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 REPLY TO PLAINTIFF SAVE OUR SPRINGS ALLIANCE INC.'S RESPONSE, AND SUPPLEMENTAL RESPONSE TO RESPONDENT'S PLEA TO THE JURISDICTION

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 Reply to Plaintiff Save Our Springs Alliance Inc.'s Response, and Supplemental Response to Respondent's Plea to the Jurisdiction. In support thereof, Respondent would show as follows:

I. Summary and Procedural Background

This Reply Brief is filed in response to Plaintiff's Response to Respondent's Plea to the Jurisdiction, which was filed in this matter on May 21, 2015[1], as well as in response to Plaintiff's Supplemental Response to the Plea to the Jurisdiction filed in this matter on July 6, 2015. Plaintiff's Response to the Plea to the Jurisdiction (hereinafter "PTJ") addresses the same arguments, authorities and evidence as those raised in Plaintiff's Partial Motion for Summary Judgment (hereinafter "PPMSJ") filed in this matter, which Respondent previously erroneously construed as

[1] Plaintiff's Response to Respondent's Plea to the Jurisdiction was filed on the same date as Plaintiff's Partial Motion for Summary Judgment, but due to an internal routing error within the undersigned counsel's office, was overlooked at the time of the previously scheduled May 28th hearing in this matter.

"both an independent dispositive motion seeking relief, as well as, perhaps, a response to the PTJ".[2] Accordingly, Respondent incorporates by reference in its entirety Respondent's Response to Plaintiff's Partial Motion for Summary Judgment in this Reply Brief. ***See* Attach. 1, Respondent's Response to Plaintiff's Partial Motion for Summary Judgment.** More specifically, Respondent incorporates by reference in their entirety the arguments, authorities and evidence cited and attached to the Response to PPMSJ to this Reply Brief.

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. 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.

[2] See Respondent's Response to Plaintiff's Partial Motion for Summary Judgement at 4, footnote 2.

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).

In its Supplemental Response to the PTJ Plaintiff argues that Respondent's failure to closely read the May 10th PIR at the time it was received or prior to his deposition in this case is somehow evidence of a refusal to provide public information. As set forth in his PTJ, as well as in his Response to PPMSJ and Plaintiff's Motion to Compel, initial review of correspondence received by his office, including correspondence received by email addressed to Commissioner Daugherty was delegated to his Executive Assistant at the time Barbara Smith. Ms. Smith, in turn, would bring matters that required action to Commissioner Daugherty's attention. Such delegation is not illegal, nor is it evidence of refusal to provide public information, or other violation of the TPIA.

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.

In its Supplemental Brief, Plaintiff attempts to argue that Commissioner Daugherty's response to a May 12, 2015 PIR submitted to his office is evidence that the above referenced policies restricting the use of personal electronic communication devices and personal accounts to conduct County business are insufficient or inadequate to accomplish their stated purposes, and therefore they cannot moot Plaintiff's claims. Essentially, Plaintiff asks this Court to allow Plaintiff to substitute its judgment for that of the Commissioners Court and Commissioner Daugherty to adopt policies for Travis County and Precinct 3. There is simply no authority requiring or even supporting these proposed actions. Accordingly, the Court should decline Plaintiff's request.

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. Evidence in Support of **Reply** to Response to Respondent's Plea to the Jurisdiction

In support of this Reply Brief, Commissioner Daugherty incorporates by reference the following evidence previously attached as exhibits in support of his Response to PPMSJ:

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[3];
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; and
Respondent's Exhibit 12:	LSPF Executive Director Michael Haynes Deposition Excerpts.

[3] 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. On May 21, 2015, opposing counsel was provided with an identical copy of the CD along with service of Respondent's Response to Plaintiff Save Our Springs Alliance Inc.'s Motion for Partial Summary Judgment.

III. Respondent's Plea to the Jurisdiction Should be Granted

Respondent's Plea to the Jurisdiction should be granted because the evidence before the Court conclusively establishes that Respondent has produced all public information that is available to him responsive to the May 10th PIR, and has taken reasonable steps to locate and produce public information responsive to the May 10th PIR. Plaintiff's evidence submitted in response to the PTJ, and in support of PPMSJ fails to set forth competent summary judgment evidence establishing either its entitlement to relief, or establishing a material issue of fact precluding granting of Respondent's PTJ. Rather, SOSA has engaged in asking this Court to deny Respondent's PTJ 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; Plaintiff's Response to PTJ at 1-2; 4-13.**

A. Respondent has Proffered Competent Evidence Establishing that Respondent has Produced all Public Information Responsive to the May 10th PIR.

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

In addition to the documents produced in Respondent's original response to the May 10th PIR, 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. 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.

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. 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**[4]. 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.**[5] 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. Respondent voluntarily produced additional documents in supplemental discovery responses, including documents the OAG Letter Ruling OR2013-13139 had authorized withholding.

Likewise, 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

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

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. 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.[6] 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 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.

[6] 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.

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.[7] ***See*** **Respondent's Exhibit 1 at 12-14, Att. G. pp.3-4, ¶¶ 10, 16, and 18; Att. H, 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).**

[7] 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.

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

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

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 contentions with respect to a personal computer formerly belonging to Respondent's wife is also unsupported by the evidence, and borders on being ridiculous. 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. Respondent's Plea to the Jurisdiction should be granted because there is 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.**[9] 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).**

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

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

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'[10] 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).

B. Summary of Grounds for Granting Plea to Jurisdiction

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 grant Respondent's Plea to the Jurisdiction, dismissing Plaintiff's claims under the TPIA for lack of

[10] Also a defined term.

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.

IV. Conclusion

WHEREFORE, PREMISES CONSIDERED, for the reasons stated herein, Commissioner Daugherty respectfully requests this Court grant Respondent's Plea to the Jurisdiction. Commissioner Daugherty further prays for any such other relief to which he may be justly entitled.

Respectfully submitted,

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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 and/or electronic service on this 10th day of July, 2015, as follows:

Via Electronic Filing
Velva Price
Travis County District Clerk
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