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July 23, 2015

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Re: Cause No. D-1-GN-13-003876; *Save Our Springs Alliance, Inc. vs. Gerald Daugherty in his Official Capacity as Travis County Commissioner for Precinct 3;* in the 53rd Judicial District, Travis County, Texas.

Dear Counsel:

This letter is to give you my rulings as well as some insight into my reasoning but not to invite further argument. My explanation here does not exclude other reasons I may have or limit the possible bases of support for my orders. Both parties filed post-hearing arguments and evidence on the same day, without objection, and they have been considered by the court.

The motions before the court address two distinct subjects: first, the public information, if any, withheld at this moment and, second, past and future conduct. The mandamus pertains only to the here and now.

Although this case was filed in 2013, neither party set any hearing before the court on any matter until last week. During the intervening time, the parties conducted discovery. By both accounts, over that period of time Commissioner Daugherty produced additional information some of which he concedes is public information but contends he had mistakenly failed to produce. He also voluntarily released some documents sought by S.O.S.A. while maintaining that he would be legally entitled to continue to withhold them under the Public Information Act. S.O.S.A. asserts, however, Commissioner Daugherty still possesses some public information or

has the right to obtain it from others.[1] Commissioner Daugherty, his staff, and third-party witnesses deny this. The only documents Commissioner Daugherty acknowledges retaining are certain email exchanges he contends are attorney-client privileged.[2] S.O.S.A. is entitled to have those email exchanges reviewed by the court *in camera*, and the court is not bound by the Attorney General's determination that they are privileged.[3]

The process for determining whether communications are privileged is straightforward. With knowledge of the identities and positions of the correspondents, the judge reads the communications and applies the well-established law of attorney-client privilege. Having done so, I have determined that the information is attorney-client privileged. All the communications are between Travis County officials[4] identifying issues on which they are seeking the advice of an Assistant County Attorney and the legal advice given.

S.O.S.A. also contends that other non-privileged public information may exist in: (1) the content of text messages, which may be maintained by AT&T; (2) "the Defendant's wife's donated laptop," and (3) email on a personal account that may not have been adequately searched or may have been intentionally withheld.[5] In a supplemental affidavit, Commissioner Daugherty attached a previously produced letter to and response from AT&T, his cell phone carrier. In its letter, AT&T stated it does not store the content of text messages. The supplemental response

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[1] S.O.S.A. deposed two private parties to determine if they possessed responsive email exchanges with Commissioner Daugherty, and they both denied they had any. At hearing, S.O.S.A. argued that the Public Information Act required Commissioner Daugherty to request from Hays County public officials any email communication they had with him concerning the requested public information. No authority was provided and none may exist on this point. Regardless, post-hearing, counsel for Commissioner Daugherty made a written request, a copy of which is in evidence, to the Hays County Officials for any responsive public information. This moots the issue with respect to Commissioner Daugherty as he has no authority to compel Hays County officials to respond. Those officials have their own obligations if and when any requests under the under the Public Information Act are submitted to them.

[2] Prior to the hearing, he voluntarily released documents he originally withheld based on the draft memorandum exception. Post-hearing, S.O.S.A. reviewed those documents, found a map to be unreadable, and urged the court to compel production of a readable version. Commissioner Daugherty has not yet replied to that, but if he possesses or has access to a more readable copy he will, of course, produce that voluntarily or by order of the court.

[3] S.O.S.A. states that not all documents withheld were submitted to the A.G. for review. S.O.S.A. does not contend, however, that Commissioner Daugherty has failed to submit any documents to the court for *in camera*, and the court has reviewed each of them.

[4] S.O.S.A. points out that at least one exchange does not include an attorney. However, the attorney-client privilege extends to communications "between representatives of the client" for the purpose of facilitating the rendition of legal services.

