

CAUSE NO. D-1-GN-15-002291

BRIAN RODGERS
Plaintiff

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IN THE DISTRICT COURT

v.

TRAVIS COUNTY

THE CITY OF AUSTIN
Defendant

98TH JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION FOR MANDAMUS

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Brian Rodgers (“Rodgers”) files this Original petition against Defendant City of Austin (“City”) and alleges as follows:

NATURE OF THE CASE AND DISCOVERY CONTROL PLAN

1. a. This lawsuit demonstrates that the claim by management of the City of Austin that it is dedicated to “transparency and accountability” is a farce. Rodgers requested public information about 3 controversial matters:

(1) correspondence between City officials and the Downtown Austin Alliance during the period of time they were conjuring up the ill-fated proposal for a light-rail line;

(2) records about how the scheme got hatched to let over 700 acres of Walter E. Long parkland be turned over to a for-profit developer without getting voter approval as required by the Austin City Charter and records about the contract negotiations; and

(3) records about the City’s failure to timely respond to notice from TxDOT losing the opportunity to purchase surplus state property on Bull Creek road that could have been developed as a public park but instead went to a private, for-profit developer.

In response, City management blatantly violated the Texas Public Information Act (TPIA)¹

¹ Tex. Gov’t Code ch. 552.

by refusing to promptly supply (or supply at all) public information on these controversial matters that could be embarrassing to the City, its current or prior officials, and its management staff. Rodgers will prove that City management completely ignored requests for information, made unauthorized and unexplained redactions, omitted responsive records, and despite warning, continue to stall while the controversial matters progressed for decision by the City Council. Even after the City was clearly warned in writing that it had failed to comply with the TPIA, city management stonewalled, making this lawsuit necessary pursuant to TPIA section 552.321.

b. It was only 8 months ago that City of Austin officials completed deferred prosecution for violating open government laws. Rodger’s experience with trying to get complete disclosure of public information demonstrates that City management has not learned much from the past and its process for responding to public information requests—supposedly “promptly” as required by the TPIA—is in utter shambles.

c. Discovery will be conducted under TRCP 190.3, Level 2.

CLAIM FOR RELIEF

2. Plaintiff seeks monetary relief of \$100,000 or less and nonmonetary mandamus relief. TRCP 47(c)(2).

PARTIES

3. a. Plaintiff is Brian Rodgers, the requestor of information under the TPIA, and a resident of the City of Austin, Travis County, Texas. The last three digits of Brian Rodger’s driver’s license are 357, and the last three digits of his Social Security number are 488. Mr. Rodgers can be served through his attorney-of-record in this case.

b. Defendant City of Austin is a defendant pursuant to TPIA section 552.321 as the governmental body to whom Rodgers submitted his request for information and that refused to

supply the public information. Pursuant to Tex. Civ. Prac. & Rem. Code section 17.024(b), the City can be served through its Mayor, The Honorable Steve Adler, at the Mayor's office located at 301 W. 2nd Street, Austin, Texas 78701.

JURISDICTION & VENUE

4. The Court has jurisdiction over this case under TPIA section 552.321 which also makes venue mandatory in this Court.

FACTS

City Ignored Request for Correspondence with the Downtown Austin Alliance

5. a. In 2014, Rodgers made an open records request to the Downtown Austin Alliance (DAA) for financial records and correspondence the DAA had with City officials about the light rail bond proposal and the DAA's controversial, if not blatantly illegal, campaign contribution to the PAC supporting that City bond proposition.

b. Even though its own annual report shows that the DAA receives over 98% of its revenue from public funds, the DAA asserted it was not supported with public funds, making it a "governmental body" under the TPIA, and asked for a ruling by the Texas Attorney General. The Texas Attorney General ruled in Rodgers' favor that the DAA's records were subject to disclosure under the TPIA.

c. The DAA sued the Attorney General to challenge the ruling, but when Rodgers notified the DAA that, as the records requestor, he was going to intervene in that lawsuit, the DAA dropped the lawsuit and indicated that they would provide Rodgers with the records he had requested.

d. After reviewing the correspondence the DAA provided—supposedly all of the correspondence they had with any city personnel between September 1, 2013 and December 10,

2014 (the date of Rodgers' last records request), Rodgers was convinced that the DAA was hiding some of that correspondence.²

6. So, on April 23, 2015, Rodgers submitted a public information request to the City giving the City certain URL email accounts of the DAA to obtain emails from or to City personnel during the same time period (9/2013 – 12/2014) “regardless of whether [the City personnel were] using a City or personal email account.” EXHIBIT P-1. While the former Mayor and Council members with whom the DAA probably had correspondence during that time have left office, the Texas Local Government Records Act and state rules would require their “official business” emails to be retained by the City for a minimum of 2 years. Despite being warned of the TPIA violation, the City has ignored this request and provided no records as of the date of this lawsuit.

