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

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

PLAINTIFF SAVE OUR SPRINGS ALLIANCE INC.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff seeks a partial summary judgment on its claims three and five in Plaintiff's Second Amended Petition for writ of mandamus and for injunctive and declaratory relief under the Texas Public Information Act (TPIA or "the Act"), Tex. Gov't Code §§ 552.001 *et seq.* Specifically, this motion provides that as a matter of law, Defendant violated the TPIA because Defendant did not promptly produce public information and continues to withhold public information that is contained on his private cell phone account, County email account, and personal computer that is responsive to Plaintiff's public information request. Plaintiff seeks mandamus and injunctive relief directing Defendant to immediately produce all text messages, emails, and electronic information falling within the scope of Plaintiff's public information request. Plaintiff also seeks a declaration that Defendant violated the TPIA and the Local Government Records Act (LGRA), Tex. Loc. Gov't Code §§ 201.001 *et seq.* by failing to retain public information and discarding public information responsive to Plaintiff's request before this litigation or the PIR was resolved. Finally, Plaintiff asks this

Court to enjoin Defendant and his staff from using private cell phone and email accounts to conduct County business until Defendant can demonstrate that proper retention and retrieval procedures are in place for public information.

A. INTRODUCTION

Plaintiff, Save Our Springs Alliance, Inc., filed this action against Defendant Gerald Daugherty in his official capacity as Travis County Commissioner for Precinct 3. Plaintiff petitioned a Writ of Mandamus to compel Defendant to release public information that was properly requested under the Act but withheld or simply not produced by Defendant and sought declaratory and injunctive relief under the TPIA. Defendant answered asserting a general denial. Defendant also specifically denied: that he withheld responsive electronic mail messages from his personal email account; that he withheld meeting minutes from the Capital Area Metropolitan Planning Organization; that he provided to the Attorney General only a sample of the documents he sought to withhold; that Plaintiff is entitled to mandamus relief; and that Plaintiff was forced to retain counsel.

Discovery in this suit is governed by a Level 2 discovery-control plan. On April 8, 2015, Defendant filed a Plea to the Jurisdiction, arguing that this Court has no jurisdiction because the case is moot. The hearing on Defendant's Plea as well as this Motion is set for May 28, 2015 at 2:00 p.m.

/
/

B. FACTS

On May 10, 2013, SOS by and through its Executive Director, William G. Bunch, submitted a request to Commissioner Gerald Daugherty for public information.[1] Specifically, the request sought:

> All correspondence from or to you or your identified executive assistants since you took office in January 2012 [sic] 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.

Further, the request explained that "correspondence":

> includes 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 correspondence where [Defendant was] not the primary recipient but were "cc'ed" or "bcc'ed."

In a letter to the Attorney General dated May 24, 2013, Defendant requested a decision on certain information sought in Plaintiff's request, asserting some responsive information was excepted from disclosure.[2] The letter also stated: "A supplemental brief setting forth the applicability of the above-referenced exceptions and ***representative samples of the requested information*** will be submitted to your office within fifteen business days after receipt of the request." (emphasis added).

On May 28, 2013, Defendant provided SOS with a minimal amount of documentation which Defendant deemed to be responsive. The letter also advised Plaintiff of Defendant's submission of a ruling request to the Attorney General with respect to additional

[1] Ex. 1, May 10, 2013 PIR from Save Our Springs Alliance to Comm. Gerald Daugherty.
[2] Ex. 2, May 24, 2013 Letter from Comm. Daugherty to the Office of the Attorney General.

information that was withheld from Plaintiff.[3] On May 30, 2013, Defendant, by and through counsel, submitted a supplemental letter brief to the Attorney General concerning Defendant's May 24, 2013 request for a letter ruling on information Defendant withheld from Plaintiff.[4]

On July 30, 2013, the Office of the Attorney General issued letter ruling OR2013-13139.[5] The letter ruling found in part that Defendant had failed to show that certain documents were excepted from disclosure, while allowing Defendant to withhold other documents from disclosure to Plaintiff under the TPIA.

