



March 17, 2014

David Escamilla, Travis County Attorney
509 West 11th St.
Austin, TX 78701

Via Hand Delivery

Re: Criminal Complaint against Travis County Commissioner Gerald Daugherty for the Alleged Destruction, Removal, or Alteration of Public Information and the Failure to Provide Access to or Copying of Public Information

Dear Mr. Escamilla:

Please accept this sworn criminal complaint and request for prompt investigation and potential prosecution of Travis County Commissioner Gerald Daugherty for alleged failure to provide access to or copying of public information and for the destruction, removal, or alteration of public information.

This complaint is filed on behalf of Save Our Springs Alliance pursuant to Tex. Gov't Code sections 552.351 and 552.353, which provide standards for criminal enforcement of the Texas Public Information Act (TPIA). The undersigned became aware of Commissioner Daugherty's potential criminal violations of the TPIA in the course of recent discovery proceedings in a mandamus action brought by Save Our Springs Alliance, Inc. (SOS) against Commissioner Daugherty for failing to produce information under the TPIA in response to a May 10, 2013 public information request (PIR).¹ SOS filed suit on November 12, 2013, to obtain public information that was not provided by Commissioner Daugherty. SOS Alliance also filed a subsequent PIR on the same day. Portions of Commissioner Daugherty's deposition from February 20, 2014 are referenced below and the entire deposition is attached as, *Exhibit "A"*, to support this complaint.

¹ *Save Our Spring Alliance, Inc., v. Gerald Daugherty In His Official Capacity as Travis County Commissioner for Precinct 3*, Cause No. D-1-GN-13-003876, In the District Court, 53rd, Judicial District, Travis County, Texas

(512) 477-2320

P.O. Box 684881 Austin, TX

sosalliance.org

The subject public information, some of which has yet to be produced as required by the Act, is of considerable interest and importance to the community. It is complainant's understanding that Commissioner Daugherty is not taking action to remedy these apparent and continuing violations of the Act.

I. The Texas Public Information Act

Texas Government Code section 552.351 (a) provides "a person commits an offense if the person wilfully destroys, mutilates, removes without permission..., or alters public information. Tex. Gov't Code §552.351.

Texas Government Code section 552.353 (a) provides that "an officer for public information, or the officer's agent, commits an offense if, with criminal negligence, the officer or the officer's agent fails or refuses to give access to, or to permit or provide copying of, public information to a requestor..." Tex. Gov't Code 552.353(a). Each County Commissioner is his or her own officer for public information. Criminally negligent conduct occurs when a person . . .

"...ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

Tex. Pen. Code Section 6.03(d). A violation of Section 552.353 also constitutes "official misconduct." Tex. Gov't Code 552.353(f).

II. Commissioner Daugherty's Violation of the TPIA

The evidence, summarized below, supports an investigation and potential prosecution for both willful destruction of public information and for criminally negligent failure and refusal to give SOS Alliance, as requestor, access to public information.

1. Commissioner Daugherty is familiar with the TPIA. Commissioner Daugherty previously served as County Commissioner from 2002 to 2008. Ex. A page 11, lns. 5-9.
2. He was re-elected in November of 2012 and was sworn into office in January of 2013.
3. According to Commissioner Daugherty, during his first term he took the mandatory TPIA training required for elected officials under section 552.012 of the Texas Government Code, but is unable to find his certificate of completion and has no recollection of actually taking the training course. Ex. A. pg. 11, lns., 23-25 through pg. 12, lns., 1-20.
4. Subsequent to SOS filing its lawsuit, Commissioner Daugherty watched the training video that complies with section 552.012 of the Texas Government Code alone and testified that he did not learn

anything new about the TPIA. Ex. A pg. 12., ln. 25 through pg. 14 ln. 4.