Rodger’s March 16 Request for Decker Lake Golf Scheme Negotiations

7. On March 16, 2015, Rodgers asked the City for records of its contract negotiations with Decker Lake Golf. EXHIBIT P-2 (second page). This was a proposal by a developer to take over 700 acres of parkland at the Walter E. Long Park and turn it into a for-profit, high-end golf course without asking the voters of Austin—as the City Charter requires—to permit such a loss of parkland.

a. The City provided records, but Rodgers’ attorney advised the City staff on multiple occasions that a review of those records showed very suspicious gaps in the emails. For example, the golf course scheme proposed to make a “concession agreement” of 90 years with the City for the parkland, recognizing that if they called it a “lease” the City Charter provision would clearly

² The request to the DAA was specifically for: “A copy of any correspondence (including paper or electronic communication within the definition of “public information” cited above) since September 1, 2013 between any officer, employee, attorney or agent of Austin DMO, Inc. and the Mayor of Austin, any City Council member of Austin, the City Manager, Assistant City Manager(s), or attorney for the City of Austin about any matter involving official business of the City of Austin or of Austin DMO, Inc.”

apply. But to obfuscate whether Decker's concession proposal was the same thing as a lease, the City staff negotiated a provision that would allow the City Council, for any reason or no reason, to cancel the agreement regardless of whether Decker complied with the agreement or not. The publicly disclosed records does not show the back-and-forth between the City staff or attorneys and Decker over this highly sensitive issue.

b. On April 7, 2015, Rodgers' attorney sent the City Attorney's office an email noting a mysterious gap before and after Decker Golf representative (Bellomy) wrote to City coordinator (Nicholson) that Decker would agree to that draconian cancellation provision. Bellomy's email of September 15, 2014 to Nicholson said, "We understand and accept the provisions of the City Council's ability to terminate a concession agreement and look forward to meeting with the Park Board on September 23, 2014 and City Council action on October 2nd." Apparently, this email was responding to an email that was not disclosed, and a suspicious gap in the email traffic between Decker and the City existed in the disclosed records from August 29th to September 15th and then from that date until October 21st. It is highly suspicious that in the midst of negotiating such a controversial contract provision, there was such dead silence for 2 weeks before that Bellomy email and almost a month after—no emails between Decker and the City at all.

Rodger's March 16 Request for Records Related to City's Loss of Opportunity to Acquire the Bull Creek Parkland from TxDOT

8. Rodgers found it highly ironic and frustrating that, in the midst of this scheme to lose over 700 acres of parkland to unneeded golf courses, the City flubbed an opportunity to acquire surplus TxDOT property for a 75-acre park along Bull Creek. So, on March 16, 2015, he submitted a request for those records. EXHIBIT P-3 (second page). After an inordinate, unjustified, and unexplained delay of almost 2 months, the City provided some records. However, as is shown

below, they have refused to provide information about how this request was processed internally. (See “PIR Processing Requests” below).

Rodger’s March 19 Request for Records About the “Genesis” of the Decker Golf Scheme

9. a. On March 19, 2015, Rodgers asked the City for its correspondence and records about how, apparently in 2013, the scheme was hatched to convert the Walter E. Long parkland to golf courses and to do so by bypassing the voters. EXHIBIT P-4 (second page). This request was made after seeing a published interview with City PARD Director Hensley by the American Statesman Editorial Board, in which Hensley claimed a developer brought the idea to the City as a “license” agreement (to try to bypass the voter-approval required by the City Charter. Rodgers wanted to see the interaction between City staff and the developer, particularly about whether the proposal would require voter approval.

b. On April 8, 2015—14 business days later—the City disclosed 8 pages of meeting calendaring information (only) in response to this request for all records about how the Decker Lake Golf scheme started. *Not a single email—internally within the City or between City personnel and the Decker Lake Golf developer or its lobbyist during the genesis of this scheme—before the RFQS was issued in the Spring 2014—has been disclosed by the City.* The records the City disclosed, showed that a meeting on March 26, 2013 with PARD Director Hensley (and staff) and Richard Suttle³ and developer Warren Hayes. The next meeting was organized by ACM Sue Edwards and was with PARD staff and Warren Hayes on July 3, 2013. The next meeting was organized by PARD Director Sarah Henley for August 20, 2013 with PARD staff and Richard

³ Another open records request for City Clerk lobby registration records indicated that Richard Suttle was not at the time, nor subsequently in 2014, registered as a lobbyist for the developer Decker Lake Golf or its principals.

