CAUSE NO. D-1-GN-11-000639

THE AUSTIN BULLDOG *Plaintiff*,	§	IN THE DISTRICT COURT
v.	§	
LEE LEFFINGWELL, MAYOR, CHRIS RILEY, COUNCIL MEMBER PLACE 1, MIKE MARTINEZ, MAYOR PRO TEM, PLACE 2, RANDI SHADE, COUNCIL MEMBER, PLACE 3, LAURA MORRISON, COUNCIL MEMBER PLACE 4, BILL SPELMAN, COUNCIL MEMBER PLACE 5, SHERYL COLE, COUNCIL MEMBER, PLACE 6, and the City of AUSTIN	§	250th JUDICIAL DISTRICT
Defendants.	§	TRAVIS COUNTY, TEXAS

DEFENDANT BILL SPELMAN'S PLEA TO THE JURISDICTION AND GENERAL DENIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Bill Spelman, Council Member Place 5, ("Spelman" or "Defendant"), a Defendant in his official capacity in the above styled cause, and files this his Plea to the Jurisdiction, and subject thereto, his General Denial. Spelman would respectfully show as follows.

INTRODUCTION

1. Defendant City of Austin ("City") is a home rule municipal corporation. In this action, the City has been sued by "The Austin Bulldog," (Plaintiff') a d/b/a name for the Austin Investigative Reporting Project, a Texas Non-Profit Corporation. Plaintiff alleges claims and seeks relief under two statutes: Chapter 552, TEX. GOV'T. CODE, the Texas Public Information Act ("TPIA") and Chapter 201, et. seq. TEX. LOC. GOV'T. CODE, the Local Government Records Act ("LGRA"). Plaintiff seeks mandatory injunctions under TPIA and under LGRA requiring

the City and Defendant to obtain and handle documents in a certain way and to turn over certain documents to Plaintiff, plus an award of attorneys fees under TPIA and the Uniform Declaratory Judgments Act ("UDJA").

2. In addition to suing the City, Plaintiff purports to sue the Mayor of Austin and six City Council Members ("the Official Capacity Defendants"), including Defendant, in their respective official capacities. The Official Capacity Defendants are filing separate Pleas to the Jurisdiction and General Denials, since neither TPIA nor LGRA creates a private cause of action against public officials in their official capacity. TPIA creates a private cause of action against governmental bodies only, and LGRA creates no private cause of action against officials or governmental bodies.

3. For the reasons set forth in more detail below, Defendant asserts a Plea to the Jurisdiction and raises the issue of standing with respect to all of Plaintiff's claims and allegations under LGRA and any related ordinances or rules. With respect to Plaintiff's claims under TPIA, Defendant asserts a Plea to the Jurisdiction since TPIA creates no cause of action except against governmental bodies, and on the grounds of mootness, since the information requested by Plaintiff under TPIA either has been released to Plaintiff by the City or is in the process of being released, and the relief Plaintiff seeks under TPIA therefore cannot be granted.

PLAINTIFF'S CLAIMS UNDER LGRA

4. LGRA is a Texas statute that requires local governments in Texas, including municipal corporations, to adopt record retention policies. On its face, LGRA neither creates nor recognizes a private cause of action. Texas courts have distinguished between the roles of TPIA and LGRA in the area of government records, noting that TPIA "does not enforce the rules regarding retention and preservation of records." *Cearly v. Smith*, 2007 WL 3173303, (Tex.

App.-Tyler 2007, no pet.). In denying the plaintiff a requested mandamus based on an argument under LGRA that certain records must be preserved in a certain way, the court in *Cearly* stated:

> *"The statutory writ of mandamus, if issued, only allows a trial court to compel a governmental body to make public information available for inspection." Id.*

Neither LGRA nor any other Texas law grants private persons standing to act as self-appointed enforcers of local government policies on obtaining, storing, organizing, cataloging and retaining government records.

5. The fact that LGRA does not provide for private enforcement and creates no personal cause of action does not mean that LGRA lacks any enforcement mechanism. Under the Act, the governing body of a municipality may demand from any person a local government record that is wrongfully held by such person, and may petition the district court for relief if he refuses to deliver the record. (§202.005(a) and (b)).