On November 12, 2013, Plaintiff brought suit, in part contending that, because Defendant was so active in advocating for SH 45 SW, the amount of information produced or even identified as being withheld could not amount to all the public information that Defendant had in his possession that was responsive to Plaintiff's PIR. Unfortunately, it was only through litigation and subsequent discovery requests that Plaintiff was provided access to additional public information responsive to its PIR, which Defendant had failed to produce in response to Plaintiff's May 2013 PIR.

In the course of discovery, Defendant, Travis County Commissioner Gerald Daugherty, has admitted that he:

- Deleted emails from his Travis County email account that were responsive to Plaintiff's PIR.[6]
- Changed his phrasing to say that he did not "delete" emails, but rather moved them to the deleted items folder, yet did not state that he made any effort to review his deleted emails in response to Plaintiff's PIR.[7]

[3] Ex. 3, May 28, 2013 Letter from Comm. Daugherty to William G. Bunch.
[4] Ex. 4, May 30, 2013 Supplemental Br. from Comm. Daugherty to the Office of the Attorney General.
[5] Ex. 5, July 30, 2013 Attorney General Letter Ruling No. OR2013-13139.
[6] Ex. 12, Daugherty Dep. 40:22-41:14 (Feb. 20, 2014).

- Never produced text messages in response to Plaintiff's PIR and discovery requests[8] (even though there is substantial evidence that responsive text messages existed and still do exist[9]); and
- Gave away his wife's computer that may have had files responsive to Plaintiff's PIR after this litigation was filed.[10]

Together, these actions show a reckless disregard for retaining public information in accordance with the law applicable to public officials.

Plaintiff moves for partial summary judgment based on evidence demonstrating that: (1) Defendant failed and continues to fail to make a meaningful effort to locate and disclose responsive public information text messages on his private cell phone account; (2) Defendant failed and continues to fail to make a thorough search to disclose responsive public information in the form of emails on his Travis County issued email account; (3) Defendant failed and continues to fail to seek review and disclose potentially responsive information on his wife's former laptop. Plaintiff seeks mandamus and injunctive relief compelling Defendant to further search for and immediately provide to Plaintiff all public information responsive to Plaintiff's PIR that Defendant continues to withhold and which are within Defendant's power to obtain with reasonable efforts. Plaintiff further seeks a declaratory judgment that Defendant violated the TPIA by failing to promptly produce all non-exempt public information responsive to Plaintiff's request. Such a declaration would serve as a basis for and as part of requested injunctive relief

---

[7] Ex. 12, Daugherty Dep. Changes & Corrections at 75:10-19; Ex. 11, Def.'s Obj. & Answers to Pl.'s Second Set of Interrog. at 5, Answer Nos. 13-14 to Interrog. No. 1.
[8] Ex. 6, Def.'s First Am. Obj. & Resp. to Pl.'s Req. for Admis. at 5-6, Req. Nos. 3,4, & 5; Ex. 10, Obj. & Answers to Pl.'s First Set of Interrog. at 9, Answer No. 6.
[9] *See* Ex. 15, AT&T Text Record Log of Gerald Daugherty (excerpt).
[10] Ex. 11 at 8, Answer No. 23 to Interrog. No. 5 (admitting Defendant is "not certain as to the date of this donation"); Ex. 9, Def.'s Suppltl. Resp. to Pl.'s Req. for Produc. at 5, Req. No. 2 and corresponding doc. 2120306.

compelling Defendant to adopt and follow a records-retention and retrieval policy adequate to ensure full future compliance with the TPIA and the LGRA.[11]

C. APPLICABLE LAW

1. Summary Judgment Standard

A plaintiff is entitled to summary judgment when he establishes that there is no genuine issue of material fact so that judgment should be granted as a matter of law. TEX. R. CIV. P. 166a(c); *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). A plaintiff meets his burden if he produces evidence that would be sufficient to support an instructed verdict at trial. *Harris Cnty. Hosp. Dist. v. Cornelious*, 2000 Tex. App. LEXIS 7637, *8 (Tex. App.—Houston [1st Dist.] Nov. 9, 2000). A defendant that relies on an affirmative defense, without supporting proof, will not defeat a motion for summary judgment. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