Suttle, Warren Hayes, and someone identified only as jfalk@abaustin.com. The next meeting disclosed was on October 25, 2013 and was organized by ACM Sue Edwards with Richard Suttle and Warren Hayes and ACM Bert Lubreras and PARD staff.

c. Either one must believe that this huge, unprecedented transfer of City parkland to private developers was being discussed with City personnel and not a single email or other correspondence and not a single note taken during a meeting was generated—internally nor from or to any outside party, like Suttle or Decker Lake Golf—for the 7 months these quiet meetings were going on. Or, the City has refused to disclose those records.

Rodgers' April 13th Request for Records About PIR Processing of his Prior Requests

10. a. The City Law Department, open records section, has an automated system for logging, referring, and tracking open records requests. Frustrated that the City was not being responsive or timely to his TPIA requests, on April 13, 2015, Rodgers asked for the open records section's log information about his previously filed requests. EXHIBITS P-2, P-3, and P-4 (first pages). These records should show to whom (which City personnel and departments) the records requests were routed, when that routing occurred, and what response the central open records section received. For example, knowing that ACM Sue Edwards was very much involved in the genesis of the scheme to give up the Walter E. Long parkland and the failure to acquire the Bull Creek property, but not a single piece of correspondence from or to her and Decker Lake Golf or TxDOT was disclosed, Rodgers wondered if she had even been sent the open records requests by the Law Department. The PIR processing records would show whether some City staff with relevant records just weren't made aware of the Rodgers requests.

b. Ironically, to this day, the City has failed to produce the PIR processing system records and correspondence requested by EXHIBITS P-3 (Bull Creek) and P-4 (Genesis of Decker

Lack Golf scheme). The City produced the records for EXHIBIT P-2 (which is attached as EXHIBIT P-5, second page) which proves that such records exist but have been withheld by the City for some reason.

Unexplained, Unjustified Delay Notices from the City

11. a. Several times, the City staff—often long after 10 business days of receiving the requests—would, out of the blue, send a notice that the response would be delayed. TPIA section 552.221(c) and (d) do permit, under certain circumstances, the officer for public information to send the requestor notice of a delay. Not one of the notices the City staff sent, explained why the delay was occurring or why, sometimes *weeks* after receiving the records request, the delay notice was being sent.

b. On the morning of April 23, 2015, Law Department employee Lyn von Roeder sent an email, apparently applying to all of Rodgers’ outstanding open records requests going back to the March 16th requests, saying that the City “will make the effort to ensure that the information you requested is made available to you in a timely manner. We anticipate completing your requests on or before May 11, 2015.” No explanation was given as to why almost a 60-day delay was occurring in providing the information “timely.” Ms. Von Roeder did not respond to an email that same day from Rodgers’ attorney inquiring as to why the notice was being sent.

c. On the afternoon of April 23, 2015 Eloy Del Bosque (identified as “PIR Team, Law Department”) send 3 emails responding to Rodgers’ April 13th request for the PIR processing records. Instead of providing the records Rodgers requested—as the TPIA requires—he instead provide made-up information about department responses to the prior requests. And, apparently referring the PIR processing log records from his own office, Del Bosque said, “We anticipate having any additional responsive information to you on or before May 11, 2015.”

12. The City did not provide the requested records by or after May 11, 2015.

Unauthorized, Unexplained Redactions of Records Provided

13. a. The City did not obtain authorization from the Texas Attorney General to withhold or redact any of the records responsive to the Rodgers' request. But the City redacted entire emails. When Rodgers' attorney pointed out the redactions and requested an explanation for why the redactions were made, the City did not respond.

b. EXHIBIT P-6 is an example of a complete email redaction, without explanation, related to Rodgers' request for the genesis of the Decker Lake Golf scheme.

c. EXHIBIT P-7 is an example of complete redactions, without explanation, related to Rodgers' request for records related to the City's failure to acquire the Bull Creek parkland.

