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**

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

COMES NOW, Respondent, the Honorable Gerald Daugherty, in his official capacity as Travis County Precinct Three Commissioner (hereinafter "Respondent" and/or "Daugherty"), by and through his undersigned attorneys of record, and hereby files Respondent's Response to Plaintiff Save Our Springs Alliance Inc.'s Motion for Partial Summary Judgment (hereinafter sometimes referred to as "PPMSJ"). In support thereof, Respondent would show as follows:

I. Summary and Procedural Background

Respondent incorporates by reference the Statement of the Case set forth in Respondent's Plea to the Jurisdiction filed in this matter on April 8, 2015. ***See Respondent's Exhibit 1 at 1-5, I. Statement of the Case.*** Respondent hereby timely files his Response to Plaintiff Save Our Springs Alliance Inc.'s Motion for Partial Summary Judgment filed in this matter on May 7, 2015. The PPMSJ is presently set for hearing on May 28, 2015 at 2:00 p.m., to be heard (if necessary) after the hearing on Respondent's Plea to the Jurisdiction.

Both Respondent's Plea to the Jurisdiction and the PPMSJ arise out the facts and circumstances surrounding Save Our Springs Alliance Inc.'s ("SOSA") May10, 2013 Public Information Request ("PIR") to Respondent pursuant to the Texas Public Information Act ("TPIA"

or "the Act"), Tex. Gov. Code §552.001, *et seq.*, for "all correspondence from or to you or your identified executive assistants since you 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" (hereinafter referred to as "May 10th PIR" or "PIR"); and Respondent's response[s] and related actions taken in connection therewith.

Respondent filed his Plea to the Jurisdiction ("PTJ") because Plaintiff fails to meet the statutory requirements for mandamus relief under the Texas Public Information Act. Section 552.321(a) of the Act sets out three scenarios under which the Attorney General or a requestor is entitled to file suit for mandamus relief. First, if a governmental body fails to request an Attorney General decision in the time permitted, the information is presumed to be open to public disclosure, and the governmental body must release the information. *See id*. § 552.321(a). Second, if the Attorney General has rendered a decision and the governmental body has failed to comply with the decision, the Attorney General or the requestor may then file suit. *See id*. Finally, either the Attorney General or the requestor may file suit, if the governmental body "refuses to supply public information." *Id*.

The evidence before this Court will demonstrate it is undisputed Respondent made a timely request for an attorney general opinion, and further demonstrates Respondent produced all documentation as required by the Office of the Attorney General ("OAG") opinion. Thus, Plaintiff is not entitled to relief under the "failed to make timely request", or "failed to produce items determined [to be] public information" by the OAG under Section 552.321(a) of the Act.

Accordingly, Plaintiff is left with attempting to show Respondent "refuses to supply public information" within the meaning of Section 552.321(a). The evidence before this Court conclusively demonstrates that through the TPIA response process, combined with Respondent's

voluntary responses to discovery in this lawsuit, Respondent has produced any and all information in his possession, or in the possession of his office that is responsive to the PIR. Accordingly, this Court is deprived of jurisdiction over Plaintiff's "refusal to supply public information" claims under the mootness doctrine. *See City of El Paso v. Abbott*, 444 S.W.3d 315, 323-325 (Tex. App. – Austin 2014, pet filed).

To the extent Plaintiff attempts to assert a mandamus action against Respondent in his official capacity under the Local Government Records Act ("LGRA"), Plaintiff's claims are barred because the LGRA does not provide Plaintiff a cause of action for mandamus relief that falls within the narrow waiver of official immunity created by the Legislature. Even assuming *arguendo* the documents and information at issue are "public records" within the meaning of LGRA, Chapters 201 and 202 of the Act do not create a private cause of action for mandamus relief. Accordingly, Plaintiff's claims for relief under the LGRA are barred by immunity.