5. Commissioner Daugherty testified he understood upon taking office in January of 2013, that emails from his personal accounts that referenced county business were public information subject to the TPIA. Ex. A pg. 42, lns., 22-25 through pg. 43, lns. 1-6.
6. From the above evidence, Commissioner Daugherty was aware of the standard of care that should have been afforded to retaining and making available correspondence and documents referencing county business on his personal email and cell phone accounts.
7. Shortly after taking office in January of 2013, Commissioner Daugherty was appointed by Capital Area Metropolitan Planning Organization (CAMPO) Chairperson, Hays County Commissioner Will Conley, to chair a CAMPO sub-committee on the proposed and publicly controversial State Highway 45 Southwest toll road (SH 45 SW). CAMPO is a governmental entity subject the TPIA and Texas Open Meetings Law.
8. If built, the SH 45 SW toll road would cross over the recharge zone of the Barton Springs Edwards Aquifer, Texas' most vulnerable drinking water aquifer, and through endangered species habitat.
9. If built, the SH 45 SW toll road would also have the effect of diverting traffic from Interstate 35 over to Mopac, or Loop 1, on the west side of Austin. Mopac is already overwhelmed with traffic and the addition of diverted I-35 traffic to Mopac is of great public concern and interest.
10. Despite the overwhelming public interest in the SH 45 SW project and its potential effects on both the environment and Mopac traffic congestion, Commissioner Daugherty, as committee chair, held committee meetings without notice to the public, without keeping minutes of the committee's meetings, and without preparing any kind of public summary of those meetings. Ex. A pg. 26, lns. 4-11.
11. In light of this secrecy around Commissioner Daugherty's SH 45 SW sub-committee, and given SOS Alliance's non-profit mission to protect the Edwards Aquifer and Barton Springs, on May 31, 2013 SOS Alliance submitted the following public information request directly to Commissioner Daugherty and his assistant, Ms. Barbara Smith, with a copy to the Travis County Attorney:

All correspondence from or to [Commissioner Daugherty] or [his] identified executive assistants since [he] took office in January 2012 to the present, that references the proposed SH 45 SW, the Manchaca Expressway, or other name for a proposed road or toll road along the SH 45 SW alignment or any part of such alignment.

The instructions make clear that the request for correspondence included:

all exchanges of information of any kind, or records thereof, including, but not limited to, telephone conference notes, meeting notes, emails, text messages, letters, notices, applications, memoranda, attachments to any of these, or other communications whether or not such information was received on, generated from, or stored on devices or data bases paid for privately or by entities other than your office or Travis County. It also includes any such correspondence where you were not the primary recipient but were "cc'ed" or "bcc'ed."

The entire request, with instructions, was roughly a single page or less in length. A copy of this information request is attached as Exhibit "B".

12. Despite the brevity of this information request, Commissioner Daugherty admitted in his deposition on February 20, 2014, that until the date of the deposition he did not "recall seeing or reading in any sort of detail" the May 10, 2013 public information request. Ex. A pg. 7, lns. 11-17. And that he only "cursorily" read the information request." Ex. A pg. 8, lns. 20-22
13. On July 30, 2013, the Attorney General ruled that Commissioner Daugherty could retain some requested documents as exempt from public disclosure, while also requiring that other documents and parts to documents be disclosed. A copy of that Attorney General decision is attached as Exhibit "C".
14. On November 12, 2013, SOS Alliance filed its lawsuit seeking mandamus relief under section 552.321 of the Texas Government Code, claiming documents that should have been provided by Commissioner Daugherty were not provided to SOS Alliance in response to the May 10, 2013 public information request. A copy of that lawsuit is attached as Exhibit "D". For example, an email that had been provided in response to the request referenced email correspondence concerning SH 45 SW on Commissioner Daugherty's personal email account but no such emails were provided.
15. On the next day, November 13, 2013, SOS Alliance filed a follow up public information request to Commissioner Daugherty requesting essentially identical to the original request but seeking correspondence from the date of the original request forward to November 13, 2013.

A copy of that request is attached as *Exhibit "E"*.

16. On December 2, 2013, Commissioner Daugherty, with assistance from the County Attorney's Office, produced documents in response to the November 12, 2013 request. Several of the documents produced in response to this request were actually responsive to the prior May 10, 2013 request, but had not been provided in response to the May 2013 request as required by the TPIA.