2. The Texas Public Information Act and Local Government Records Act.

The purpose of the TPIA is to provide access at all times to complete information about the affairs of government and the official acts of public officials and employees. Tex. Gov't Code § 552.001. Requested public information must be promptly produced. *Id*. § 552.221. Public information is "information under a law or ordinance or in connection with the transaction of official business, collected, assembled, or maintained by a governmental body; or for a governmental body and the governmental body owns the information or has a right of access to it." *Id*. § 552.021. The TPIA allows public information

[11] Plaintiff waives Claim Two as set forth in Plaintiff's Second Amended Original Petition, relating to documents containing highly intimate or embarrassing facts." In response to discovery requests, Plaintiff received a copy of the subject document.

to be excepted from public disclosure if the information is considered to be confidential by law, either constitutional, statutory, or by judicial decision. *Id*. § 552.101.

The Travis County Commissioners Court is a "governmental body" pursuant to the TPIA. *Id*. § 552.003(1)(A)(i). Defendant is the officer for public information and the custodian, as defined by Local Government Code section 201.003, of information created or received by Defendant's office. *Id*. § 552.201.

The Attorney General has recognized that when personal emails and personal cell phones are used to conduct public business, information in the form of email communications and personal cell communications as well as corresponding records are public information. *See* Open Records Letter No. 2005-01126 at 3 (2005) (information in a public officeholder's personal email account may be subject to the Act where the officeholder uses the personal email account to conduct public business); and No. 2003-1890 (2003)(finding that personal cellular, personal office, and home telephone records, as well as the email correspondence from personal email account that relate to the transaction of governmental business, is subject to disclosure under the TPIA); see also Tex. Gov't Code § 552.002 ("public information" includes "any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.").

Similarly, communications made in the course of public business are "local government records." The Local Government Records Act (LGRA) at § 201.003(8) defines "local government record" without regard to whether the record was created on a government-provided communication system or on personal communication systems controlled by public officials and employees. If a county commissioner or his executive

assistant creates or receives a record in the transaction of public business, it is a "local government record." *See* Tex. Loc. Gov't Code § 201.003(8) (defining a "local government record" as "any document paper, letter,…electronic medium, or other information recording medium regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of the state or created or received by a local government or any of its officers or employees pursuant to law … or in the transaction of public business").

Any emails or text messages sent from private accounts or personal devices do not belong exclusively to Defendant or his executive assistants. *See id*. § 201.005(a) (declaring that local government records "created or received in the transaction of official business" are "public property" and subject to the LGRA and Tex. Gov't Code §§ 441.151 *et seq.*: Preservation and Management of Local Government Records); § 201.005(b) ("A local government office or employee does not have, by virtue of the officer's or employee's position, any personal or property right to a local government record even though the officer or employee developed or compiled it.").

D. SUMMARY JUDGMENT EVIDENCE

Plaintiff intends to use the specified discovery products as summary judgment proofs to support this Motion for Partial Summary Judgment. The discovery products are provided in an appendix filed with this Motion. The evidence consists of the following:

- Ex. 1: May 10, 2013 Public Information Request from William G. Bunch, Executive Director of Save Our Springs Alliance, to Travis County Commissioner Gerald Daugherty
- Ex. 2: May 24, 2013 Letter Request from Comm. Daugherty to Office of Attorney General