Last, to the extent any claim for declaratory or injunctive relief has not been mooted by Respondent's voluntary production of any and all responsive public information in possession of Respondent or his office, such claims are mooted by Travis County and the Travis County Precinct 3 Commissioner's Office adoption of policies restricting the use of personal electronic communication devices and personal accounts to conduct County business, and requiring the forwarding and retention of any public information created or stored on a personal device or account to a County account for retention in accordance with applicable state required retention schedules. Accordingly, Plaintiff's claims for declaratory and/or injunctive relief under Section 552.3215 of the TPIA are barred as moot.

Following the filing of Respondent's PTJ, Plaintiff filed its PPMSJ. It appears the PPMSJ may be both an independent dispositive motion seeking relief, as well as, perhaps, a response to the

PTJ[1]. For the reasons set forth more fully herein, Plaintiff fails to proffer competent summary judgment evidence establishing its entitlement to mandamus, declaratory or injunctive relief under the TPIA or the LGRA. Accordingly, the PPMSJ should be denied.

In addition to failing to meet its burden to be entitled to affirmative relief on its PPMSJ, Plaintiff has failed to set forth competent evidence sufficient to defeat Respondent's PTJ. In short, Plaintiff has failed to submit competent evidence which establishes Respondent has "refused" to provide public information within the meaning of the TPIA, and refuting that Respondent has voluntarily complied with the request to the extent that he can within the meaning of the Act. Respondent has further established through the evidence submitted in support of his PTJ, as well as that submitted in support of his Response to the PPMSJ, filed and submitted herewith that the requested relief sought by Plaintiff would be futile as Respondent has produced all responsive information that is within Respondent's ability to produce. Accordingly, Respondent is entitled to have his PTJ granted. *See City of El Paso v. Abbott*, supra.

II. Standard of Review

When the plaintiff moves for summary judgment, plaintiff must show entitlement to prevail on each element of the cause of action, except damages. *See, e.g., Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 875 (Tex.App.--Dallas 1990, no writ); *Bergen, Johnson, & Olson v. Verco Mfg. Co.*, 690 S.W.2d 115 (Tex.App.--El Paso 1985, writ ref'd n.r.e.). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. Therefore, the court must view the evidence and its reasonable inferences in the light most favorable to the non-movant. *Bassett v. American Nat'l Bank*, 145 S.W.3d 692, 696 (Tex.App.-Fort Worth 2004, no pet.).

The non-movant is not required to prove his defense to the movant's claims by a

[1] To date Plaintiff has not filed a Response to the PTJ. It is unclear whether SOSA intends to do so.

preponderance of the evidence or as a matter of law-- raising a fact issue is enough. *See American Petrofina v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994). Moreover, movant is not entitled to prevail based on conclusory statements and/ or assumptions set forth in its motion for summary judgment—pleadings do not constitute summary judgment proof. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

III. Evidence in Support of Response to Partial Motion for Summary Judgment

Commissioner Daugherty incorporates by reference the following evidence attached as exhibits in support of this Response:

Respondent's Exhibit 1:	Respondent's Plea to the Jurisdiction, and Attachments filed therewith.
Respondent's Exhibit 2:	Respondent's May 2013 OR Production, (Respondent's Documents Released on 5/28/13 in Response to 5/10/13 PIR; Respondent's Documents Released on 8/6/13 in Response to 5/10/13 PIR); Respondent's November 2013 OR Production; and Respondent's Discovery Responses.[2]
Respondent's Exhibit 3:	John Stark Deposition Excerpts
Respondent's Exhibit 4:	Commissioner Gerald Daugherty Deposition Excerpts
Respondent's Exhibit 5:	Barbara Smith Deposition Excerpts
Respondent's Exhibit 6:	Robert (Bob) Moore Deposition Excerpts
Respondent's Exhibit 7:	Rebecca Bray Deposition Excerpts
Respondent's Exhibit 8:	Susan Narvaiz Deposition Excerpts
Respondent's Exhibit 9:	Shawn Malone Deposition Excerpts
Respondent's Exhibit 10:	Supplemental Affidavit of Gerald Daugherty
Respondent's Exhibit 11:	Supplemental Affidavit of Amy Pollock
Respondent's Exhibit 12:	LSPF Executive Director Michael Haynes Deposition Excerpts

