

CAUSE NO. D-1-GN-13-003876

SAVE OUR SPRINGS ALLIANCE, INC.	§	
	§	IN THE DISTRICT COURT
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	53 <sup>RD</sup> JUDICIAL DISTRICT
	§	
GERALD DAUGHERTY	§	
In His Official Capacity as Travis	§	
County Commissioner for Precinct 3	§	
<i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS

**PLAINTIFF’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS PURSUANT TO THE TEXAS PUBLIC INFORMATION ACT UNDER PROTECTIVE ORDER OR, IN THE ALTERNATIVE, FOR AN IN CAMERA INSPECTION OF DOCUMENTS**

Pursuant to the Texas Public Information Act (TPIA), Plaintiff Save Our Springs Alliance (Plaintiff) requests the Court to compel the production of information sought by Plaintiff in its May 2013 public information request. Under section 552.322 of the TPIA, the Court may compel the production of information sought subject to a protective order. In the alternative, the Court may allow for an *in camera* inspection of the information sought under section 552.3221. As set out below, Plaintiff contends that the withheld emails and documents are not excepted from disclosure by the attorney-client privilege or the agency memoranda exceptions as asserted by Defendant Commissioner Gerald Daugherty (Defendant). A copy of the subject redacted documents in Plaintiff’s possession and as redacted by Defendant are attached, together with a copy of excerpts from Defendant’s privilege log.

**A. FACTS**

On May 10, 2013, Plaintiff SOS, by and through its Executive Director, William G. Bunch, submitted a request for records (Public Information Request or PIR) to Travis County Commissioner Gerald Daugherty regarding “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 PIR specifically requested, among other information, any “emails, [] memoranda, [and] attachments” sent or received by Defendant or his executive assistants that referenced the proposed SH 45 SW toll road that were sent or received between January 1, 2013 and the date the request was filed on May 10, 2013.

Defendant continues to withhold public information in the form of redacted emails, claiming they are subject to the attorney-client privilege under section 552.107 of the TPIA. Defendant also continues to withhold information under section 552.111 of the TPIA, claiming an exception to disclosure as agency memoranda.

## **B. APPLICABLE LAW**

The TPIA requires that a public figure disclose “information that is written, produced, collected, assembled, or maintained . . . in connection with the transaction of official business” by a governmental body or by an employee of a governmental body in the employee’s official capacity. Tex. Gov’t Code § 552.002. A government employee may not withhold public information or limit its availability to the public “except as expressly provided by [the TPIA].” *Id.* § 552.006. Among these express exceptions is information subject to section 552.107 concerning attorney-client privilege and section 552.111 concerning agency memoranda.

A requestor may file a complaint against an employee of a governmental body acting in his or her official capacity if the requestor believes he has violated the TPIA. *Id.* § 552.3215(e). In a suit under the TPIA, “the court may order that the information at issue [] be discovered only under a protective order until a final determination is made.” *Id.* § 552.322. The court may also review the information at issue *in camera*. *Id.* § 552.3221.

## C. ARGUMENT

### 1. Defendant is Wrongly Withholding Emails under Attorney-Client Privilege.

Section 552.107 of the TPIA excepts from disclosure public information that is protected under the attorney-client privilege. *Id.* § 552.107. The burden of establishing the privilege is on the party asserting it. *Harvey v. State*, 97 S.W.3d 162, 168 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd). Attorney-client privilege protects “confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.” Tex. R. Evid. 503(b)(1). Attorney-client privilege does not apply if the attorney is acting in a capacity other than that of attorney. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, pet. denied). Merely cc’ing an attorney on an email does not afford it the protections of the attorney-client privilege. *In re Avantel, S.A.*, 343 F.3d 311, 321 (5th Cir. 2003) (applying Texas law) (cc’ing an attorney by itself “is clearly insufficient to establish the privilege”). Generally, a communication is confidential if it is not intended to be disclosed to third parties, other than: (a) those to whom disclosure is made in furtherance of rendering professional legal services to the client; or (b) those reasonably necessary to transmit the communication. Tex. R. Evid. 503(a)(5).

Attached are three redacted email threads that Defendant produced in response to Plaintiff’s 2013 PIR, and still claims are protected by attorney-client privilege. The first of these emails is a forward from Travis County Executive Steven Manilla to Defendant’s Executive Assistant Bob Moore on January 22, 2013 with the subject “May 2010 SH 45 SW Resolution” in which Manilla appears to copy an earlier email from that same morning that he sent to Travis County employee Anna Bowlin and cc’ed to Assistant County Attorney

Tom Nuckols.<sup>1</sup> It is the content of this earlier email that has been redacted, and Defendant's privilege log maintains this communication is excepted from disclosure under attorney-client privilege.<sup>2</sup> However, the previous communication was between Manilla and Bowlin, two non-lawyers, and only cc'ed Assistant County Attorney, Tom Nuckols. With the Assistant County Attorney merely cc'ed, it is unlikely that this email was sent for the purposes of rendering legal services, and the content of this email should be disclosed.

The second of these redacted email threads consists of four emails, three of which are "reply" emails to the original email. Steven Manilla forwarded the original email to Defendant Gerald Daugherty and Tom Nuckols, and changed the subject line to "SH 45 SW Attorney-Client Privilege [sic]," a subject the "reply" emails retained.<sup>3</sup> Defendant's privilege log maintains these four emails are excepted from disclosure under attorney-client privilege.<sup>4</sup> Simply because a communication involves or includes an attorney for the County does not mean the privilege applies. Government attorneys fulfill many roles other than that of professional legal counsel. Therefore, we ask that the Court review these emails to determine if the communications were made for the purpose of rendering professional legal services to the client and are thus exempt from disclosure.

