overseeing the process. Finally, the CAIU has caused great harm to my reputation by widely circulating its flawed Report to:

- the Mayor,
- City Council and Council Members' staff,
- the City Manager,
- the Assistant City Managers,
- the Ethics Review Commission,

- the City Clerk,
- the Director of Austin Resource Recovery; and
- the Director of Communications and Public Information.

Beyond any consideration of legality, such conduct by the CAIU was more than simply unjust and not commensurate to the alleged offense. I have been effectively “tarred and feathered” in the public perception without having been provided my legally entitled due process rights in this matter. Further, the CAIU’s action in disseminating the report in the manner they did has rendered worthless the process expressly required in the City Code, Chapter 2-7, Article 3.

There is no purpose for the Ethics Review Commission and the process for managing ethics and financial disclosure complaints established in the City Code if the CAIU can effectively determine guilt and widely publicized their unsubstantiated conclusions?

Based on the foregoing, I ask the following questions:

- Doesn’t the CAIU have a minimal responsibility ensure the accuracy of its reports prior to irreparably injuring a person’s reputation?
- Can the CAIU disregard the Ethics Review Commission and the process for managing complaints required in City Code Chapter 2-7, Article 3?
- Does not the CAIU have the power to deny the due process rights of the citizens of Austin?
- Is this the way the City treats its citizens who volunteer to participate in the governance process?

I trust you will respond to these answers in a just manner and grant the relief I seek.