[2] Due to the volume of documents produced, the records referenced in Respondent's Exhibit 2 are produced on a compact disc ("CD") for the Court's review and consideration, and are incorporated herein by reference. Opposing counsel has been provided with an identical copy of the CD along with service of this Response.

IV. SOSA is Not Entitled to Partial Summary Judgment

SOSA is not entitled to partial summary judgment on its claims set forth in Plaintiff's Second Amended Petition for writ of mandamus, and for injunctive and declaratory relief under the Act. SOSA has failed to set forth competent summary judgment evidence establishing its entitlement to such relief. Rather, SOSA has engaged in asking this Court to grant relief based on assumptions, conclusions, and in some instances, pure speculation to support its contentions that Respondent violated the TPIA and/or the LGRA. Plaintiff contends Respondent violated the Acts by:

- "Failing to promptly produce and continuing 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."
- "Failing to retain public information and discarding public information responsive to Plaintiff's request before this litigation or the PIR was resolved."

***See* PPMSJ at 1.** In addition, SOSA has failed to establish it is entitled to injunctive relief in the form of prohibiting Daugherty and his staff from using "private cell phone and email accounts to conduct County business until defendant can demonstrate the proper retention and retrieval procedures are in place for public information." ***Id*. at 1-2.**

A. Disputed Summary Judgment Facts

1. SOSA omits Respondent timely produced additional documents in compliance with OAG Letter Ruling OR2013-13139.

Based on the facts, evidence and authorities set forth more fully below in this Response, SOSA's PPMSJ should be denied. Although disagreeing with the characterization of the facts provided by SOSA, Respondent generally agrees with the fact timeline set forth in SOSA's motion, at least until the Office of the Attorney General ("OAG") issued its July 30, 2013 Letter Ruling OR2013-13139. ***See* Respondent's Exhibit 1**, **Respondent's Plea to the Jurisdiction, § I. Statement of Case at 1-2**. Curiously, SOSA omits the key fact that on August 6, 2013,

Daugherty, through his counsel, Assistant County Attorney Elizabeth Winn, produced the additional documentation the OAG determined in Letter Ruling OR2013-13139 could not be withheld under the TPIA. ***See* Respondent's Exhibit 1 at 2, Attach. D. *See also* Respondent's Exhibit 2, May 2013 OR Production, (Respondent's Documents Released on 8/6/13 in Response to 5/10/13 PIR, Document Bates Stamp Nos. ORR2120077–ORR2120103).**

2. SOSA omits Respondent timely and voluntarily responded to an almost identical November 13, 2013 PIR, providing documents that were inadvertently omitted from the May 10th PIR response.

SOSA further omits from the "Facts" section of its motion that on November 13, 2013, one day after filing its Original Petition, SOSA served Daugherty with another PIR for almost the identical information sought in the May 10th PIR. SOSA further omits that, as established in Daugherty's First Amended Objections and Responses to Plaintiff's Request for Admissions, attached as Exhibit 6 to SOSA's PPMSJ, many of the documents SOSA now contends were wrongfully and intentionally withheld, were in fact not produced due to oversight, and were produced by Daugherty in response to the November 13th PIR. ***See* Respondent's Exhibit 2, Respondent's November 2013 OR Production. *See also* PPMSJ at 9-16, *Exhibit 6* at 9-11**[3]. In fact, with respect to Request for Admission No. 12, Daugherty produced the document in redacted form, as authorized by the OAG in its Letter Ruling in response to the May 10th PIR, and produced the document again, this time in unredacted form in response to the November 13th PIR. ***Id.* at 9.**[4] The voluntary production of these documents in response to SOSA's November 13th PIR severely undercuts SOSA's contention that Daugherty has "refused and continues to refuse" to produce public information as it is required to do to be entitled to mandamus relief under the TPIA.