- Ex. 3: May 28, 2013 Letter from Comm. Daugherty to William G. Bunch
- Ex. 4: May 30, 2013 Supplemental Brief from Comm. Daugherty to Office of Attorney General
- Ex. 5: July 30, 2013 Attorney General Letter Ruling No. OR2013-13139
- Ex. 6: Defendant's First Amended Objections and Responses to Plaintiff's Request for Admissions
- Ex. 7: Defendant's Objections and Responses to Plaintiff's Second Set of Request for Admissions
- Ex. 8: Defendant's Objections and Responses to Plaintiff's Third Set of Request for Admissions
- Ex. 9: Defendant's Supplemental Responses to Plaintiff's Requests for Production with applicable documents Bates Numbered or Open Record Request Numbered (ORR)
- Ex. 10: Defendant's Objections and Answers to Plaintiff's First Set of Interrogatories
- Ex. 11: Defendant's Objections and Answers to Plaintiff's Second Set of Interrogatories
- Ex. 12: Deposition of Gerald Daugherty and Changes & Corrections thereto (excerpts)
- Ex. 13: Deposition of Barbara Smith (excerpt)
- Ex. 14: Deposition of John Stark (excerpts)
- Ex. 15: AT&T Text Record Log of Gerald Daugherty (excerpt)
- Ex. 16: ORR 2120085, Email from Susan Narvaiz to Charlyn Daugherty (Mar. 24, 2013)
- Ex. 17: 2120295, Email from Rebecca Bray to M. Espinoza et al. (Apr. 19, 2013)
- Ex. 18: Affidavit of William G. Bunch

/
/

E. ARGUMENT

1. Defendant Failed to Promptly Produce Public Information and Continues to Fail to Produce Public Information in the Form of Text Messages on his Private Cell Phone Account.

Defendant violated and continues to violate the TPIA by not providing public information in the form of text messages from his personal cell phone account. Although evidence shows that Defendant corresponded via text message with public officials about SH 45 SW, Plaintiff has yet to receive a copy of one single text message in response to its PIR and discovery requests. Defendant must either seek out and provide the public information from his cell phone carrier, or offer proof, such as a sworn statement from his carrier that the responsive text messages no longer exist.

Defendant used his personal cell phone through his carrier AT&T to conduct official business in his capacity as County Commissioner for Precinct 3.[12] At least one email obtained by Plaintiff in response to its PIR suggests that Defendant sent and received text messages concerning SH 45 SW.[13] Defendant's former executive assistant indicated that Defendant would give his phone number out over the radio, meaning he could have received text messages from members of the public about SH 45 SW.[14] Defendant himself admitted under oath that he texted Will Conley, Hays County Commissioner and chair of CAMPO's Transportation Policy Board, about the SH 45 SW project.[15] In fact, phone record logs obtained by Plaintiff show the following:

[12] Ex. 6 at 5-6, Req. No. 3.
[13] Ex. 9 at 8-9, No. 7 and corresponding doc. ORR 2120145.
[14] Ex. 13, Smith Dep. 27: 4-5 (Apr. 17, 2014).
[15] Ex. 12, Daugherty Dep. 44, ln. 25 to 45, ln. 6.

- Ten text messages sent between the cell phones of Defendant and Will Conley from January 9, 2013 to March 21, 2013.[16]

- Seven text messages sent between the cell phones of Defendant and Susan Narvaiz, facilitator of the SH 45 SW subcommittee, on March 8, 2013.[17]

- Three text messages on February 1, 2013 sent between the cell phones of Defendant and Mark Jones, Hays County Commissioner and member of the SH 45 SW subcommittee that Defendant chaired.[18]

- Ten text messages sent from March 3, 2013 to March 7, 2013 between the cell phones of Defendant and Rebecca Bray, a traffic engineer who provided information to Defendant about highways and participated in the SH 45 SW subcommittee.[19]

Despite evidence that there were a significant amount of text messages among Defendant and other policymakers involved on SH 45 SW, Defendant admitted that text messages on his personal cell phone were not reviewed in response to the PIR, and that he never provided text messages in response to the PIR.[20] Although Defendant states that since this litigation began, he reviewed the text messages "that were still available on [his] personal cell phone," Defendant did not take any action to retrieve the text messages that were, for some reason, no longer available on his phone but could still potentially be retrieved from his carrier.[21]