6. A court may also grant emergency relief when a governing body applies for it to recover a record. (§202.005(c)) Further, executive and administrative officers of the Texas State Library and Archives Commission ("the TSLAC") may demand and recover any local government record of permanent value in private possession. (§202.005(d) and (e)). The LGRA also provides for criminal penalties for certain violations of the Act. (§§202.008 and 202.009).

7. When the Legislature intends to create a private right of action to permit citizen enforcement under a Texas law, it does so. *See*, *eg*, TPIA; the Texas Open Meetings Act (Chapter 251, TEX. GOV'T. CODE); The Whistleblower Act (Chapter 251, TEX. GOV'T CODE); The Ethics in Government Act (§571, TEX. GOV'T CODE) authorizing private complaints to the Texas Ethics Commission; the Prevailing Wage Statute (Chapter 2258, TEX. GOV'T CODE); the Capitol View Corridors Statute (Chapter 3151, TEX. GOV'T CODE); and The County and

Municipal Purchasing Acts (Chapters 262 AND 252, TEX. LOC. GOV'T CODE). (While TPIA does create some civil remedies, the Attorney General has noted that it "does not provide a civil remedy for the release of confidential information." (TEX. ATTY. GEN. OPIN. JC-0561 (2002).)

8. In many Texas statutes affecting local and state public administration, including LGRA, the legislature has declined to create any private cause of action or citizen enforcement mechanism for the statutes' remedial terms. These include The Municipal Budget Act (Ch. 102, TEX. LOC. GOV'T CODE); the County Budget Act (Ch. 111, TEX. LOC. GOV'T CODE); The Local Government Financial Disclosure Act (Ch 145, TEX. LOC. GOV'T CODE); the statute regulating sale and lease of municipal property (§253, TEX. LOC. GOV'T CODE); the Nepotism statute (Ch. 573, TEX. LOC. GOV'T CODE); and the statute on state contract standards and funds management (Ch. 2261, TEX. GOV'T CODE). Under those statutes, any enforcement authority is generally delegated to a public official.

9. As noted by the Texas Supreme Court, "if a cause of action and remedy for its enforcement are derived not from the common law, but from a statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable. *Tex Cat. Prop. Ins. Ass'n v. Council of Co-owners*, 706 S.W. 2d 644-46 (Tex. 1986). In this case, the statutory remedies that LGRA provides are exclusive, and they do not include citizen suits to control the policies or actions of local government and local government officials.

10. In this case, while TPIA specifically affords a cause of action to sue a governmental body for alleged violations of TPIA, Plaintiff cannot "bootstrap" its TPIA right to obtain "public information" into standing to obtain mandatory relief under a different statute that affords no private cause of action. The fact that Plaintiff seeks certain information under TPIA

does not create jurisdiction for a court to mandate that a governmental body obtain, store, manage and preserve records in accordance with the retention schedules and procedures that Plaintiff believes are applicable. This court lacks subject matter jurisdiction over such claims, and Plaintiff lacks standing to assert such claims.

PLAINTIFF LACKS STANDING UNDER LGRA

11. Standing to bring a particular claim or cause of action is a component of subject matter jurisdiction, a requirement based on the Texas Constitution's explicit separation of powers provisions. "We therefore hold that standing, as a component of subject matter jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court." *Texas Association of Businesses v. Texas Air Control Board*, 852 S.W.2d 440, 445-46 (Tex 1993). Stated another way, standing is a constitutional predicate to a court's exercise of subject matter jurisdiction in a lawsuit. *See Texas Dept. of Transportation v. City of Sunset Valley*, 146 S.W. 3d 637, 646 (2004).

12. To obtain standing in so called "public right" cases, a plaintiff must allege and prove a right distinct from the general public's interest before he can proceed with a civil action against a governmental body or official capacity defendant. As explained by the United States Supreme Court, the "particularized injury" requirement requires more than an individual's special interest or concern about a public policy. The standing requirement is not met unless:

> *"plaintiffs...demonstrate a personal stake in the outcome...Abstract injury is not enough. The plaintiff must show that he has sustained or is in immediate danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural or hypothetical."* City of Los Angeles v. Lyons, *461 U.S. 95, 101-02 (1983) (internal citations omitted).