[3] *See* Daugherty's Responses to Plaintiff's Request for Admissions Nos. 11, 13-16.
[4] *See* Responses to Plaintiff's Request for Admissions No. 12.

3. SOSA omitted Respondent voluntarily produced additional documents in supplemental discovery responses, including documents the OAG Letter Ruling OR2013-13139 had authorized withholding.

Likewise, SOSA omits that in supplemental responses to Plaintiff First and Second Request for Production Daugherty voluntarily produced additional documents that had previously been withheld or redacted under the OAG's ruling in OR 2013-13139. Respondent also produced, in the supplemental responses, email documents that provided certain email addresses that had previously been redacted, as well as providing email documents in a format that allowed Plaintiff to view email addresses of the sender/recipient that could not be viewed in the previous format the document had been produced. ***See* Respondent's Exhibit 1 at 3-4.** ***See also* Respondent's Exhibit 2, Respondent's Discovery Responses (8/26/14 Supp. Responses to Discovery); Respondent's Exhibit 3, John Stark Deposition Excerpts at 4-6.**

4. SOSA omits Respondent produced "deleted" KeepMoPacLocal emails in Respondent's supplemental responses to discovery.

In support of its PPMSJ, SOSA cites this Court to Daugherty's deposition testimony regarding "deleting" of certain emails from Keep MoPac Local, an organization SOSA's Executive Director and attorney, Mr. Bunch is a member. SOSA attempts to dismiss, however, Daugherty's explanation of these actions contained in the errata sheet to his deposition transcript, stating he moved these duplicate emails into his "Deleted Items" folder in Outlook.[5] This explanation is important and credible in that Respondent's 8/26/14 Supplemental Discovery Responses contained hundreds of these emails that were not previously produced. ***See* Respondent's Exhibit 2, Respondent's Discovery Responses (8/26/14 Supp. Responses to Discovery)**. The explanation and supplemental document production further undercuts SOSA's

[5] Review of the emails in question reveals that KeepMoPacLocal organized a "blast" email campaign where members and supporters were able to send out an identical, form email via its website in opposition to SH 45 SW to Daugherty and other public officials. The only thing that changed with the email was the name and email address of the sender.

contention that Respondent continues to refuse to produce public information in the form of emails, particularly emails contained in "Deleted Items" folders on Respondent and his staff's computers.

5. SOSA's contention that Daugherty took no steps to review his "Deleted Items" folder is contradicted by the evidence.

Furthermore, SOSA's contention that Daugherty took no steps to review his "Deleted Items" folder is untrue and refuted by the evidence. As set forth in the affidavits of Commissioner Daugherty, Travis County ITS Systems Engineer Frank Trevino, and Travis County Attorney's Office Litigation Paralegal Amy Pollock, filed in support of Respondent's Plea to the Jurisdiction, Daugherty specifically authorized Travis County ITS to conduct electronic searches of the Outlook electronic mailboxes of Daugherty and his staff for documentation responsive to the May 10th PIR. Trevino conducted the electronic searches for responsive documents including searches of the "Deleted Items" folders and provided the search results to Daugherty's attorney, Assistant County Attorney ("ACA") Nelson and his paralegal, Amy Pollock. The responsive documents were then produced by ACA Nelson in the August 26, 2014 supplemental responses to discovery. Again, in these supplemental responses literally hundreds of KeepMoPacLocal "blast" emails that had not been previously produced were provided.[6] ***See*** **Respondent's Exhibit 1 at 12-14, Att. G. pp.3-4, ¶¶ 10, 16, and 18; Att. H,**