---

[16] Ex. 15, AT&T Text Record Log of Gerald Daugherty, at 1-3, 8; Ex. 11 at 7, Answer Nos. 17-22 to Interrog. No. 4 (identifying Will Conley's cell phone number).
[17] Ex. 15 at 6-7; Ex. 16, ORR2120085 (Susan Narvaiz's cell phone number); Ex. 12, Daugherty Dep. 25:4-7 (explaining Ms. Narvaiz's role in the SH 45 SW subcommittee).
[18] Ex. 15 at 4; Ex. 11 at 7, Answer Nos. 17-22 to Interrog. No. 4 (Mark Jones's cell phone number). Ex. 12, Daugherty Dep. 25:4-9 (identifying Mr. Jones as a member of the SH 45 SW committee).
[19] Ex. 15 at 5-6; Ex. 17, Doc. 2120295 (Rebecca Bray's cell phone number); Ex. 12, Daugherty Dep. 25: 14-20 (explaining Ms. Bray's role in the SH 45 SW subcommittee).
[20] Ex. 6 at 6, Req. Nos. 4 & 5; Ex. 10 at 9, Answer No. 6 (admitting that Defendant did not search his personal cell phone account, nor did he direct his staff to do so, in responding to Plaintiff's May 10, 2013 PIR because "Defendant did not understand that he was required to do so, nor did he believe that such records constituted and/or contained documentation responsive to the PIR.").
[21] Def.'s Plea to Jurisd., Attach. G, Affidavit of Gerald Daugherty ¶ 15; Daugherty Dep. 45:19-46:1 (stating that AT&T told Defendant that text message records are available via subpoena).

Defendant admitted that as of March 13, 2014, the earliest text message on his iPhone at that time was dated January 31, 2013.[22] Thus, it is clear that the non-production of these texts is not due to iPhone automatically deleting emails of a certain age. If the text messages no longer exist on Defendant's phone, they were deliberately deleted, and Defendant has violated his duty to retain public information. If the text messages do exist on his phone, Defendant has violated and continues to violate TPIA in not producing these text messages to Plaintiff.

In his Affidavit supporting his Plea to the Jurisdiction, Defendant implies that he has helped facilitate Plaintiff's efforts to subpoena his cell phone records.[23] However, his statement conveniently sidesteps the fact that Plaintiff has yet to see the content of any text messages referencing SH 45 SW known to exist and which are responsive to Plaintiff's PIR.[24] Through a subpoena, Plaintiff received Defendant's cell phone records from AT&T in October 2014. But, for text messages, these records only provide the phone number that sent or received the message, whether the message was outbound or inbound, and the date and time of the message.[25] The actual text message content was never produced. Moreover, Defendant has offered no proof that AT&T cannot provide the text messages to him directly as the owner of his personal text messages. Defendant bears the burden of either providing these text messages or showing that they no longer exist and cannot be retrieved from AT&T, as this furthers the TPIA's purpose to provide public access ***at all time to complete information*** about the affairs of government and the official acts of public officials. Tex. Gov't Code § 552.001*; see City of Garland v. Dallas Morning News*, 22

[22] Ex. 11 at 6, Answer No. 16 to Interrog. No. 3.
[23] Daugherty Aff. ¶ 15.
[24] Ex. 6 at 6, Req. No. 5.
[25] *See* Ex. 15.

S.W.3d 351, 355-56 (Tex. 2000). Defendant cannot be relieved of his duty to provide public information by claiming AT&T will not provide access to such records. If Defendant deleted text messages, AT&T may still have them.[26] And under the LGRA, a "person under contract or agreement with … an elected county officer … to provide services, equipment, or the means for the creation, filing, or storage of local government record data "may not, under any circumstances, refuse to provide local government records data to the local government in a timely manner in a format accessible and useable by the local government." Tex. Loc. Gov't Code § 205.009. The definition of "public information" extends to information where the governmental body "owns the information or has a right of access to it." Tex. Gov't Code § 552.002(a). Defendant clearly has both ownership in and a right of access to responsive text messages still held by his carrier AT&T, yet he continues to fail to retrieve the responsive text messages or demonstrate with compelling evidence that responsive text messages do not exist at this time.

The relevant evidence and plain language of the TPIA, combined with the policy stated in the TPIA that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees," establishes Plaintiff's right of mandamus and injunctive relief to the responsive text messages that Defendant has failed to produce. *See* Tex. Gov't Code § 552.001.