[5] In its motion for partial summary judgment S.O.S.A. also contends that the hard drive of the commissioner's office computer was not searched, citing one staff member who said he was not aware of anyone searching it. Commissioner Daugherty cites the deposition testimony of his executive assistant at the time, Barbara Smith, who said she searched his hard drive. This creates no fact issue because the two statements are not contradictory.

also contains an excerpt from the deposition of the executive director of the foundation that received the donated computer. He testified there was nothing on the hard drive when it was received. There is no evidence to the contrary with respect to text messages or the donated computer.

With respect to Commissioner Daugherty's personal computer and email account, S.O.S.A. states: "It is concerned that Defendant has not conducted an adequate search of his personal email account for public information, and that, because there is no public oversight of his private email account, Defendant may intentionally be concealing responsive public information." Commissioner Daugherty's affidavit does not state how he searched his home computer and email,[6] nor does S.O.S.A. state what would be adequate. In other reported public information cases, sworn statements from officials that they searched personal devices have been accepted without challenge. *See for example City of El Paso v. Abbott.* Whatever S.O.S.A. believes would be adequate, it was incumbent on it to request it through the discovery process. Whether or not a public official would be required to initiate an expert search upon receiving a public information request is an entirely different question from whether the requestor, once in court, could obtain an agreement from the opposing party to do it or could obtain a court order requiring it. Forensic searches for digital information are common in discovery, by agreement and by court order over an objection. S.O.S.A. clearly understood this because the record reflects the parties' discovery dispute and tentative agreement regarding a forensic search of the donated laptop. Furthermore, S.O.S.A. cited favorably a public information case in which a computer specialist searched a sheriff's computer. *S.O.S.A.'s response at page 10.* The court records do not contain all discovery conducted by the parties, so the court does not know whether S.O.S.A. ever asked Commissioner Daugherty to agree to an expert search of his home computer and personal email account. Regardless, had there been a request and no agreement, S.O.S.A. could have filed a motion and set a hearing before the court. This case has been pending for two years allowing ample time to conduct discovery and present findings to the court.

With respect to truthfulness, the judicial system must rely primarily on a person's compliance with his or her oath - whether in verifying the production of all responsive documents, making statements by affidavit, or testifying in court - along with the civil and criminal penalties that may be imposed for perjury. When public information is at issue, an official's willful destruction or concealment of public information might also lead to criminal prosecution under the Public Information Act, sections 552.353 and 552.354. Recognizing, however, that oaths and laws may be broken, an opposing party may offer evidence contradicting sworn statements or testimony, and in court or by deposition an opposing party may cross-examine the witness. Although a plea to the jurisdiction may be based on affidavits alone, either party is entitled to call live witnesses. S.O.S.A. did not call Commissioner Daugherty to the stand, though he was present with counsel. And S.O.S.A. acknowledges examining him at

[6] S.O.S.A. says Commissioner Daugherty's affidavit does not specifically say he searched his email account, though it acknowledges he swore to that in his deposition. Commissioner Daugherty's affidavit does state he searched his computer "for any information." Moreover, he did produce some emails. Both of these indicate his search included email.

length in a deposition, some excerpts of which it included in its response. Commissioner Daugherty did not testify in court on his own behalf either, so with respect to his testimony, the plea rests on his affidavit.

Though it is true, as S.O.S.A. argues that a judge cannot credibility based on affidavits, when the rules of law require a court to consider affidavit testimony, as it does here, a judge is also required to take that testimony as true unless the statement itself has indications that it is not trustworthy or the opposing party creates a genuine dispute concerning credibility. If an expression of doubt were sufficient to overcome the presumption that sworn statements are true, no court could ever make rulings based on affidavits, something courts do in every motion for summary judgment, motions for continuance, motions to transfer venue and innumerable other instances.

When an affidavit is from an interested party, it is subject to greater scrutiny. To suffice it must be clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. Considering all the evidence in the motions and responses before the court, Commissioner Daugherty's sworn statement that he searched his home computer and he released all responsive information meets those criteria. His statement might have been readily controverted, if untrue, through questioning in the deposition or in court. Most importantly, it could have been controverted[7] by objective evidence from a forensic search of the hard drive and email account, which S.O.S.A. did not request the court to order. Based on the evidence now before the court from both sides, Commissioner Daugherty has met his burden to show conclusively that he does not here and now possess public information or have the right to obtain any such information from others. I will grant the plea with respect to the mandamus.

