

CAUSE NO. D-1-GN-11-002713

**THE AUSTIN BULLDOG**  
*Plaintiff,*

v.

**CITY OF AUSTIN**  
*Defendant*

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**IN THE DISTRICT COURT**

200<sup>th</sup> JUDICIAL DISTRICT

**TRAVIS COUNTY, TEXAS**

**PLAINTIFF'S ORIGINAL PETITION**

COMES NOW, Plaintiff, The Austin Bulldog, who files this Original Petition, and in support thereof would show as follows:

**SUMMARY OF THE CASE**

1. a. One of the most politically volatile and financially significant issues before the Austin City Council in recent years is Water Treatment Plant No. 4 (WTP4). The Austin Bulldog investigates and reports on such issues. On July 27, 2011, the Austin Bulldog submitted a request for records (indicating a preference to receive electronic copies) regarding WTP4. On August 10, 2011, the City asked the Attorney General to withhold some records (based on alleged attorney-client privilege) but told the Attorney General that the City would release most of the records to the Bulldog. But now, 36 days later, the City has yet to provide *any* of the WTP4 records requested by the Bulldog.

b. It should not be this hard or take this long to get such public records, particularly regarding high-profile subject matter. It is undemocratic and unlawful for the City officials to try to manage the timing of public reporting and discussion of controversial matters, such as WTP4, by stall tactics and plain disregard for the requirement that they "*promptly*" make public information available. Discovery in this case should be conducted under Level 2, TRCP 190.3.

## **PARTIES**

2. Plaintiff is The Austin Bulldog, which is the assumed name for the Austin Investigative Reporting Project, a Texas nonprofit corporation. It can be served in this case through its attorneys of record.

3. Defendant is the City of Austin. Austin is a municipality and is sued as a “governmental body” pursuant to the Texas Public Information Act. The City of Austin can be served by delivering a copy of citation and this Petition to the Mayor, The Honorable Lee Leffingwell, at Austin City Hall, 301 West 2nd Street, Austin, Texas 78701.

## **JURISDICTION & VENUE**

4. This Court has jurisdiction to issue the mandamus relief requested under the Texas Public Information Act, Government Code Section 552.321. In a suit against the City of Austin, venue is mandatory in District Court in Travis County.

## **FACTS**

5. On July 27, 2011, the Austin Bulldog made an open records request to the City of Austin for records related to contracts and correspondence on WTP4. Attached Exhibit P-1. In that request, the Austin Bulldog said, “I would prefer to receive electronic copies (pdf format) of these records on a computer disk (CD).”

6. That same day, the City’s Public Information Specialist, Kyle Carvell, requested clarification of the request as to which parties to correspondence were included in the request. That clarification was provided by the Austin Bulldog on July 28<sup>th</sup> to include correspondence “between any city staff person and any employee of [WTP4 contractor] MWH, and between any employee of MWH and any employee of any subcontractor.”

7. On August 1, 2011, Mr. Carvell requested the another clarification as to the request for

correspondence involving “any city staff person,” suggesting it would be helpful to the City if the request could “specify individuals or specific offices/departments” that were parties to the correspondence the Bulldog was requesting. That same day, the Bulldog responded, explaining that the Bulldog has “no way of identifying everyone who may be involved.” The Bulldog said, “As a minimum, this request pertains to everyone in the Austin Water Utility who is, or has been, involved in the Jollyville Transmission Main contract, from rank-and-file employees on up the chain to the managers of the utility, Assistant City Manager Rudy Garza and City Manager Marc Ott, and to their assistants.”

8. On August 10, 2011—the 10<sup>th</sup> business day after the record request was received by the City—the City Law Department requested a ruling by the Attorney General about withholding records under TPIA section 552.107 which pertain to attorney-client privilege. The request said, “Most of the requested information will be released to the requestor.”

