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

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

PLAINTIFF SAVE OUR SPRINGS ALLIANCE INC.'S RESPONSE TO RESPONDENT'S PLEA TO THE JURISDICTION

COMES NOW, Plaintiff, Save Our Springs Alliance (Plaintiff), by and through its undersigned attorneys of record, and hereby files its Response to Respondent Gerald Daugherty's Plea to the Jurisdiction, filed April 8, 2015.[1]

This case is not moot, and Defendant's plea should be denied. On several of Plaintiff's claims, fact issues remain on whether documents withheld from Plaintiff or redacted by Defendant should be disclosed as public information, in whole or in part. On other claims, as argued in Plaintiff's pending Motion for Partial Summary Judgment, the evidence shows that Defendant has failed to produce public information requested in Plaintiff's May 10, 2013 information request, and such information remains subject to Defendant's "right of access" and must be produced to Plaintiff. *See* Tex. Gov't Code § 552.002 (defining public information, in part, as information that a governmental body owns or "has a right of access to").

[1] Although the Plea is styled as "*Respondent's* Plea to the Jurisdiction," and refers to "Respondent" Commissioner Gerald Daugherty throughout, Plaintiff will use the term "Defendant" in reference to Commissioner Daugherty to remain consistent with previous filings in this case.

Defendant's argument that this case is moot because he has now provided to Plaintiff (belatedly and as a result of Plaintiff's discovery) all documents responsive to Plaintiff's May 10, 2013 public information request (PIR), except those deemed exempt from disclosure under the Attorney General's letter ruling, does not fit with either the facts or the law. Plaintiff's Motion for Partial Summary Judgment, filed May 7, 2015 and incorporated into this Response for all purposes, points to discovery evidence showing that there is responsive information—known to exist and to which Defendant has a right of access—that has yet to be produced as required by the Texas Public Information Act (TPIA), Tex. Gov't Code §§ 552.001 *et seq*. In addition to the documents known to exist that have not been produced, as summarized below, there is a factual question as to whether other documents responsive to the PIR exist but were not subject to an adequate search. Finally, the Attorney General's opinion does not insulate Defendant from a suit for mandamus under Texas Government Code § 552.321. A requestor can bring suit for a writ of mandamus or declaratory relief seeking disclosure even if the Attorney General has held the documents exempt. *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411-12 (Tex. App.—Austin 1992, no writ). The Attorney General's opinions under Texas Government Code § 552.301, while given considerable weight by the courts, are not binding. *Id.* at 412. Plaintiff asserts that the Attorney General erred in concluding some of the documents were exempt from disclosure or subject to redaction to withhold information. Moreover, Defendant did not submit in full the documents which he asserted were privileged in seeking an opinion from the Attorney General. Rather, Defendant submitted only "a representative sample" to the Attorney General. [2]

Thus, this case is not moot and the plea should be denied.

[2] Ex. 1, May 24, 2013 Letter from Gerald Daugherty to Office of the Attorney General.

LEGAL BACKGROUND

1. Pleas to the Jurisdiction

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court reviews the relevant evidence submitted by the parties to determine if a fact issue exists. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004). If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue is resolved by the factfinder at trial. *Id*. at 227-28. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id*. at 228. A court must indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *Id*.

2. Texas Public Information Act

The Texas Public Information Act, found in Texas Government Code, chapter 552, is an expression of a "fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people…" *See* Tex. Gov't Code § 552.001(a). Accordingly, because it is their own information, the people have the privilege of access to public documents. *See id*. That privilege is enforced by a statutory framework that requires government officials to justify any decision not to provide documents. *Id*. §§ 552.006, 552.301. The TPIA is to be liberally construed in favor of granting requests for information. *Id*. § 552.001(b).

The TPIA defines "public information" as including information that is "written, produced, collected, assembled, or maintained … in connection with the transaction of official business" that a governmental body owns or "has a right of access to." *Id*. § 552.002(a). Defendant relies on a legislative amendment defining "public information" approved after Plaintiff's May 10, 2013 PIR. Def.'s Plea at 1-2. However, the more detailed 2013 definition did not change what is or is not public information; the legislation merely

affirmed the definition of "public information" as previously and consistently interpreted by the courts and Attorney General opinions. Tex. Att'y Gen. OR2005-06753 (collecting letter rulings finding that electronic communications discussing official business maintained on any device qualify as public information). Specific to this case, electronic communications concerning public business, regardless of whether on private or public devices or accounts, were considered public information before and after the amendment. *Id*.; *see Adkisson v. Paxton*, No. 03-12-00535-CV, 2015 WL 1030295, at *6, 10 (Tex. App. Mar. 6, 2015) (interpreting pre-2013 definition of "public information" to include e-mail communications related to official County business). And significantly, both the previous and current statutory definition of "public information" include information that a governmental body owns or "has a right of access to." Therefore, Defendant cannot hide behind the previous definition to excuse his failure to produce text and e-mail messages concerning government business.