[6] The additional KeepMoPacLocal emails can be explained in two ways: (1) emails that were moved by Daugherty (and his Executive Assistant, Bob Moore) to "Deleted Items" in their respective Outlook email accounts (***See*** **Respondent's Exhibit 4, Daugherty Depo Excerpts at40-42; errata pg. 75; Respondent's Exhibit 6, Moore Depo Excerpts at 45-46**); or (2) Daugherty's former Executive Assistant Barbara Smith deposition testimony admitting that she did not provide all of the KeepMoPacLocal emails to ACA Winn for review in preparation of Respondent's initial response to the 5/10/13 PIR because they were duplicates and she did not think it was necessary to do so. (***See*** **Respondent's Exhibit 5, Smith Depo Excerpts at 50-52**). Smith was also asked on deposition whether she checked Daugherty's hard drive for responsive materials. Smith testified she did and there was nothing responsive. ***Id.*** **at 57**. In light of the fact that Smith is the person who maintained Daugherty's computer, including his emails, and was also the person who reviewed, gathered and forwarded Daugherty's Travis County emails to ACA Winn for preparation of the original 5/10/13 PIR response, Smith's testimony supports an oversight or error, rather than an intentional refusal to produce these emails by Daugherty.

pp. 2-6; Att. I, pp. 2-4, ¶¶ 4-8; Respondent's Exhibit 2, Respondent's Discovery Responses (8/26/14 Supp. Responses to Discovery).

6. SOSA's contention that Respondent refuses to produce existing responsive text messages is refuted by the facts, and based on conclusions and conjecture.

SOSA's "fact" contention in the PPMSJ that Respondent has failed to produce text messages responsive to the May 10th PIR "(even though there is substantial evidence that responsive text messages existed and still do exist)" is simply unsupported assumptions, conclusions and conjecture. Review of the PPMSJ reveals SOSA appears to base its claim in this regard on Daugherty's AT&T cell phone billing records obtained by SOSA via subpoena,[7] which reflect phone calls and text messages to fellow CAMPO members Hays County Commissioners Will Conley and Mark Jones, consultant Susan Narvaiz, and engineer Rebecca Bray. ***See* PPMSJ at 5, 10-13*, Exhibits 6,15.*** Plaintiff assumes that the calls and texts to these individuals were about County business pertaining to SH 45 SW, and were responsive to the May 10th PIR. SOSA also assumes that Respondent continues to have access to these text messages, but refuses to produce them.

The assumption that Respondent still has access to these text messages, but has refused to do anything to retrieve and produce them is clearly refuted by the evidence. Daugherty has testified consistently in both his deposition and his affidavit that he has reviewed the messages on his cell phone and he does not have any messages pertaining to SH 45 SW. ***See* Respondent Exhibit 1, Att. G at p.3, ¶ 15; Respondent's Exhibit 4.** He further testified that his cell phone records were available by subpoena from his carrier, AT&T, and that he would not resist SOSA obtaining these records. SOSA issued a subpoena to AT&T to obtain the records, and Daugherty

[7] As agreed to in his deposition, Daugherty did not contest SOSA's subpoena to AT&T for his cell phone records.

did not resist the subpoena. SOSA obviously obtained the records because they are attached to the PPMSJ.

Plaintiff's assumptions fall apart, however, with respect to Daugherty's ability to obtain and provide copies of the *content* of the text messages, as well as SOSA's contention that Daugherty has refused, and continues to refuse to attempt to do so. Daugherty requested his cell phone call and text records from AT&T. In his written request to AT&T, Daugherty stated, *"I would like to request that my call and text logs from the dates January 23, 2013 through May 10, 2013 be released to my person. If possible, I would like to request all content of the text messages to and from my mobile device for that the time between January 23, 2013 and May 10, 2013."* Daugherty produced a copy of this letter to SOSA in Respondent's January 29, 2014 Responses and Objections to Plaintiff's Requests for Production. ***See*** **Respondent's Exhibit 2, Respondent's Discovery Responses (1/29/14 Responses to Discovery, Document Bates Stamp No. 2120150).**