Because Defendant failed and continues to fail to promptly produce public information in the form of text messages from Defendant's private cell phone accounts

[26] Daugherty Dep. 45:19-46:1.

responsive to Plaintiff's PIR, Defendant violated and continues to violate the TPIA as a matter of law.

2. Defendant Failed to Promptly Produce Public Information and Continues to Fail to Produce Public Information in the Form of Emails on his Travis County Issued Email Account.

Defendant violated the TPIA by failing to produce public information in the form of emails on Defendant's and Defendant's executive assistants' Travis County-issued email accounts that were responsive to Plaintiff's PIR.[27] Requested public information must be promptly produced. Tex. Gov't Code § 552.221. Plaintiff only received access to this public information as a result of this litigation and a subsequent PIR.[28]

In responding to Plaintiff's May 10, 2013 PIR, Defendant made no attempt to have the Travis County Information Technology Department search the corresponding email servers for all responsive public information generated and received using the email accounts of Defendant and his executive assistants.[29] If Defendant wanted to conduct an adequate and thorough search for responsive public information, the search would have included County servers and thus all applicable email accounts. Such a search could only be performed by the Travis County Information Technology Services Department.[30] Such a search was never requested by Defendant or any member of his staff in response to Plaintiff's PIR.[31] Regardless of the method and adequacy of the search performed, Defendant failed to provide numerous documents in response to Plaintiff's initial PIR.[32]

[27] Ex. 6 at 9-11, Req. Nos. 11, 15, & 16.
[28] Plaintiff filed a second Public Information Request with Defendant on November 11, 2013.
[29] Ex. 8, Def's Obj. & Resp. to Pl.'s Third Set of Req. for Admis. at 10, Req. No. 48.
[30] Ex. 14, Stark Dep. 70:3-11 (Aug. 26, 2014).
[31] Ex. 8, at 10, Req. No. 48.
[32] Ex. 6 at 9-11, Nos. 11-16; Ex. 8 at 5-8 & 11, Req. Nos. 35-39, 41-43, & 52.

One of the emails Defendant attempted to withhold and which was redacted in-part was an email indicating CAMPO would move forward with traffic and revenue forecasting for the eastern segment of SH 45 SW from FM 1626 to IH-35.[33] Another one of these documents was a map received by Defendant in January of 2013 showing potential alignments of a proposed eastern segment of SH 45 SW from FM 1626 to IH-35.[34] Until recently, the existence of this very alignment was strongly denied by proponents of a western segment of SH 45 SW running from MoPac to FM 1626.

It is access to this type of information that makes accurate and complete responses to public information requests so critical. Defendant's failure to promptly provide this statutorily mandated public information damaged Plaintiff's ability to use such information to advocate with public officials, the media, and the public for alternatives to the proposed toll road SH 45 SW.[35] *See Como v. City of Beaumont*, 345 S.W. 3d 786, 796 (Tex. App—Beaumont 2011, reversed on other grounds) (observing that an ongoing violation of TPIA may exist if requestor suffered harm from government's failure to promptly provide public information).

Only after Plaintiff filed suit, submitted discovery requests, and filed a *subpoena duces tecum* with Travis County—not Defendant—seeking electronic documents held on Travis County controlled servers did Defendant produce, in parallel, the documents produced in response to the Travis County subpoena.

The Affidavit of Frank Trevino, filed in support of Defendant's Plea to the Jurisdiction, describes the search he performed of Defendant's and his staff's mailbox

[33] Ex. 9 at 8, No. 7 and corresponding doc. ORR 2120101.
[34] Ex. 9 at 8-9, No. 7 and corresponding doc. 2951079.
[35] Ex. 18, Affidavit of William G. Bunch ¶¶ 10-12.

searches in response to Plaintiff's discovery request. Def.'s Plea to Jurisd., Attach. I, Trevino Aff. ¶¶ 4-8 (filed Apr. 8, 2015). The various searches Mr. Trevino performed included all folders in a user's mailbox, including the deleted items folders. *Id*. ¶ 4. But if a user had emptied his deleted items folder, these messages would not come up on the search. *Id*. If the deleted items folder is not emptied, "Travis County's exchange serves are setup to store these items indefinitely, or until space runs out." *Id*.