ARGUMENT

The Court must not grant Defendant's plea because Defendant fails to produce undisputed evidence showing that there is no more responsive information to produce. Defendant never unequivocally states in any pleading or discovery response that no responsive information exists in his personal accounts that has yet to be produced to Plaintiff.

1. Defendant Has Not Produced Text Messages Responsive to Plaintiff's PIR.

Plaintiff has not yet received a single text message from Defendant in response to the PIR, despite the substantial evidence showing that Defendant used his personal cell phone to send and receive texts messages in connection with SH 45 SW.[3] Defendant

[3] *See* Pl.'s Mot. Partial S.J. at 10-11 and exhibits cited in attached Appendix; Ex. 2, Excerpts from the Deposition of Gerald Daugherty 43:7-12 (Feb. 20, 2014) (hereinafter "Daugherty Dep."). Although there is some overlap, the deposition excerpt attached to this Response includes some pages not attached to Plaintiff's Motion for Partial Summary Judgment.

asserts that Plaintiff's claims are moot as to this issue yet fails to show that there are no text messages in existence that are responsive to Plaintiff's PIR.

As a public official, Defendant has a duty under the TPIA to do more than passively not resist a subpoena; the burden falls on Defendant to gather and provide public information generated or received by his office.[4] *See Adkisson*, 2015 WL 1030295, at * 15 n.7 (stating it is not the Attorney General's or the requestor's burden to prove that responsive e-mails exist); *cf. Econ. Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266, 268 (Tex. Civ. App.—San Antonio 1978, writ dism'd) (holding that where *sufficient evidence* showed documents were no longer in government agency's possession, agency could not be required to produce documents).

Plaintiff endeavored to acquire a record of Defendant's text messages via a subpoena to Defendant's carrier, AT&T, and Plaintiff acknowledges that Defendant did not resist or contest the subpoena.[5] However, the subpoena yielded only phone record logs—phone numbers, dates, and times that calls and text messages were received or sent.[6] Plaintiff's unsuccessful attempt to retrieve information from AT&T did not shift the burden to Plaintiff to continue to try to retrieve Defendant's text message records, because Defendant has a duty and a right to access his own text messages even if archived on AT&T's servers.

Text messages relating to the transaction of official public business are public information subject to the TPIA, and Defendant, as the public information officer for his County office, has a legal duty to produce them. *See* Tex. Att'y Gen. OR2012-06843 (e-mails and text messages created in connection with transaction of official business in personal accounts of public officials are subject to the TPIA). Local government records, which are

[4] Indeed, it is to Defendant's advantage to obtain the text messages, so that he may filter out the personal, non-responsive text messages before providing them to Plaintiff.
[5] Attach. G to Def.'s Plea to Jurisd., Aff. of Gerald Daugherty ¶ 20 (hereinafter "Daugherty Aff.").
[6] *See* Ex. 15 to Pl.'s Mot. Partial S.J., AT&T Text Record Log of Gerald Daugherty.

expressly subject to the TPIA, Tex. Loc. Gov't Code § 201.009(a), include documents created or received by a local government or any of its officers or employees in the transaction of public business, "regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of this state." *Id*. § 201.003(8). A County Commissioner, such as Defendant, "is the officer for public information and the custodian, as defined by Section 201.003, Local Government Code, of the information created or received by that county officer's office." Tex. Gov't Code § 552.201(b); *see also* Tex. Loc. Gov't Code § 201.003(2) (defining "custodian" as "the appointed or elected public officer who by state or other law is "in charge of an office that creates or receives local government records"). Accordingly, Defendant is charged with the statutory duty of protecting public information of his County's office—no matter where that information is physically created or received—and making it available for public inspection and copying. *See* Tex. Gov't Code § 552.203; *see also* Tex. Loc. Gov't Code § 203.002 (listing duties and responsibilities of elected county officers as records management officers).

The fact that Defendant may have to request these text messages from AT&T does not mean Defendant is relieved of his duty to make such public information available for public inspection. AT&T is prohibited by law from denying access to local government record data if requested by the local government. *See* Tex. Loc. Gov't Code § 205.009.[7] Further, Defendant has a right of access to local government records in the form of text messages relating to County business, meaning these documents are "public information" subject to disclosure under the TPIA. *See* Tex. Gov't Code § 552.002(a) (defining "public information," in part, as information produced in connection with the transaction of official business for a governmental body that a governmental body owns or has a "right of access"

[7] "A person under contract or agreement with a local government or elected county officer to … provide services, equipment, or the means for the creation, filing, or storage [of local government record data], may not, under any circumstances, refuse to provide local government record data to the local government in a timely manner in a formal accessible and useable by the local government." Tex. Loc. Gov't Code § 205.009.

to.); *City of Dallas v. Dallas Morning News*, 281 S.W.3d 708, 715 (Tex. App.—Dallas 2009, no pet.) ("The [TPIA] does not qualify or narrow the definition of 'access' to direct, or easy, access only. The issue is 'right of access.' "). Because Defendant is the custodian of the public information in the form of text messages, and because AT&T may not deny Defendant access to the information, Defendant has a duty to locate and produce the text messages.