AT&T responded to Daugherty's written request by letter dated February 25, 2014. In its response AT&T stated: *"Thank you for your recent inquiry concerning your wireless account with AT&T. Unfortunately, we do not store the content of your messages. You can view the date, time and number that messages were sent to and from on your myAT&T account."* AT&T's February 25, 2014 response letter was produced to SOSA's counsel in response to discovery matters on October 17, 2014. ***See*** **Respondent's Exhibit 10, Supplemental Affidavit of Gerald Daugherty at 2, Att. B; Respondent's Exhibit 11, Supplemental Affidavit of Amy Pollock at 2, Att. A.** Based on the AT&T correspondence which has been produced to SOSA, it is clearly established: (1) Daugherty has requested the content of his text messages from AT&T;

and (2) Daugherty *cannot obtain the content of his text messages from AT&T because AT&T does not store the content of customers' text messages.*

In addition to the AT&T correspondence, SOSA has also deposed Susan Narvaiz and Rebecca Bray in this lawsuit. Both of these witnesses were subpoenaed, with an accompanying duces tecum requests. Both witnesses were questioned regarding whether they had any text messages to/from Daugherty regarding SH 45 SW, and both denied having any such responsive text messages. Both further denied deleting any text messages to/from Daugherty regarding SH 45 SW. ***See* Respondent's Exhibit 8, Susan Narvaiz Deposition Excerpts at 22-23; 25-26; Respondent's Exhibit 7, Rebecca Bray Deposition Excerpts at 20-27; 73-74.** Executive Assistant Bob Moore testified that he rarely text messages about substantive County business, and generally when he text messages about County business at all it is a scheduling matter, e.g., he is running late, is his calendar open for an appointment. ***See* Respondent's Exhibit 1, Att. G, Aff. of Moore at 2-3, ¶¶ 8-10; Respondent's Exhibit 6, Robert (Bob) Moore Depo Excerpts at 22**. Former Executive Assistant Barbara Smith testified similarly. ***See* Respondent's Exhibit 1, Att. G, Aff. Of Barbara Smith at 2-3, ¶¶ 9-10; Respondent's Exhibit 5, Barbara Smith's Depo Excerpts at 25.** In addition, at Smith's deposition she produced copies of "screenshots" of text messages from her phone in response to the duces tecum request, and provided them to SOSA's counsel for inspection. None were substantive, or responsive to the May 10th PIR. ***See* Respondent's Exhibit 5, Barbara Smith's Depo Excerpts at 39-41.**

Taken together this evidence conclusively establishes (1) Daugherty has taken reasonable steps to secure copies of the content of his text messages from his carrier, AT&T; (2) those efforts have been unsuccessful, and would be unsuccessful in the future because AT&T does not store the content of text messages; and (3) the alleged content is not available from the parties he

is alleged to have texted with. In short, Respondent is not refusing to produce his text messages – they are not available. Even if the law supported granting SOSA's requested injunctive relief of ordering him to produce them – which it does not—such relief would be futile because he can't produce what does not exist.

7. SOSA's claim that Respondent refuses to seek potentially responsive information from a donated computer is not supported by evidence.

SOSA's contention that it is entitled to declaratory and injunctive relief with respect to a personal computer formerly belonging to Respondent's wife is also unsupported by the evidence, and borders on being ridiculous. In the PPMSJ, SOSA attempts to conjure up some mystery regarding the whereabouts of the computer in question. As SOSA is aware, there is no mystery.