9. On August 11, 2011, counsel for the Austin Bulldog wrote to the City Law Department, noting, “To date, not one piece of information, in paper or electronic form (as requested by our client) has been provided to our client by the City. Please let me know promptly when The Austin Bulldog can obtain electronic copies of the public information that is not subject [to] the TPIA ruling request you submitted to the Attorney General.” To this day, no response to that letter has been received by the Austin Bulldog or its counsel.

10. On August 12, 2011, the City gave the Austin Bulldog a cost estimate based on making paper copies of 4,700 pages and 6 hours of staff time, for a total of \$578.00.

11. On August 14, 2011, the Austin Bulldog responded by email to Allen Smiley in the City Law Department regarding the cost estimate, noting that the Bulldog had requested electronic copies of the records. The email said, “If these records exist in electronic format, it is not

necessary to print them out and charge for copying. In view of this, please reassess the cost estimate you provided and let me know if these records are available in electronic format.”

12. No one from the City responded to the August 14<sup>th</sup> email, so on August 17<sup>th</sup>, the Austin Bulldog wrote Mr. Smiley again, saying, “This is the third business day since I sent that e-mail and I would appreciate hearing from you to let me know you got my message and will be looking into the validity of the original cost estimate.” Then on August 18<sup>th</sup>, the Austin Bulldog wrote to Mr. Smiley and other City staff, “I hereby agree to pay whatever the adjusted cost estimate turns out to be, but I want to obtain the electronic copies to the requested documents as soon as possible.... I will deliver a check to the City of Austin for the full amount of the reassessed cost estimate as soon as you provide it.”

13. After another 2-week delay, the Austin Bulldog has received no response whatsoever to its request.

## **CAUSES OF ACTION**

### **Mandamus to Provide Public Records**

14. Defendant City of Austin violated the Austin Bulldog’s right under the TPIA to be “*promptly*” provided copies, in electronic form, of the records requested on July 27, 2011. Under the TPIA, the requested records are “public information” subject to public disclosure.

15. The Austin Bulldog asks the Court to issue a writ of mandamus requiring the City of Austin to “promptly” provide copies of those records to The Austin Bulldog pursuant to the terms of the Texas Public Information Act.

## **ATTORNEY FEES**

16. Plaintiff has retained legal counsel to enforce its rights under the Texas Public Information Act. Plaintiff asks the Court to order the Defendant to pay reasonable and necessary

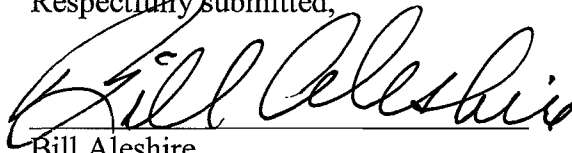
attorney fees and costs to Plaintiff, pursuant to Tex. Gov't Code section 552.323.

**PRAYER**

For these reasons, Plaintiff, The Austin Bulldog, requests that the Defendant be cited to appear and answer and that the Court:

- a. order the Defendant City of Austin to promptly provide to the Austin Bulldog copies of the records requested on July 27, 2011 at a reasonable cost; and
- b. order the Defendant City of Austin to pay the reasonable and necessary attorney fees and costs to the Austin Bulldog and grant such other and further relief, at law and in equity, to which it shows itself to be justly entitled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bill Aleshire", is written over a horizontal line.

Bill Aleshire  
State Bar No. 24031810  
RIGGS ALESHIRE & RAY, P.C.  
700 Lavaca St., Suite 920  
Austin, Texas 78701  
512 457-9806  
512 457-9066 facsimile

**From:** Ken Martin <ken@theaustinbulldog.org>  
**Sent:** Monday, August 01, 2011 10:48 AM  
**To:** Carvell, Kyle  
**Cc:** Bill Aleshire  
**Subject:** Re: Open Records Request 30

Dear Kyle,

This request is technical enough that I want to be careful not to narrow it to the point that pertinent, significant correspondence is not provided, as I have no way of identifying everyone who may be involved. I am concerned that a phone conversation might have that effect. So I want to maintain a clear written record.