In his Plea to the Jurisdiction, Defendant makes only one factual assertion regarding his effort to obtain responsive text messages: that "Defendant searched his cell phone for text messages responsive to the May 10th PIR, and found none." Def.'s Plea at 13. However, Defendant's affidavit in support states that Defendant "reviewed the text messages that were *still* available on his personal cell phone."[8] (emphasis added). Defendant does not state *when* he conducted this review. This statement, far from proving that there is no more information to produce, raises several questions about what text messages were "still" available when Defendant finally reviewed them, why some text messages were no longer available on his cell phone, and whether the text messages not available on his cell phone are still available elsewhere.

Because evidence in the record demonstrates that, by Defendant's own admission, Defendant failed to review and produce text messages responsive to Plaintiff's PIR, Plaintiff's claims that Defendant continues to withhold responsive information goes beyond mere "speculation and guesswork." *See* Def.'s Plea at 6. Nor is the information Plaintiff seeks "in control of those other than the governing body." *See id*. On the contrary, Defendant has a right of access to text messages sent or received by him on his AT&T account, and Defendant has a duty under the TPIA and the LGRA to obtain the text message records and produce them to Plaintiff. Defendant has never shown he has made any

[8] Daugherty Aff. ¶ 15.

meaningful effort to obtain the information from AT&T. Absent proof that all potentially responsive text messages have been produced, the Court cannot grant Defendant's Plea.

2. Defendant Has Not Shown Compliance with the TPIA with Regard to His Personal E-mail Account and Personal Computer.

Defendant owns and utilizes, for personal use, a Road Runner e-mail account.[9] Defendant used this e-mail account to communicate about County business and violated the TPIA by failing to promptly produce this public information responsive to Plaintiff's PIR. It was only through litigation that fourteen e-mails qualifying as public information were eventually made available to Plaintiff.[10] Plaintiff is concerned that Defendant still has not performed an adequate search of his personal e-mail account for public information, and that, because there is no public oversight of his personal e-mail account, Defendant may intentionally be concealing responsive public information.

Defendant has admitted to using his personal e-mail account for County business and to accessing County business from his wife's laptop computer.[11] Furthermore, Defendant admitted that he deleted e-mails containing public information.[12] Many e-mail programs, such as Outlook, actually download e-mails as well as e-mail attachments when opened for viewing. Defendant knew at the time he took office that if County information is discussed over his personal e-mail account, that it is still public information.[13] Therefore, in the course of producing documents responsive to Plaintiff's PIR, Defendant had a duty to conduct a reasonable search of both his personal e-mail account and the hard drive of his wife's computer for responsive public documents.

[9] Ex. 10 to Pl.'s Mot. Partial S.J., Def.'s Obj. & Answers to Pl.'s First Set of Interrog. at 7, No. 4.
[10] Ex. 7 to Pl's Mot. Partial S.J., Def.'s Obj. & Resp. to Pl.'s Second Set of Req. for Admis. Nos. 18-27, 31-34.
[11] Daugherty Dep. 35:3-36:12; Daugherty Dep. 29:13-30:21. Daugherty amended his testimony from "yes," to "yes, it is possible I have used my wife's computer to view some e-mails." Changes & Corrections 75:16-17.
[12] Daugherty Dep. 40:22-41:14.
[13] Daugherty Dep. 42:22-43:6 (Defendant stating that he "thinks [he] knew" that upon taking office in January 2013, e-mails on his personal e-mail account that involved Travis County business were public information).

Unlike Defendant's Travis County-issued e-mail address and those of his executive assistants, where the Travis County Technology Services Department searched applicable Travis County-issued e-mail accounts and servers,[14] no one can verify the adequacy or even the extent of the search performed on the Defendant's personal e-mail account. Defendant claims that he searched his personal e-mail account himself and forwarded any responsive information to his executive assistant to produce in response to the PIR.[15] In his affidavit supporting the Plea, Defendant asserts that he searched his home computer for any information responsive to the PIR, but he does not specifically mention searching his personal e-mail or any other computer he may have used.[16] He also concedes that he used his home computer to conduct County business, although it was "rare," and that "generally" when he did so he forwarded the information to his executive assistant.[17] These statements do not conclusively establish that all information on Defendant's personal e-mail account was searched in response to the PIR. Defendant's vague assertion that he "searched his home computer for any responsive information" is insufficient to negate the existence of a fact dispute on this issue. Given that it took filing a lawsuit to obtain the 14 previously produced e-mails, Plaintiff has genuine concerns that e-mails sent or received using the Defendant's personal e-mail account and which reference official Travis County business exist and have not been produced in response to its PIR.