S.O.S.A. contends that if there is no public information on the computers or in the personal email account, Commissioner Daugherty intentionally deleted it. That allegation of misconduct could be relevant to the Declaratory Judgment Action, but not to the mandamus. The court cannot compel production of information that no longer exists, no matter the reason it does not exist. *See Cearley v. Smith*, No. 12-07-00079-CV, 2007 WL 3173303, at *2 (Tex. App. Oct. 31, 2007).

The Declaratory Judgment action pertains to past and future conduct. S.O.S.A. alleges Commissioner Daugherty failed to retain public information and discarded public information responsive to ask for orders requiring the retention and release of public information in the future. Commissioner Daugherty denies the allegations and contends, in any event, the action is moot because of new policies he has implemented. Since the parties attempt to resolve factual contentions through a dispositive motion and a dispositive plea, neither party can prevail without *conclusively* proving its version of the facts. Neither has done so. There remains a question of the court's jurisdiction, as a pure question of law, over a Declaratory Judgment Action seeking to

[7] "Readily controverted" does not mean without burden or expense but rather means capable of being disproven by extrinsic evidence.

enforce the Public Information Act. The parties have not adequately briefed this, so the court must defer a ruling on the plea to the jurisdiction in this regard until they have. If all issues are not resolved as a matter of law on dispositive motions, of course, remaining questions of fact will be resolved by trial. Counsel should confer with one another and my staff concerning future settings.

My orders follow.

Sincerely,

Stephen Yelenosky
Judge, 345th District Court

SY/nh

Orig: Ms. Velva L. Price, District Clerk

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

SAVE OUR SPRINGS ALLIANCE, INC. DISCIPLINE	§	IN THE DISTRICT COURT OF
VS.	§	DALLAS COUNTY, TEXAS
GERARLD DAUGHERTY IN HIS OFFICIAL CAPACITY AS TRAVIS COUNTY COMMISSIONER FOR PRECINCT 3	§	53RD JUDICIAL DISTRICT

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

The Court heard this motion considered the pleadings, the evidence including post-hearing submissions on July 17th, 2015, and the arguments of counsel.

The Court ORDERS that 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 is GRANTED as to the request for *in camera inspection* and DENIED in all other respects.

Signed this 23rd day of July, 2015.

JUDGE PRESIDING

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

SAVE OUR SPRINGS ALLIANCE, INC. DISCIPLINE	§	IN THE DISTRICT COURT OF
VS.	§	DALLAS COUNTY, TEXAS
GERARLD DAUGHERTY IN HIS OFFICIAL CAPACITY AS TRAVIS COUNTY COMMISSIONER FOR PRECINCT 3	§	53RD JUDICIAL DISTRICT

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

The court heard this motion and considered the pleadings, the evidence including post-hearing submissions on July 17th, 2015, and the arguments of counsel.

The Court ORDERS that Plaintiff Save Our Springs Alliance Inc.'s Motion for Partial Summary Judgment is DENIED.

Signed this 23rd day of July, 2015.

JUDGE PRESIDING

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

SAVE OUR SPRINGS ALLIANCE, INC. DISCIPLINE	§	IN THE DISTRICT COURT OF
VS.	§	DALLAS COUNTY, TEXAS
GERARLD DAUGHERTY IN HIS OFFICIAL CAPACITY AS TRAVIS COUNTY COMMISSIONER FOR PRECINCT 3	§	53RD JUDICIAL DISTRICT

ORDER ON RESPONDENT'S PLEA TO THE JURISDICTION

The court heard this plea and considered the pleadings, the evidence including post-hearing submissions on July 17th, 2015, and the arguments of counsel.

The Court ORDERS that Respondent's Plea is GRANTED with respect to the mandamus claim under the Public Information Act and DEFERRED, pending further briefing, in all other respects.

Signed this 23rd day of July, 2015.

JUDGE PRESIDING