The City Ignored Warnings of this Lawsuit

14. a. At one point, the City filed, but withdrew, a request to the Attorney General for ruling about whether the contract negotiation records and the Bull Creek fiasco could be withheld. On March 31, 2015, Rodgers' attorney emailed Catherine Riley in the Law Department noting that no records had been disclosed and specifically asked if the City was refusing to disclose "any" of the records.

b. After still not receiving the requested records, on April 7, 2015, Rodgers' attorney emailed Asst. City Attorney Elaine Nicholson specifically warning that a lawsuit was going to be filed. Rodgers' concern was that the Decker Lake Golf scheme was proceeding through the City Council's decision process while the City staff was withholding relevant records.

c. On April 13, 2015, Rodgers' attorney sent Catherine Riley of the Law Department noting that additional records Purchasing employee Terry Nicholson had had still not been disclosed (including the records related to the strange gap in emails with Decker Lake Golf in

August to October, 2014).

d. On April 15, 2015, Rodgers' attorney sent Catherine Riley another email pointing out problems with the City's response to the Rodgers' open records request. The email said, "I'm trying very hard to muster the patience to wait and see if the Law Department can get the city management staff and whomever has control of the former Mayor and Council records to comply with the TPIA. But if the rest of the records are not forthcoming soon, I am left no choice but to seek assistance from the court to enforce Mr. Rodgers' rights under the TPIA."

e. On April 22, 2015, Rodgers' attorney wrote to Catherine Riley thanking her for a phone call in response to the April 15th email, but pointing out that responsive records still had not been received. The email said, "No offense, but there comes a point where we just give up on any expectation that leadership at the City is going to comply and instead seek help from the court."

f. On April 28, 2015, Rodgers' attorney wrote an email to city attorneys and open records staff, Eloy Del Bosque, Elaine Nichoson, Desta Walker, Carla Scales, and Catherine Riley noting that it had been over 40 days since Rodgers made his requests, and specifically noted that Del Bosque's office itself had not produced requested records about how his office processed the Rodgers request to which incomplete or no responses had been received. The email concluded, "What will it take—a lawsuit?—to get more serious attention to this failure to promptly comply with the Texas Public Information Act?"

15. Despite all of these warnings, Rodgers' waited until after May 11, 2015 (the date the City had said it would disclose all of the records) to see if the City would comply with the TPIA. On May 14, 2015, Rodgers' attorney sent an email detailing the deficiencies in the City's response to the Rodger's requests for records and attaching another copy of all of the Rodgers request to which the City had not fully (or, on some, even partially) complied. EXHIBIT P-8. The email said, "No

further notice will be given to the City regarding this noncompliance with the TPIA before enforcement action is taken.” Now, almost a month after that “final” warning, Rodgers brings this lawsuit.

COUNT 1 – SUIT FOR MANDAMUS

16. The facts stated above are incorporated here as the basis for this cause of action for mandamus. Pursuant to the TPIA, Tex. Gov’t Code section 552.321, Plaintiff Rodgers brings this suit for mandamus against the City of Austin and asks the Court to order Defendant and its personnel to supply all of the information Rodgers requested in Exhibits P-1, P-2, P-3, and P-4 attached to this Petition.

CONDITIONS PRECEDENT

17. All conditions precedent to plaintiff’s claim for relief have been performed or have occurred.

ATTORNEY FEES

18. Plaintiff has retained the under-signed attorney to bring this action. Plaintiff asks the court to award costs and reasonable and necessary attorney fees pursuant to TPIA section 552.323.

PRAYER

For these reasons, Plaintiff Brian Rodgers asks the Court to set this matter for an expedited hearing on mandamus pursuant to Tex. Gov’t Code section 552.321, and to order Defendant and its personnel to supply all of the information Rodgers requested in Exhibits P-1, P-2, P-3, and P-4 attached to this Petition. Plaintiff asks the Court to award Plaintiff costs and reasonable and necessary attorney fees, and to grant Plaintiff all other relief to which he may be entitled.

Respectfully submitted,

A handwritten signature in blue ink that reads "Bill Aleshire". The signature is written in a cursive style and is positioned above a horizontal line.

Bill Aleshire

Texas Bar No. 24031810

AleshireLAW, P.C.

700 Lavaca, Suite 1400

Austin, Texas 78701

Telephone: (512) 320-9155

Facsimile: (512) 320-9156

Bill@AleshireLaw.com