Similarly, Defendant has not provided evidence showing that there is no responsive information on Defendant's wife's donated laptop. One month after this suit was filed, and around the same time a litigation hold was put in place on Defendant's Travis County accounts, Defendant donated his wife's laptop computer to the Lone Star Paralysis Foundation.[18] However, he could not remember if he checked his wife's computer for

[14] *See* Attach. I to Def.'s Plea to Jurisd., Aff. of Frank Trevino ¶¶ 3-8.
[15] Daugherty Dep. 35:3-20.
[16] Daugherty Aff. ¶ 3.
[17] Daugherty Aff. ¶ 3.
[18] Ex. 11 to Pl.'s Mot. Partial S.J., at 8, Answer No. 23 to Interrog. No. 5; Ex. 9 to Pl.'s Mot. Partial S.J., at 5, Req. No. 2 and corresponding doc. 2120306.

responsive information,[19] and neither he nor his wife recorded the contents of the computer before giving it away.[20]

Neither the Plea to the Jurisdiction nor evidence submitted in support thereof mentions the donated laptop, and Defendant never produced evidence showing that the donated laptop was searched and found to have no responsive information. Thus, there is a live factual controversy regarding this information until Defendant can produce evidence showing that the laptop was searched and found to have no responsive information. *Cf. Cearley v. Smith*, No. 12-07-00079-CV, 2007 WL 3173303, at *2 (Tex. App.—Tyler Oct. 31, 2007, no pet.)(mem. op.) (affirming trial court's finding that sheriff did not have requested documents because it was supported by evidence, including testimony of a computer specialist who tried unsuccessfully to retrieve lost data from sheriff's computer).

Because Defendant has a right to access his own accounts, this case is distinguishable from *City of El Paso v. Abbott*, 44 S.W.3d 315 (Tex. App.—Austin 2014, pet. filed). *See* Def.'s Plea at 9-12. In that case, Stephanie Allala filed a public information request with the City of El Paso, seeking various public-business communications, including those made on personal e-mail accounts, between specific city officials. *City of El Paso*, 44 S.W.3d at 317-18. The City sought to withhold some information and requested an opinion from the Attorney General, who ruled that e-mails made on personal accounts that relate to official business are subject to disclosure. *Id*. at 318. The City filed suit, seeking a declaratory judgment that the responsive information in the City's possession was exempt from disclosure under the TPIA, and Allala intervened. *Id*. However, during the pendency of the suit, the City decided to withdraw its challenge to the Attorney General's decision and produced to Allala the responsive information in its possession. *Id*. at 318-19.

[19] Daugherty Dep. 38:4-17.
[20] Daugherty Dep. 30:16-31:12.

The City then filed a Plea to the Jurisdiction; Allala objected and sought discovery, asserting there were e-mails on individual's personal e-mail accounts that were not turned over to the City. *Id*. at 319. Although evidence showed one former city councilor declined to provide personal e-mails in response to the City's official requests that he do so, the court found that the City had made reasonable efforts to obtain the information and had produced to Allala all of the responsive information it had been able to locate and obtain. *Id*. at 323-24. Thus, the court found that the City was not *refusing* to supply public information in violation of the TPIA. *Id*. at 324. Because the City could not compel the former city councilor to comply with its request, the City had satisfied *its* burden to produce *its* responsive records to Allala. *Id*. at 326.

By contrast, Defendant here is in possession of or has a right of access to all the public information created or maintained by his office that is potentially responsive to Plaintiff's PIR. As to text messages that are no longer on Defendant's cell phone, Defendant has a right of access to any and all text messages he sent or received that are still available on his carrier's server. And although Defendant may no longer have a right of access to the laptop that was given to the nonprofit, Defendant should at least be compelled to request an opportunity to recover any remaining, responsive information on the donated computer. Unlike *City of El Paso*, Defendant is not hamstrung by other individuals declining to provide responsive information. *See* 44 S.W.3d at 326. The information not produced to Plaintiff is or was in Defendant's possession. Until Defendant produces the text messages and e-mails on his personal e-mail account, or shows that they cannot be produced, there is a factual question precluding this Court from granting Defendant's Plea to the Jurisdiction.