17. In response to SOS Alliance's requests for admissions, Commissioner Daugherty admitted that several documents that should have been provided in response to the May 10, 2013 request were only provided later, in response to the November 12, 2013 request. A copy of SOS Alliance's requests for admissions, with Commissioner Daugherty's responses are attached as Exhibit "F" and "G" respectively. (See Response to Admissions 14-16)
18. In response to SOS's requests for admissions Commissioner Daugherty indicated that he uses his personal cell phone account for county business at a frequency he describes as "incidental use" Ex. G #3. However, Commissioner Daugherty was unable to clearly articulate what "incidental usage" means in his deposition. Ex. A, pg. 59 lns. 6-14.
19. Commissioner Daugherty also testified that he has no other cell phone account for county business and that the county does not provide a cell phone account to him.
20. Regardless of the definition of "incidental use" sample emails indicate Commissioner Daugherty is more than willing to discuss or text about county business on his personal cell phone account. Ex. "I". Commissioner Daugherty even makes himself available to discuss county business when he is on vacation. Ex. J
21. Commissioner Daugherty admitted to using his wife's old laptop for county business. Ex. A p. 30, lns., 8-21. However, Commissioner Daugherty failed to inventory, save or backup the county business he conducted on the laptop prior to recently conveying it to a third party as a charitable donation. Ex. A p. 30, lns., 22-25 through p. 31, lns., 1-12.
22. Commissioner Daugherty admitted to deleting emails relevant to State Highway 45 Southwest from his Travis County issued email address. Ex. A pg.,40, lns. 22-25 through pg. 41, lns., 1-16.
23. Commissioner Daugherty also admitted to deleting text messages referencing county business. Ex. A p. 43, lns. 7-12.
24. The Local Government Records Act, Tx. Local Government Code Sections 201.001 *et seq* require that correspondence concerning county business, including email and text messages, be retained according to a records retention schedule. The applicable schedule appears to require that the correspondence requested by SOS Alliance's May 2013 and November 2013 requests be retained for at least two years.
25. Commissioner Daugherty cannot willfully delete or alter public information under applicable law and is required to retain his email and text messages that pertain to county business. By deleting correspondence and conveying the laptop computer without retaining a copy of correspondence concerning county business, Commissioner Daugherty appears to have violated the Local Government Records Act and In doing so, Commissioner Daugherty allegedly committed a misdemeanor punishable pursuant to section 552.351 of the Texas Public Information Act.

26. Commissioner Daugherty has failed to thoroughly search and make available text, email and phone records from his personal cell phone account referencing county business. While Commissioner Daugherty testified that minimal effort has been made to get copies of cell phone records from his service provider relating to the public information request surrounding the pending lawsuit, he has yet to instruct his counsel to issue a subpoena for those records and apparently has not made other efforts to recover and produce records requested by SOS Alliance in November 2013 that do not require subpoena to his cell phone service provider. Emails and text from private accounts that reference county business need to be retained and archived regardless of whether they are sought in a public information request.
27. Commissioner Daugherty testified that his understanding of computers was that deleted email messages weren't truly deleted and could always be retrieved but that he had made no effort to obtain technical assistance to retrieve deleted emails that were responsive to SOS Alliance's May and November 2013 public information requests. Pg. 50, ln 21 thru pg. 51, ln 11; pg. 63, lns 7 thru 17
28. Commissioner Daugherty appears to be in continuing violation of the TPIA for not reviewing and making available responsive text messages requested in the PIR submitted on May 10, 2013 and the PIR submitted on November 13, 2013 and for not taking efforts to retrieve responsive but deleted email and text messages. It is not the public responsibility to force the proper gathering and archiving of public information.
29. Given that a priority of the TPIA is prompt production of public information, and Commissioner Daugherty continues to work to expedite SH 45 SW construction as fast as possible, Commissioner Daugherty's violations of the TPIA and the Local Government Records Act violate SOS Alliance's rights under the Act and materially impede the Alliance's ability to engage in policy making discussions and communications concerning the proposed SH 45 SW aquifer toll road.
30. Commissioner Daugherty has also apparently failed to take action to obtain text and possibly email messages from his personal cell phone account and personal email account referencing county business in response to Save Our Springs Alliance's November 13, 2013 PIR. See, e.g. Ex. A p. 48, lns.,3.

The undersigned respectfully submits that the evidence warrants a prompt and thorough investigation and potential prosecution for violations of state law as set out above.

William G. Bunch

State of Texas)
)
County of Travis)

On this _____ day of March 2014, William G. Bunch, known to me, gave his signature below and states under oath that the statements in the above letter of complaint addressed to Travis County Attorney David Escamilla are true and correct, that Mr. Bunch is over the age of eighteen (18), is a resident of Travis County, and is of sound mind and capable of giving this affidavit.

William G. Bunch

Sworn and Subscribed before me:

Notary Public in and for the
State of Texas