Respondent stated in his responses to interrogatories that he donated the computer to a charitable organization. Unfortunately, his original response was inaccurate as to the name of the organization (i.e., originally identifying Seton at Brackenridge, and subsequently amending his response to identify the Lone Star Paralysis Foundation ("LSPF").) This mistake was honest and understandable, given that LSPF is located in the building immediately adjacent to the Seton/ Brackenridge complex. Respondent produced a copy of the tax donation receipt for the computer in its August 26, 2014 supplemental responses to discovery. ***See*** **Respondent's Exhibit 2, Respondent's Discovery Responses (8/26/14 Supp Responses to Discovery, Document Bates Stamp No. 2120306).**

SOSA apparently did not seriously question or doubt that this was the correct computer because they subpoenaed and took the deposition of LSPF Executive Director Michael Haynes at LSPF's offices. Prior to the deposition, counsel for the parties conducted a visual inspection of the computer and monitor, including recording the serial numbers. This information was read into the record of the Haynes deposition, along with a related Rule 11 agreement of the parties

pertaining to the computer. The subpoena duces tecum to LSPF sought to require LSPF to disconnect the computer, and turn it over to SOSA for unspecified forensic examination of the hard drive. Respondent objected to the proposed unspecified forensic examination. The parties reached agreement to postpone such examination until such time that agreement could be reached regarding the scope and methodology of the examination to be utilized, the identity and qualifications of the forensic examiner, and protection of any residual personal data that might remain on the computer. The Rule 11 agreement was also read into the record and attached as an exhibit. ***See* Respondent's Exhibit 12, Michael Haynes Depo Excerpts at 4-7, Ex. 1-3**. LSPF Executive Director Haynes testified regarding his knowledge regarding the donation of the computer, as well as the status of the computer's hard drive at the time it was received. Specifically, Haynes testified that he was advised by his staff person who prepared the computer to be put into use that at the time it was received the hard drive was blank. Haynes further testified that the only content or software that was on the computer at the time of the deposition was Dragon dictation voice recognition software which allowed disabled individuals to use it, and Microsoft Word. ***Id.* at 22-26**. Haynes further agreed not to alter the hard drive prior to any forensic examination. SOSA has made no effort or request to conduct a forensic examination of the computer.

Based on Haynes' testimony there is no reason for Daugherty to make any further efforts with respect to the donated computer – any such effort would be futile, regardless of whether it was done voluntarily, or pursuant to direction from the Court. In addition to Haynes' testimony, both Daugherty and former Executive Assistant Smith have testified in their respective affidavits and depositions that Daugherty rarely utilized his personal home computer for County business, and when he did he generally forwarded any document or correspondence to Ms. Smith at his or

her County account for handling. ***See*** **Respondent's Exhibit 1, Att. G, Aff. Of Commissioner Daugherty at 2, ¶ 3; Barbara Smith at 2, ¶ 8.**

Last, Respondent no longer owns the computer, and as a consequence, has no right of access to the computer superior to that of any other member of the public. Indeed, counsel for SOSA even offered to purchase the computer from LSPF for $1,000.00. ***See*** **Respondent's Exhibit 12, Michael Haynes Depo Excerpts at 31.** In short, there is no credible evidence to support SOSA's claims with respect to the donated computer.

8. No factual evidence in support of SOSA's request for declaratory and injunctive relief in connection with Respondent's document retention policies.

SOSA seeks declaratory and injunctive relief with respect to the record retention policies of Travis County and the Travis County Precinct 3 Commissioner's Office. SOSA complains that the policies concerning use of personal electronic devices and/or accounts to conduct County business recently adopted by Travis County and Pct. 3, respectively, are inadequate and were adopted in an effort to resolve the litigation. ***See*** **PPMSJ at 18-21.** SOSA's arguments are without merit, and, again, are not supported by summary judgment proof.