3. <u>Issues Remain on Whether Documents Either Withheld or Redacted Should be Subject to Public Disclosure, as Sought in Plaintiff's Motion to Compel.</u>

The Attorney General concluded that certain documents were exempt from disclosure under the inter-agency memoranda exception or the attorney-client privilege

exception. *See* Tex. Att'y Gen. OR2013-13139. Consistent with that opinion, Defendant has withheld certain documents or produced them in redacted form.[21] Defendant asserts that because these are the only documents still being withheld, Plaintiff's claims are moot. But the Attorney General opinion does not absolutely immunize these documents from disclosure.[22] Plaintiff has the right to seek mandamus to compel production of documents, even if the Attorney General has determined that those records are exempt from disclosure. *See Gilbreath*, 842 S.W.2d at 411-12; Tex. Gov't Code § 552.321 (allowing mandamus suit when the governmental entity refuses to produce public information **or** refuses to produce information the Attorney General has deemed public information). The Attorney General's opinion, while given due consideration, is not binding on the courts. *Id*. at 412. The Attorney General does no fact finding, and offers opinion based almost exclusively on the representations made by the governmental party seeking to withhold information from disclosure. *See, e.g.*, Tex. Att'y Gen. OR2013-1319 at 6 (stating that the letter ruling "is limited to the facts as presented" to the Attorney General's Office by the governmental entity seeking to withhold documents).

Because there are factual issues as to what these documents contain, Plaintiff filed a Motion to Compel Production of Documents Under the TPIA on May 18, 2015. In the Motion, Plaintiff requests that this Court compel disclosure of the withheld documents under seal, pursuant to Tex. Gov't Code § 552.322 or, alternatively, that the Court inspect the documents *in camera* pursuant to Tex. Gov't Code § 552.3221. Should the Court grant the requested relief, the Court will have an opportunity to inspect the withheld documents and determine whether they fall under an exemption to disclosure. Whether the Court

[21] The documents produced in redacted form or withheld are reproduced or identified in the Appendix of Plaintiff's Motion to Compel.

[22] Although Defendant released some information that the Attorney General deemed exempt, he is still withholding several documents, and his voluntary disclosure does not shield him from judicial review of whether those documents are exempt. *See* Daugherty Aff. ¶ 18.

grants Plaintiff's requested relief, the Court has the authority to make its own rulings as to the release of the documents.

Furthermore, there is a factual dispute as to whether Defendant submitted to the Attorney General all documents he sought to withhold under TPIA exemptions, or only a representative sample thereof. Defendant's May 24, 2013 letter to the Attorney General states that "**representative samples** of the requested information will be submitted to your office."[23] (emphasis added). Yet Defendant specifically *denied* that the Attorney General only received a sample of the requested documentation. Def.'s Orig. Answer & Resp. to Writ of Mandamus ¶ III.3. The Plea to the Jurisdiction lacks any definitive statement about this issue, and Defendant has not produced any evidence showing that the Attorney General received all of the documents sought to be withheld. To the contrary, Plaintiff's Motion to Compel specifically requests production of two sets of documents that were not included in the documents submitted to the Attorney General.[24] Regardless of whether these documents were known to Defendant at the time the letter ruling was requested, they are known to Defendant now, and they have not been reviewed by the Attorney General. Thus, it is clear that the Attorney General's letter ruling does not cover all documents Defendant is currently withholding. *See* Tex. Att'y Gen. OR2012-02459 (noting that letter does not authorize the withholding of any other requested records to the extent that those records contain substantially different information than that submitted).

4. Defendant's Newly Adopted Retention Policies Are Inadequate.

Shortly before filing his Plea to the Jurisdiction, Defendant sponsored a County-wide records-retention policy and adopted a records-retention policy for his office. Defendant argues that these policies moot Plaintiff's request for an injunction prohibiting Defendant

[23] Ex. 1, May 24, 2013 Letter from Gerald Daugherty to Office of the Attorney General.
[24] Def.'s Obj. & Answers to Pl.'s First Set of Interrog., at 6-7, Answer No. 3 (listing documents Defendant submitted to the Attorney General for a letter ruling; this list does not include three sets of documents requested in Plaintiff's Motion to Compel, Bates stamped as: (1) 2951072-74 (redacted); and (2) 2950679 (redacted) and Priv2120094-95, Priv295002-03 (removed)).

from using personal devices to conduct County business until an appropriate policy is in place.

As discussed in Plaintiff's Motion for Partial Summary Judgment at 19-21, these policies are inadequate in several ways. First, the policies are narrowly focused on electronic communications, particularly those transmitted via a personal device. It is clear that the policies were not designed to provide a comprehensive, forward-looking policy for ensuring the proper retention of all public information generated in the County office. The policies do not even mention non-electronic documents such as letters and meeting-handouts.