13. Under LGRA, a broad statute requiring local governments to create and adopt local policies for retention, cataloguing, classification and destruction of local public records,

there is no explicit or implicit grant of a private cause of action against the City, and no waiver of the constitutional requirement that any person seeking to enforce the statute establish a particularized direct injury separate from that of the public.

14. Plaintiff alleges that Defendant "alienated" local government records under LGRA by not turning over to the City various texts, e-mails and other electronic communications from personal electronic devices when Plaintiff sought those communications from the City under TPIA. (First Amended Petition, paragraph 11(a)). Based on the criminal provisions of LGRA, Plaintiff seeks injunctive relief from this court in the form of specific orders to the Official Capacity Defendants and the City (First Amended Petition, paragraph 11(c) and (d)). Specifically, Plaintiff invokes LGRA to ask this court to order that communications on private devices of the Official Capacity Defendants be turned over to the City, to be maintained by the City and retained for time periods set out in the City's record retention schedules, as well as a permanent injunction requiring the Official Capacity Defendants and "employees" of the City not to "withhold local government records in the future...from the Austin Records Management Officer." (First Amended Petition, Prayer for Relief item "a" and "b"). This is exactly the type of private litigation seeking to control local public administration and local public officials that the Texas Supreme Court and U.S. Supreme Court addressed when they recognized standing and the "particularized injury" rule as a jurisdictional requirement. Having access to a filing fee simply does not authorize a private actor to sue to control the day to day functions of local government.

15. In one of the few reported cases arising under LGRA, the El Paso Court of Appeals made it absolutely clear that the duties of a "records management officer" under the Act, in that case a county elected official, are discretionary.

> "...*elected county officers...are designated the "records management officers: for their respective offices and are granted authority to develop and administer their records management programs. TEX. LOC. GOV'T CODE ANN. Sec. 203.002. In that regard, the county clerk, as the records management officer for the office, is chiefly responsible for the administration of a records management program and the protection and preservation of the records of the office. (footnote omitted) Sec. 203.002, 203.023. Accordingly, we find that in performing these functions, the County Clerk has the exclusive and absolute discretion to develop policies and records management procedures that will preserve records in the most efficient and cost effective manner*...Hooten v. Enriquez, *863 S.W.2d 522, 530-31 (Tex. App.- El Paso 1993, no writ) (emphasis added*).

In Austin, under the City's Records Management Program Ordinance, Sec. 2-1-1 of the City Code, the City Clerk is the statutory records management officer. Regardless, the clear holding of the *Hooten* case is that local governments and local public officials enjoy full discretion in local records management. In no way can these state created responsibilities and functions be described as "ministerial" in nature.

16. Plaintiff has not alleged a personal stake in the City's administration of its records management policies sufficient to establish standing for the relief requested under LGRA. Plaintiff has shown no real and immediate threat of injury from the challenged official conduct, which consists of the City's and Official Capacity Defendants' discretionary decisions and activities under City records management policies. Plaintiff is in the same position as any other corporation in Austin with respect to the administration of these policies. Plaintiff has asserted neither a property right in the policies, nor a liberty interest, nor any other constitutionally recognized interest or right distinct from those of the general public. As a result, Plaintiff lacks standing to assert claims under LGRA, and this court lacks subject matter jurisdiction over such claims.

THE UDJA DOES NOT CREATE JURISDICTION WHERE NO VALID UNDERLYING CAUSE OF ACTION EXISTS

17. Plaintiff incorrectly invokes UDJA as a basis for declaratory and injunctive relief. The requirement that a plaintiff, especially in a public rights case, show a particularized injury derives from the Texas Constitution, and not from any statute or rule of procedure and it is not superseded by UDJA. *See Texas Association of Businesses*, *supra*, 852 S.W.2d at 446-47. Accordingly, a statute like the UDJA does not create jurisdiction where none otherwise exists, and courts do not need to apply a separate "justiciable interest" analysis to UDJA claims found untenable under another statute. *Patterson v. Planned Parenthood of Houston*, 971 S.W. 2d 439, 442 (Tex. 1998). Plaintiff cannot revive a facially nonjurisdictional claim based on LGRA by relying on UDJA's provision allowing courts to address and resolve certain controversies that are otherwise within their jurisdiction.