Both Travis County and the Pct. 3 Commissioner's Office have a general document retention policy. ***See*** **Respondent's Exhibit 2, Respondent's Objections and Answers to Plaintiff's First Set of Interrogatories, Responses to Interrogatories No. 7 and No. 8.**[8] Both have adopted the records retention policy provided for under state law, Local Schedule GR. This policy can be located at https://www. tsl.texas.gov/slrm/recordspubs/localretention.html. Both have designated Steven Broberg as Records Management Officer in compliance with § 203.041 of the LGRA. ***See*** **Respondent's Exhibit 2, Respondent's Discovery Responses (1/29/14 Supp. Responses to Discovery, Document Bates Stamp No. 9990001, 2970001).**

[8] See also, **PPMSJ Ex. 10.**

The newly adopted policies simply are an enhancement on the general record retention policy to specifically address use of personal electronic devices and accounts in the conducting of County business. ***See* Respondent's Exhibit 1, Attachments E and F.** SOSA's contention that the most important documents are excluded from the reach of the new policies is completely false. Under either policy, all documents created or transmitted on a personal device or account must be transferred to a County account if they are required to be retained under State law. Likewise, both policies require documents that must be retained under State law to be retained for the period required by state law. Under both policies **"**Record Retention Period" is a defined term, meaning "the length of time that 'County Public Information'[9] must be kept according to Texas law as determined by the County's Local Government Records Management Officer". ***See* Respondent's Exhibit 1, Attachments E and F.** SOSA seeks to have this Court condemn the new policies as inadequate with absolutely no evidence that this is true. ***See also* Respondent's Exhibit 9, Shawn Malone Deposition Excerpts.**

Moreover, neither the TPIA nor the LGRA require Daugherty or Travis County to have "comprehensive" retention policies such as SOSA suggests. In fact, the LGRA does not even provide SOSA a private cause of action against Daugherty or Travis County. ***See* Respondent's Exhibit 1, at 19.** Accordingly, SOSA is not entitled to injunctive or declaratory relief with respect to the record retention policies of Travis County and the Travis County Precinct 3 Commissioner's Office. *See City of El Paso v. Abbott,* 444 S.W.3d 315, 326-27 (Tex. App. – Austin 2014, pet. filed).

[9] Also a defined term.

9. Summary of PPMSJ Deficiencies

In summary, based on the above referenced evidence, arguments and authorities, under the Third Court of Appeals' holding in *City of El Paso v. Abbott*, 444 S.W.3d 315 (Tex. App. – Austin 2014, pet. filed) and the cases and authorities cited therein, this Court must deny Plaintiff's Motion for Partial Summary Judgment, and grant Respondent's Plea to the Jurisdiction, dismissing Plaintiff's claims under the TPIA for lack of jurisdiction. The evidence conclusively establishes that: (a) Respondent produced all information required of him and his office under Open Records Letter Ruling OR2013-13139; (b) Respondent has not "refused" to produce public information within the meaning of the Act; and (c) Plaintiff cannot demonstrate a "refusal" to produce public information within the narrow waiver of sovereign immunity created by the Act with respect to Plaintiff's claims against Respondent in his official capacity.

V. Conclusion

WHEREFORE, PREMISES CONSIDERED, for the reasons stated herein, Commissioner Daugherty respectfully requests this Court deny Plaintiff's Motion for Partial Summary Judgment. Commissioner Daugherty further prays for any such other relief to which he may be justly entitled.

///

Respectfully submitted,

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ATTORNEYS FOR TRAVIS COUNTY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Respondent's Response to Plaintiff Save Our Springs Alliance Inc.'s Motion for Partial Summary Judgment** was served in accordance with the Texas Rules of Civil Procedure via electronic filing, electronic service and/or certified mail return receipt requested on this 21st day of May, 2015, as follows:

Via Electronic Filing
Velva Price
Travis County District Clerk
1000 Guadalupe Street
Austin, Texas 78701

Via Electronic Service
Via CMRRR # 7012 0470 0000 0990 7194
William G. Bunch
Kelly Davis
905 West Oltorf, Suite A
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/s/ Anthony J. Nelson
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