Second, both policies allow a wide amount of discretion for each employee as to which electronic records to retain. The Precinct 3 policy states that County business must be forwarded to a County account "unless there is no administrative value in doing so."[25] But "administrative value," is not defined and is therefore a useless standard. The term appears to exclude the most important types of public information: documents with *public policy* value. Thus, this policy may actually make the retention practices of public information worse, not better. Likewise, the Travis County policy merely states that a communication referencing County business must be forwarded, "so long as the information's Record Retention Period requires it to be kept."[26] Again, this leaves discretion up to the employee and does not provide clear guidance for ensuring compliance with the TPIA.

Finally, the policies do not contain any procedures relating to the retrieval of public records that are properly requested. Retention policies are only one part of effectively responding to PIR requests. Without guidance or a standard procedure for locating and retrieving documents in response to public information requests, Defendant and his

[25] Attach. F to Def.'s Plea to Jurisd., Pct. 3 Commissioner's Office Electronic Communication Devices Policy.
[26] Attach E to Def.'s Plea to Jurisd., Travis County Code Ch. 42: County Records.

executive assistants still lack the tools necessary to promptly and thoroughly respond to future requests.

In the larger context, the new policies are completely inadequate given the circumstances of this case. Defendant deleted e-mails and text messages, failed to conduct a meaningful search of each device and account which he used to conduct County business, and is still failing to produce responsive information. Defendant's flouting of the public information laws is a critical issue that needs to be addressed through an all-inclusive, genuine policymaking effort, not through an eleventh hour, reactive policy tailored to toss out Plaintiff's claims here. Defendant's failure to live up to the high standards that holding an elective office entails contributes to the erosion of public confidence in government, and he must be held accountable.

CONCLUSION

The evidence before this Court shows there is factual dispute as to whether Defendant has produced all documents in response to Plaintiff's May 10, 2013 PIR, and the Court has jurisdiction to determine if the documents withheld under the Attorney General opinion are exempt from disclosure. For these and the above reasons, the Court must deny Defendant's Plea to the Jurisdiction.

Respectfully submitted,

/S/ Kelly D. Davis
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Plaintiff's Response to Respondent's Plea to the Jurisdiction** has been served on the following counsel and parties of record on this 21st day of May, 2015 via electronic service through eFile.TXCourts.gov.

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May 24, 2013

Hand Delivered

Ms. Amanda Crawford, Division Chief
Office of the Attorney General of Texas—Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request from **Bill Bunch** on **5/10/2013**—Request for Ruling

Dear Ms. Crawford:

On behalf of the Travis County Commissioner for Precinct 3, Gerald Daugherty, and under Government Code section 552.301, we are requesting a decision regarding the status of certain information sought in the attached request. Commissioner Daugherty will release some responsive information to the requestor but asserts that the remainder of the requested information is excepted from disclosure under sections 552.101-552.153 of the Act, along with the exceptions incorporated therein. Accordingly, we are asking for a decision from your office with respect to the requested information. By copy of this letter, we are informing the requestor that we wish to withhold some of the requested information and that we are asking for a decision from your office.

A supplemental brief setting forth the applicability of the above-referenced exceptions and representative samples of the requested information will be submitted to your office within fifteen business days after receipt of the request.

If you have any questions, please contact me at (512) 854-4168, or by e-mail at elizabeth.winn@co.travis.tx.us.

Sincerely,

Elizabeth Hanshaw Winn

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your help with but I'll come back to that.

So help me understand. You have your cell phone and I assume you have some sort of desktop computer in your office here?

A. I do.

Q. Okay. And then at home, if you're using your e-mail account, what do you actually work on?

A. Laptop.

MR. NELSON: Object -- hold on. Objection, form.

Q. (BY MR. BUNCH) A lap -- you have a laptop?

A. I do.

Q. Is there any other computer device at your home that you might do work on from time to time?

A. My --

MR. NELSON: Objection -- hold on. Objection, form.

Now you can answer.

A. My wife has a computer.

Q. (BY MR. BUNCH) And you'll use her computer from time to time?

A. As --

MR. NELSON: Objection, form.

MR. BUNCH: Can you explain yourself?

MR. NELSON: Sure.

MR. BUNCH: This is kind of annoying.

MR. NELSON: Well, I'm going to object to your sidebar comments. You're not being specific. I'm objecting as to it being a vague question. "That he can work on" does not advise as to whether you're asking is he doing county work, is he doing personal work. It's very vague and ambiguous in your question.

Q. (BY MR. BUNCH) Okay. What kind of computer does your wife have?

A. Her new computer is an Apple.

Q. And when did she get that?

A. Oh, in the last six months.

Q. And there have been occasions when you've used that computer to undertake county business?

A. No.

Q. Okay. And what computer did she have before this new one?

A. A Dell.

Q. And was there ever occasion that you would do county business on that computer?

A. Yes.

Q. Do you still have that computer?

A. No.

Q. Was -- how was it disposed of?

A. I think we gave it to Seton to be used in their

rehabilitation department.