As a minimum, this request pertains to everyone in the Austin Water Utility who is, or has been, involved in the Jollyville Transmission Main contract, from rank-and-file employees on up the chain to the managers of the utility, to Assistant City Manager Rudy Garza and City Manager Marc Ott, and to their assistants.

I hope this guidance is sufficiently clear to get this request moving through the system.

Best regards,

Ken

Ken Martin  
Founder, Editor & Publisher  
The Austin Bulldog



Nonprofit investigative journalism in the public interest

Phone O: 512-474-1022  
e-mail [ken@theaustinbulldog.org](mailto:ken@theaustinbulldog.org)  
web [www.theaustinbulldog.org](http://www.theaustinbulldog.org)  
Facebook: <http://on.fb.me/i8sFU3>  
<http://twitter.com/AustinBulldog>  
<http://www.linkedin.com/in/kenmartinaustin>  
P.O. Box 4400 Austin TX 78765

On Aug 1, 2011, at 8:50 AM, Carvell, Kyle wrote:

Ken,

Sorry to hear about your email misfortune--I know that can be frustrating.



Thanks for clarifying, but I was looking more into the actual part where you say "any city staff person"---it would be helpful for us if you could specify individuals or specific offices/departments so we know who to concentrate our search on. Just wanted to give you this opportunity to narrow it down so that we can proceed with getting the information from the individuals you have in mind.

Give me shout when you can and we can talk about it further. Thanks, Ken.

Kyle  
974.7953

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**From:** Ken Martin [mailto:ken@theaustinbulldog.org]  
**Sent:** Thursday, July 28, 2011 4:58 PM  
**To:** Carvell, Kyle  
**Subject:** Re: Open Records Request 30

Dear Kyle,

Thanks for your question. Our server has been down all day and I've been feeling like a fish out of water for not being able to get on with the work.

At any rate, as I said in the voice mail I just left, I just discovered I can send e-mails though I can't receive them or access our website.

The passage you questioned: "between any city staff person and any other person, or between any employee of MWH and any other person" could probably have been better worded. What we have is MWH acting as a private manager on behalf of the city for construction of the Jollyville Transmission Main. The real work is being done by the subcontractors MWH hires. But the records of communication that flows between the city staff and MWH and between MWH and its subcontractors, are still public information.

So, to clarify the passage, change it to read: "between any city staff person and any employee of MWH, and between any employee of MWH and any employee of any subcontractor"

Just to be safe, here's Item 4 as changed:

4. All correspondence, including e-mail--whether on city or private email accounts--between any city staff person and any employee of MWH, and between any employee of MWH and any employee of any subcontractor, referencing the work to be done and/or prerequisites to beginning work pursuant to the contract for the construction of the Jollyville Transmission Main, where such correspondence was sent or received after city staff approved MWH to go forward with the Jollyville Transmission Main project.

Please let me know you have received this change and will proceed with getting this open records request into the system for a response.

Best regards,

Ken

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"We're drowning in information and starving for knowledge." -- Rutherford D. Rogers, New York Times, Feb. 25, 1985.

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Ken Martin  
Founder, Editor & Publisher  
The Austin Bulldog

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Phone O: 512-474-1022  
e-mail [ken@theaustinbulldog.org](mailto:ken@theaustinbulldog.org)  
web [www.theaustinbulldog.org](http://www.theaustinbulldog.org)  
Facebook: <http://on.fb.me/i8sFU3>  
<http://twitter.com/AustinBulldog>  
<http://www.linkedin.com/in/kenmartinaustin>  
P.O. Box 4400 Austin TX 78765

On Jul 27, 2011, at 5:26 PM, Carvell, Kyle wrote:

Ken,

Can you please give me a shout re: the request below? I had a quick question on #4, specifically where you state:

*"between any city staff person and any other person, or between any employee of MWH and any other person,"*

Thanks in advance.