PLAINTIFF LACKS STANDING TO SUE OFFICIAL CAPACITY DEFENDANTS UNDER TPIA

18. TPIA provides the remedy of mandamus against governmental bodies who allegedly violate the Act. TEX. GOV'T. CODE §552.321. It does not provide any such remedy against a public official who is not a "governmental body," and members of City Councils clearly are not "governmental bodies."

> "*Keever is not a "school district board of trustees;" he is one member of that body. Therefore, Keever is not a governmental body and not subject to the act. Finlan was not entitled to seek a mandamus against Keever to compel him to make information available for his inspection under the TORA.*" Keever v. Finlan, 988 S.W.2d 300, 305 (Tex. App.-Dallas 1999, pet. dism'd).

In the *Keever* case, the court further noted that a school board member was not a "custodian of records" under TORA (now TPIA), and that an official other than a TPIA custodian (now "officer for public information") under the Act has no duty to produce public information. *Id.*

19. Similarly, the Dallas Court of Appeals has noted that the term "governmental body" under TPIA "does not include Mayor Laura Miller or any City employee." *City of Dallas v. Dallas Morning News*, 281 S.W.3d 211, 214 (Tex. App.-Dallas 2009, no pet.). Accordingly, it is beyond dispute that under TPIA this court lacks jurisdiction over purported TPIA claims against defendant and the other Official Capacity Defendants.

PLAINTIFF'S CLAIMS UNDER TPIA ARE ALSO MOOT

20. Plaintiff's First Amended Petition seeks additional documents responsive to two PIA requests that Plaintiff filed with the City on January 19, 2011 and January 27, 2011 (the "two PIA requests.") Specifically, Plaintiff seeks both additional e-mails and other electronic communications on City servers sent from or exchanged by the Official Capacity Defendants on specified dates, and certain electronic communications that those officials exchanged on personal electronic devices (such as personal computers, or personal smart phones or blackberries). Plaintiff alleges that responsive public information has not been released as TPIA requires, and seeks a mandamus ordering the Official Capacity Defendants to "turn over" the information from their personal electronic devices to the "Austin Records Management Officer" (PRAYER, part "a"), an injunction requiring those Official Capacity Defendants "and Austin employees" to turn over such records from personal devices in the future (PRAYER, part "b"), and an order to the City to "obtain the requested e-mails" from the Official Capacity Defendants and "turn them over" to Plaintiff (PRAYER, part "c"). Finally, Plaintiff asks the Court to order the City to turn over to the Plaintiff public information on the City's computer server that is responsive to the two PIA requests, but that has not yet been turned over. (PRAYER, part "d").

21. These claims for relief are now moot or will be very shortly. Information on the "City Server" responsive to the two PIA requests has been turned over, save and except certain

attorney-client privileged documents that were submitted to the Attorney General and found to be excepted from the TPIA, some wholly personal e-mails, which have been submitted to the Attorney General but not ruled on, and any additional information that may be discovered through a final comprehensive search carried out by the City's technical staff. The initial response to the two PIA requests was incomplete, in part because of the broad scope of requests, and in part because the requests required personal extensive searches of multiple City e-mail accounts, including e-mail files misleadingly labeled "deleted" under the City's software, but which in fact held e-mails which are recoverable when properly searched. Ultimately, the City performed multiple searches to obtain accurate results and is only waiting to process the results of the final technician assisted search.

22. After a good faith effort and repeated electronic searches, the City has represented on information and belief that the information on the City server responsive to the two PIA requests has been released to Plaintiff or will be very shortly. Accordingly, the relief sought by Plaintiff in part "d" of the Prayer relating to information on the City server is moot or soon will be.