Q. And did you record your contents before you gave it away on a hard drive or some other recording device?

A. I did not.

Q. Do you know if your wife did?

A. To my knowledge she did not.

Q. And did anybody else --

A. No.

Q. -- make a recording?

A. No.

Q. Okay. And when did y'all give that to Seton?

A. In the last 45 days.

Q. Okay. Do you have any other tablets or other computers that you would do -- you would -- could potentially have done county business on --

MR. NELSON: Objection, form.

MR. BUNCH: I'm not finished with my question.

MR. NELSON: Okay.

Q. (BY MR. BUNCH) -- other than your county computer, your home laptop?

MR. NELSON: Hold on. I just wanted to give him the courtesy of finishing. Objection, form.

If you understand the question, you can answer.

to both e-mail accounts and cell phone accounts.

A. Uh-huh.

Q. And your answer here addresses your cell phone accounts. My question to you is, did you make any effort to search or query your personal e-mail records in response to our May 10th public information request?

A. Yes.

Q. Explain what you did.

A. Went back and looked on my personal e-mail at home to see if there were any things that pertained to 45 Southwest. And if there were those things, then I sent them on to Barbara knowing that she was the one that was compiling, you know, the information. And that's how.

Q. So you did find some?

A. I don't recall. But if they were in there, I mean, I sent them.

Q. If they were there, you sent them, but you don't remember if there were any?

A. No, not really.

Q. Do you use your personal e-mail account every day, on average?

MR. NELSON: Objection, form.

A. No, not every day.

Q. (BY MR. BUNCH) Okay. How often would you say

you use your personal e-mail account?

MR. NELSON: Objection, form.

A. Some days I don't use it at all. Some days I use it a few times.

Q. (BY MR. BUNCH) Is your personal e-mail account forwarded to your cell phone?

A. Yes.

Q. And was it that way in the first half of 2013?

A. Yes.

Q. Do you -- have you ever exchanged any e-mails on your personal account with Commissioner Will Conley?

A. Probably.

Q. And do you have an e-mail address for Commissioner Conley that's other than his official Hays County e-mail address?

A. I don't know what e-mail address I have on my phone for Commissioner Conley. I assume that it's his officeholder account.

Q. But you don't know?

A. No.

Q. Do you have your cell phone with you where you could look at your contact information?

A. I don't have my cell phone with me.

Q. Okay. Can you look and let me know after this deposition, if your attorney agrees, as to whether you

have an e-mail address for Commissioner Conley that's other than his official Hays County e-mail address?

MR. NELSON: If you want to leave a blank in the deposition for that, I'm agreeable to him supplementing that information if he has a different address for him.

A. Absolutely.

Q. (BY MR. BUNCH) Is that okay with you?

A. Absolutely.

Q. All right. Thank you.

A. (Please provide your answer on the "Changes and Corrections" page found at page 75.)

Q. And could we have the same agreement concerning Commissioner Mark Jones?

A. (Nods head.)

MR. NELSON: Yes.

A. Yes.

Q. (BY MR. BUNCH) And do --

A. Yes.

Q. Do you know today whether you might have, other than his official address, Commissioner Jones' personal e-mail address?

A. I think I only have his official county e-mail.

Q. Okay.

A. But I'll also let you know that as well.

Q. Okay. All right.
A. (Please provide your answer on the "Changes and Corrections" page found at page 75.)
Q. Back to interrogatory number 6, in looking for any personal e-mails that you might have, did you also make any effort to look at your wife's Dell computer?
MR. NELSON: Objection, form.
A. I probably did. I probably did.
MR. NELSON: Well, don't guess. And he asked you at the beginning of the deposition to -- if you don't know, don't guess. So if you --
A. No.
MR. NELSON: -- know, you know. If you don't, you don't.
A. Then no.
Q. (BY MR. BUNCH) You don't know?
A. I don't know.
Q. Your answer here indicates that you did not direct your staff -- office staffmembers to look for their -- through their personal cell phone accounts for potentially responsive text messages. Is that correct?
A. It appears so.
Q. Okay. And would the same be true for -- that you did not also ask them to look for e-mail messages that might be responsive that were on their personal

e-mail accounts?

A. That is correct.

Q. Do you ever have occasion to correspond with Mr. Moore in your office concerning county business where that correspondence is directed to Mr. Moore's personal e-mail accounts?

A. No.

Q. Okay. Do you know if he has a separate personal e-mail address?

A. I don't know.

Q. So if you had ever e-mailed to him about county business on a personal e-mail account, you wouldn't be aware of it?

A. No.

MR. NELSON: Objection -- hold on. Objection, form.