Importantly, Mr. Trevino does not state whether the server did in fact run out of room, resulting in the permanent deletion of emails in each user's deleted items folder. The status of these emails, and whether they are currently recoverable, is still in question. And, although Mr. Trevino placed a litigation hold on the mailboxes ***after*** this suit started, Defendant and his staff could have emptied their deleted items folder, before or after receiving the PIR. Defendant has made no definitive statement as to whether he emptied his deleted items folder. The burden is on Defendant to prove that responsive emails that have not already been disclosed no longer exist anywhere on Travis County servers or Defendant's other computers, or that Defendant is withholding such records in reliance on the Attorney General's Opinion.

Additionally, the Travis County Technology Services Department only searched the email server and did not search the hard drives of Defendant's and his executive assistants' Travis County computers.[36] Given the sizeable amount of public information not disclosed initially, Plaintiff questions whether there is public information responsive to its PIR located on the hard drives of these computers that has yet to be disclosed.

[36] Ex. 14, Stark Dep. 58: 9-17.

3. Defendant Failed and Continues to Fail to Review and Disclose Potentially Responsive Information on his Wife's Laptop.

Assistant County Attorney Anthony Nelson directed Defendant that a litigation hold would be put in place on December 13, 2013.[37] Defendant donated his wife's personal computer to the Lone Star Paralysis Foundation sometime in December 2013.[38] Furthermore, Defendant has provided varying accounts of this donation—switching from identifying the computer as a laptop to a desktop, and the receiving charity from Seton to Lonestar Paralysis Foundation.[39] According to Defendant, he "place[d] the computer under a desk at their location," but did not hand the computer to anyone."[40]

It is not surprising then, that this computer has not been found. Yet, Defendant had and continues to have a duty under the TPIA to review the hard drive of this computer for any documents, including emails and email attachments that were responsive to Plaintiff's PIR. At the very least, Defendant had a duty not to give away a computer he used pending a TPIA suit. Defendant initially admitted to having used this computer for County business, although he later changed his testimony to merely leave open the possibility.[41] However, even the possibility, together with the date of the donation—after suit was filed, and very close in time to when a litigation hold was placed on County files—suggests that Defendant deliberately or with "willful blindness" allowed the spoliation of evidence that could have supported a finding that Defendant withheld public information that should have been released. *See Brookshire Bros., Ltd. v. Aldridge*, 438 S.W. 3d 9, 22 (Tex. 2014) (recognizing that "a party's intentional destruction of evidence may, '[a]bsent evidence to the contrary,'

[37] Ex. 10 at 10, Answer No. 9.
[38] Ex. 11 at 8, Answer No. 23 to Interrog. No. 5 (admitting Defendant is "not certain as to the date of this donation"); Ex. 9 at 5, Req. No. 2 and corresponding doc. 2120306.
[39] Ex. 11 at 8, Answer No. 23 to Interrog. No. 5
[40] *Id*.
[41] Ex. 12, Daugherty Dep. 30:19-21; Changes & Corrections 75:16.

be sufficient by itself to support a finding that the spoliated evidence is both relevant and harmful to the spoliating party").

4. Defendant Lacks a Records-Retention and Retrieval Policy Adequate to Ensure Full Future Compliance with the TPIA and LGRA.

Defendant frequently used his personal email account to conduct Travis County business.[42] Defendant violated the TPIA and LGRA by not retaining public information referencing Travis County business that was sent or received on his private email and cell phone text accounts. This is not surprising given that Defendant has admitted that no retention policy was in place to retain emails referencing Travis County business on his personal email account, and that there was no retention policy in place for his personal cell phone account.[43] Not only does Plaintiff take issue with the fact that it took filing of this suit and subsequent discovery for Plaintiff to obtain this public information, but this delay could have been prevented if Defendant and Travis County had procedures in place to properly retain public information and retrieve that public information when it is properly requested under the Act.