Kyle  
974-7953

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**From:** Ken Martin [mailto:[ken@theaustinbulldog.org](mailto:ken@theaustinbulldog.org)]  
**Sent:** Wednesday, July 27, 2011 11:29 AM  
**To:** Information, Public  
**Cc:** Bill Aleshire  
**Subject:** Open Records Request 30

Please acknowledge receipt of this request by e-mailing me at [ken@theaustinbulldog.org](mailto:ken@theaustinbulldog.org)

Pursuant to the Texas Public Information Act (TPIA), Chapter 552, Texas Government Code, which guarantees the public's access to information in the custody of government agencies, I respectfully request that you promptly ("as soon as possible, under the circumstances, that is, in a reasonable time, without delay") provide me with copies of:

1. All bids received by MWH or city staff for construction of the Jollyville Transmission Main (including signature pages and any cover or letter of conveyance).
2. The final contract for construction of the Jollyville Transmission Main (including signature pages with dates) and any change orders issued for those contracts.
3. Records of any scoring or evaluation of the bids submitted for construction of the Jollyville Transmission main performed by city staff, by contractors MWH or CDM, or any other contractor, together with any written comments on such scoring, and any and all e-mail--whether on city or private e-mail accounts--or other correspondence written by any city staff member referencing the bids received for construction of the Jollyville Transmission Main.
4. All correspondence, including e-mail--whether on city or private email accounts--between any city staff person and any other person, or between any employee of MWH and any other person, referencing the work to be done and/or prerequisites to beginning work pursuant to the contract for the construction of the Jollyville Transmission Main, where such correspondence was sent or received after city staff approved MWH to go forward with the Jollyville Transmission Main project.
5. All invoices from Linda Rife or any company employing Linda Rife for work related to WTP4, together with all correspondence, including e-mail--whether on city or private e-mail accounts--to or from any Austin Water Utility employee(s) or contractor(s) where such correspondence references WTP4 and such correspondence was sent or received on or after February 1, 2011.
6. All invoices submitted by MWH for work on WTP4.
7. All correspondence, including e-mail--whether on city or private e-mail accounts--between any employee or representative of the city and any employee or representative of MWH where such correspondence references the Forest Ridge Transmission Main (or tunnel).

The records requested, as listed above, include information in the possession of the city or to which the city has a right of access, including but not limited to documents in the possession of city contractors, outside attorneys, or other agents. Correspondence includes all forms of information communicated between one person or entity and any other or multiple persons or entities.

I would prefer to receive electronic copies (pdf format) of these records on a computer disk (CD). I will pick up the disk when notified that it is ready.

I am represented in this matter by attorney Bill Aleshire of Riggs Aleshire & Ray P.C., who can be reached at 512-457-9838 or e-mail at [Aleshire@R-ALaw.com](mailto:Aleshire@R-ALaw.com). If you need clarification of this request, or if you believe that any of

the information I have requested is within an exception to disclosure and you may request a ruling from the Texas Attorney General on that issue, I invite you to contact Mr. Aleshire first, so that I may consider amending my request to avoid any unnecessary ruling request or unintended issue about disclosure.

I agree to pay the reasonable cost of providing this public information as provided by the TPIA. However, since The Austin Bulldog is a 501(c)(3) nonprofit providing the public with information about their city government, I request that the city waive all fees and provide responsive documents free of charge pursuant to Section 552.267 of the Texas Public Information Act.

Ken Martin  
Founder, Editor & Publisher  
The Austin Bulldog

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web [www.theaustinbulldog.org](http://www.theaustinbulldog.org)  
Facebook: <http://on.fb.me/i8sFU3>  
<http://twitter.com/AustinBulldog>  
<http://www.linkedin.com/in/kenmartinaustin>  
P.O. Box 4400 Austin TX 78765