Q. (BY MR. BUNCH) Okay. On interrogatory number 7, you reference a records retention policy. Do you see that?

A. I do.

Q. Okay. Do you know when your office adopted that records retention policy?

A. I do not.

Q. Do you know if adopting this referenced records retention policy was memorialized in any way?

A. No.

MR. NELSON: Um -- go ahead.

Q. (BY MR. BUNCH) Do you know the method as to how that records retention policy was adopted?

A. I do.

Q. And what was that?

A. There was one in place, from what I understand, that was put in place by my predecessor. And it is my understanding that that stays in place unless you change it yourself or unless -- you know, for some other reason that you want that changed.

Q. So it's your understanding that that policy for your office was adopted by a predecessor officeholder and you simply inherited it?

A. That's what I understand.

Q. Okay. And on interrogatory number 8 it refers to a general records retention policy for the county. Is that correct?

A. Yes.

Q. Do you know when that policy was adopted?

A. No.

Q. Okay. On interrogatory number 9 -- since May 10th of 2013, have you ever undertaken to delete any e-mails on either your personal or county accounts that address Travis County business?

MR. NELSON: Objection, form.

A. Yes.

Q. (BY MR. BUNCH) Okay. And can you tell me what you're thinking of?

A. I delete an awful lot of Keep MoPac Local. Because I have been barraged with them. And I will oftentimes just delete.

Q. Okay. Are there any other messages that might be relevant to 45 Southwest that you recall deleting?

A. Yes.

Q. And tell me what you're thinking of.

A. The ones that come to me talking about how they feel like I am wrong in my desire to build 45 Southwest, I delete them.

Q. And do you know if your staff also deletes those messages if they receive them?

A. I don't think they do that, no.

Q. And why do you think that they do not?

A. Anything that pertains to something where it is of obvious great importance in the office, which 45 Southwest is, no one deletes -- or very -- I don't know that I can recall of any time that people would delete that without showing it to me.

Q. And what is your basis for that belief?

A. It's just such an important subject matter to me

that I don't believe there's anyone in the office that would delete anything with -- that has 45 Southwest on it because they know that I would at least want to see it.

Q. Have you ever instructed your staff to not delete county business e-mails?

A. No.

Q. Are you generally familiar with the Austin Bulldog lawsuit against the city council concerning open meetings issues?

A. Somewhat.

Q. Okay. And can you tell me your understanding of that matter?

A. I think it's the one where they were e-mailing, texting, corresponding with each other, oftentimes from the dais, about subject matter that could have been -- in some instances should have been for public knowledge.

Q. Okay.

A. If that's the one that I'm recollecting.

Q. And do you know -- do -- are you aware of how that particular matter was ultimately resolved?

A. Not really, no.

Q. Okay. When you took office in January of 2013, did -- what was your understanding of whether e-mails on your personal e-mail account that involved Travis County business was either public information or not public

information?

A. I think I knew that it was public information, that it was county business.

Q. That it didn't matter what account it was on. Is that --

A. That's right.

Q. Okay. I asked you about deleting e-mails. What about deleting text messages?

A. Same. I do delete text messages.

Q. Okay. And do you have occasion to discuss county business by text message?

A. Occasionally, yes.

Q. And how frequently would you estimate that would be?

A. Not very frequent.

Q. It's not like a daily occurrence?

A. No.

Q. If I could ask you to look at your -- the question and your answer to interrogatory number 11, please.

A. (Witness reviews document.)

Q. Okay. As the earlier one we discussed, this question asks about both e-mail accounts and personal cell phone accounts. So my question is, why did you only answer as to cell phone accounts?

CHANGES AND CORRECTIONS

WITNESS NAME: GERALD THOMAS DAUGHERTY

DEPOSITION DATE: FEBRUARY 20, 2014

Reason Codes: (1) to clarify the record; (2) to conform to the facts; (3) to correct a transcription error; (4) other (please explain).

PAGE	LINE	CHANGE	REASON CODE
			Code (1),(2),(4) employment records checked.
23	22	"No." Change to "It is correct that her work for me was not related to a campaign."	Code (1),(2),(4)- The question was confusing as asked, and contained a double negative, so I needed to clarify my response.
26	8	"My understanding was that notice was not required."	Code (1),(2)
30	21	"Yes." Change to "Yes, it is possible I may have used my wife's computer to view some emails."	Code (1),(2)
34	21	"I don't think so." Change to "In addition to the information included in my discovery response to Interrogatory No. 6, I omitted from my explanation of the process by which the accounts identified in interrogatory 4 and 5 were searched or queried to determine if there are any documents responsive to the PIR is the fact that I searched my emails on my personal computer at home to look for potentially responsive documents and forwarded	