23. Upon receipt of the two PIA requests, which also specifically sought certain information from the personal electronic devices of the Official Capacity Defendants, the City initially had no responsive documents. As the City advised Plaintiff, the decision of the Dallas Court of Appeals in *City of Dallas v. Dallas Morning News*, *supra at 711* addresses whether such information on personal electronic devices is subject to TPIA. In that case, the court of appeals reviewed a district court order requiring the City of Dallas to produce to the plaintiff newspaper certain e-mails from personal electronic device of the then Mayor of Dallas, none of which had been sent through or kept on the City server. The court held that a "governmental body" under

TPIA "does not include Mayor Miller or any City employee." (*Id.* at 714). (emphasis added). The court further noted that the requested e-mails were not public information unless they were "collected, assembled, or maintained in connection with the transaction of official public business (1) by a governmental body ; or (2) for a governmental body and the governmental body owns the information and has a right of access to it." *Id.* Based on the record from the trial court, the court of appeals concluded that the plaintiff newspaper had failed to meet its burden to establish that the mayor's personal system e-mails were public information, and remanded the case to the district court where it remains in litigation.

24. As a result of *City of Dallas*, the law in Texas on whether e-mails related to public business on personal electronic devices are or are not "public information remains unsettled. At least two other lawsuits against the Attorney General of Texas addressing the same issue are currently pending in the district courts of Travis County. While the Attorney General of Texas has broadly opined that such information is public information, those opinions have never come to grips with the question of how and by what authority a governmental body, whether a school board, municipality, or state agency, owns or has a right of access to electronic information on an employee's personal electronic device when the governmental body neither collects, assembles, maintains, nor owns the information.

25. In responding to the two PIA requests, the City initially did not release to Plaintiff information existing on the personal electronic devices of Defendant or the other Official Capacity Defendants, since the City did not own or have access to that information at the time. Further, that information clearly was not collected, assembled or maintained by the City. Since the initial response to the two PIA requests, Defendant and each of the Official Capacity Defendants have voluntarily gathered the electronic information responsive to the two PIA

requests that existed on his or her personal electronic devices, and has either forwarded that information to a City e-mail address or otherwise entered it into a City server, thereby making the information "public information." Information from the Official Capacity Defendants' personal electronic devices that became "public information" under TPIA was then processed by the City's public information office, redacted as required by TPIA to prevent the release of private e mail addresses, and released to Plaintiff on April 8, 2011.

26. In releasing this information to Plaintiff, the City did not agree or admit that information relating to City business is "public information" under the Act if it exists only on a private electronic device, nor does Defendant agree or admit to such legal proposition. But, when information related to City business is received and stored on a City server, it becomes public information and is subject to TPIA.

27. When the information requested in a PIA has been released to the requestor, the litigation seeking that information becomes moot, and the case should be dismissed without an award of attorney's fees or declaratory or injunctive relief. *Dallas Morning News v. City of Arlington,* 2011 WL 182886 (Tex. App.-Austin 2011, no pet).

GENERAL DENIAL

28. Subject to the foregoing Plea to the Jurisdiction, Defendant generally denies and places in issue all allegations in Plaintiff's First Amended Petition.

SUMMARY AND CONCLUSION

Plaintiff's claims for relief against Defendant under LGRA should be dismissed for lack of subject matter jurisdiction and lack of standing, since the LGRA affords no private cause of action and since Plaintiff has alleged no particular injury apart from the interests of the public at large. Plaintiff's claims for relief under TPIA should be dismissed for lack of jurisdiction since

Defendant is not a "governmental body," and dismissed as moot since the information responsive to the two PIA requests at issue has been released to Plaintiff or shortly will be. In the absence of an actionable claim for relief under LGRA, and given the mootness of the TPIA claim, Plaintiff has no right to attorney's fees or other relief under UDJA.

PRAYER

Wherefore, premises considered, Defendant Spelman respectfully prays for relief as follows:

A. That Plaintiff's claims under LGRA be dismissed for want of jurisdiction.

B. That Plaintiff's claims under TPIA be dismissed as moot.

C. That Plaintiff take nothing by its petition, and that all claims for relief be denied.

D. That Defendant be granted all other relief, legal and equitable, to which he may be entitled.

Respectfully submitted,

James E. Cousar

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was sent to:

ATTORNEYS FOR PLAINTIFF Bill Aleshire Riggs Aleshire & Ray 700 Lavaca, Suite 920 Austin, TX 78701	✓ Regular Mail ____ Certified Mail, RRR ____ Federal Express ____ Hand Delivery ____ Facsimile ✓ Electronic Service

on the 11th day of April, 2011.

James E. Cousar