The third and final redacted email thread consists of five emails, according to Defendant's privilege log, four of which were removed from production pursuant to attorney-client privilege.<sup>5</sup> The email that was produced was heavily redacted, although the disclosed communication is only between Bob Moore and Steven Manilla, two non-

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<sup>1</sup> Ex. 1, ORR2120087-88, Email from Steven Manilla to Bob Moore (Jan. 22, 2013) (later produced on Aug. 26, 2014 through supplemental production, revealing more history of the chain of emails, at 2950526-27).

<sup>2</sup> Ex. 2, SOSA Privilege Log at 6, Bates No. ORR2120087; at 43, Bates No. 2950526-27.

<sup>3</sup> Ex. 3, 2951072-74, Email thread from Steven Manilla (Jan. 19-22, 2013) (produced on Aug. 26, 2014 through supplemental production).

<sup>4</sup> Ex. 4, SOSA Privilege Log at 43, Bates No. 2951072-74.

<sup>5</sup> Ex. 5, SOSA Privilege Log at 43, Bates No. 2950679 (redacted); at 44, Bates Nos. Priv2120094, Priv2120095, Priv295002, Priv295003 (removed).

lawyers.<sup>6</sup> Because Defendant has repeatedly and brazenly withheld information later determined to be responsive and unprivileged, Plaintiff asks that the Court review these emails to determine if Defendant is properly withholding them from disclosure.

## **2. Defendant is Wrongly Withholding Information as Agency Memoranda.**

The TPIA excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Tex. Gov’t Code § 552.111. Texas courts limit the agency memoranda exception to only those agency communications or parts of agency communications that relate to the agency’s policymaking. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000). This exception is not meant “to prevent all disclosures that would chill all frank and open discussions,” but to promote frank and open discussions within the agency of policy matters. *Id.* The agency memoranda exception must be construed narrowly and in favor of granting a request for information. *See id.*

Under the agency memoranda exception, Defendant is wrongly withholding one seven-page document that appears to have been an email attachment. Defendant’s Answer No. 3 to Plaintiff’s First Set of Interrogatories indicates that Defendant possesses a document entitled “Campo SH45 SW Progress Report” that is seven pages in length.<sup>7</sup> Defendant’s answer cites sections 552.111 of the TPIA as cause for withholding the information. This document does not appear on Defendant’s privilege log. Although Defendant has produced similarly titled documents that are five pages in length, Defendant has not produced a seven-page document. Plaintiff requests the court compel production of this document.

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<sup>6</sup> Ex. 6, 2950679, Email from Bob Moore to Steven Manilla (January 30, 2013) (produced on Aug. 26, 2014 through supplemental production).

<sup>7</sup> Ex. 7, Def.’s Obj. & Answers to Pl.’s First Set of Interrog., at 7-8, Answer No. 3, point 10.

Lastly, Defendant asserts the agency memoranda exception to withhold redacted portions of emails entitled “SH 45 SW Modeling Minutes Request,” which were produced in response to Plaintiff’s May 2013 PIR.<sup>8</sup> These emails between Travis County staff and CAMPO staff appear to contain information used to run models of SH 45 SW.<sup>9</sup> Indeed, the email refers to the redacted content as “information” suggesting that the redacted content is factual and not related to policy. Ex. 9. Information defining variables, setting parameters, and providing inputs to run a model does not relate to policymaking; rather, it is the factual data collected and relied upon that may lead to a modeled outcome, upon which policymaking may be based. Disclosing the type of data upon which traffic models will rely will not chill frank discussion at the County regarding SH 45 SW. Furthermore, this type of information is invaluable to the work of SOS and is information about government acts that the TPIA is meant to publicly disclose. Because this information does not relate to policymaking, it should not be excepted from public disclosure under the agency memoranda exception to the TPIA.

#### **D. CONCLUSION**

Because Defendant continues to wrongly redact or withhold the referenced emails and documents which are otherwise responsive to Plaintiff’s PIR, the Court should order the Defendant to produce the withheld documents, subject to a protective order under section 552.322 of the TPIA so that Plaintiff may effectively argue to the Court that such documents constitute public information under the TPIA. Further, or in the alternative, Plaintiffs ask that the subject documents be produced to the Court for an *in camera* inspection of the documents, without redaction, under section 552.3221 of the TPIA.

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<sup>8</sup> Ex. 8, SOSA Privilege Log, at 9, Bates No. ORR2120167-68.

<sup>9</sup> Ex. 9, ORR 2120097-98, Emails from CAMPO Senior Planner Lei Xu cc’ing Steven Manilla, and from Steven Manilla to Bob Moore (May 13, 2013).

Respectfully Submitted,

//s// William G. Bunch  
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ATTORNEY FOR PLAINTIFF  
SAVE OUR SPRINGS ALLIANCE

**CERTIFICATE OF CONFERENCE**

I certify that reasonable efforts were made to resolve the dispute without the necessity of court intervention, and the efforts failed. Tex. R. Civ. P. 191.2. Pursuant to Local Rule 2.2, I certify that I have conferred with opposing counsel who agrees to the hearing date of May 28, 2015.

//s// William G. Bunch  
William G. Bunch

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this document has been served on the following counsel and parties of record on this 18th day of May 2015 via electronic service through eFile.TXCourts.gov.

Anthony J. Nelson  
Andrew M. Williams  
314 West 11th Street  
Room 300  
Austin, TX 78701

//s// Lauren C. Ice

Lauren C. Ice