Emails and text messages transmitted or received by Defendant and his executive assistants via personal electronic devices and personal email and cell phone accounts are classified as public information and local government records. Tex. Gov't Code § 552.002 (a-2). These records, by law, must be retained by Defendant for a minimum of 4 years (if "pertaining to the formulation, planning, implementation, modification, or redefinition of policies, programs, services, or projects" of the County) or a minimum of 2 years (if "pertaining to the or arising from the routine administration or operation of the policies,

[42] Ex. 7, Def.'s Obj. & Resp. to Pl.'s Second Set of Req. for Admis. Nos. 18-27 & 31-34.
[43] Ex. 6 at 7, Req. Nos. 7 & 8.

programs, services, and projects" of the County). *See* Local Schedule GR: Retention Schedule for Records Common to all Local Governments, Tex. State Library & Archives Comm'n, GR1000-26a & GR1000-26b.[44] Because Defendant used both his private email account and private cell phone account to conduct Travis County business, any electronic information generated or received on those accounts was to be retained under the retention schedule above.

The newly adopted "PCT. 3 Commissioner's Office Electronic Communication Devices Policy," and the nearly identical "Chapter 42. County Records" Retention Policy, do not adequately ensure that public information will be maintained and produced when properly requested under the TPIA in accordance with law. The PCT. 3 Policy states that, if an employee must use a Personal Device or Personal Account to transmit the County's Public Information, the communication must be forwarded to a County Account for retention, ***unless there is no administrative value*** in retaining the communication in accordance with the applicable Records Retention Period." (emphasis added). However, "administrative value" is not defined anywhere. Moreover, important public information policy documents that are not "administrative" documents—in other words, the documents of greatest importance to the public—appear to be excluded from this policy. Without further guidance on what constitutes as "administrative value," this policy appears to be excessively narrow and will not assure that public information produced or received by Defendant will actually be retained much less retrieved and produced when properly requested. Similarly, the Travis County Records Retention Policy directs that communications made on a personal device be forwarded to a County account "so long as

[44] *Available at* https://www.tsl.texas.gov/slrm/recordspubs/localretention.html.

the information's Record Retention Period requires it to be kept." This provides wide discretion to each employee who has used a personal device. The evidence in this case suggests that Defendant (and likely most County employees) are not versed in the required records-retention periods.[45]

In addition, the narrow reach of these brand-new policies suggest that Defendant is not interested in adopting and implementing a comprehensive records-retention and retrieval policy—one that would include, for example, other information besides electronic communications. Rather, Defendant is hoping to slap a bandage on the problem with a policy specifically targeted to make this lawsuit go away. But the same issues will appear until Defendant adopts a comprehensive, clear, and precise records-retention and retrieval policy.

Plaintiff thus seeks declaratory and injunctive relief that (a) Defendant violated the TPIA and LGRA by failing to retain public information and failing to make reasonable efforts to locate and produce public information responsive to Plaintiff's request. Plaintiff further seeks to enjoin Defendant and his staff from using private cell phone and email accounts to conduct County business until Defendant can demonstrate that proper retention and retrieval procedures are in place for public information.

F. CONCLUSION

For these reasons, Plaintiff asks the Court to grant an order for partial summary judgment on its claim that Defendant did not promptly produce public information and continues to withhold public information responsive to Plaintiff's public information request (claim three) and that Defendant has failed to retain

[45] Daugherty Dep. 39:17–40:21.

public information responsive to Plaintiff's public information request (claim five). Plaintiff requests declaratory and injunctive relief compelling Defendant to immediately immediately produce all responsive documents and prohibiting Defendant and his staff from using private electronic devices until proper retention and retrieval procedures are in place.

Respectfully submitted,

//S// Bill Bunch
William G. Bunch
State Bar No. 0334520
905 W. Oltorf, Suite A
Austin, Texas 78704
T. (512) 477-2320
F. (512) 477-6410

ATTORNEY FOR PLAINTIFF
SAVE OUR SPRINGS ALLIANCE

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 7th 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//Kelly D. Davis