

TRAVIS COUNTY, TEXAS

1. Plaintiff files this Third Amended Petition after Defendants pleaded they had provided copies of all requested records. Therefore, former Defendants Leffingwell, Riley, Martinez, Shade, Morrison, Spelman, and Cole are no longer included in this lawsuit. However, some of the records of correspondence provided by the City, concerning official city business, between Austin Council members and the City Manager were improperly redacted to conceal the email address used by these city officials in that correspondence. In addition, an issue remains as to whether the City Manager, as the statutory officer for public information for the City, is a proper party in this mandamus action. 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. Defendants are:

a. The City of Austin. Austin is a municipality and is sued as a “governmental body” pursuant to the Texas Public Information Act and is liable for attorney fees in this case. The City of Austin has been served.

b. Defendant is Marc Ott, who, as City Manager (the chief administrative officer of the City of Austin) is sued as the officer for public information to be ordered by the Court to perform his duties under TPIA section 552.203 and promptly make available the records requested by the Austin Bulldog. Marc Ott can be served at the City Manager’s Office, 301 W. 2nd, Third Floor, Austin, Texas 78701.

JURISDICTION & VENUE

4. This Court has jurisdiction to issue the requested injunctive relief pursuant to Tex. Civ. Prac. & Rem Code section 65.021. This Court has jurisdiction to issue the mandamus relief requested under the Texas Public Information Act, Government Code Section 552.321. In this case, it is appropriate to use the procedural mechanism of the Uniform Declaratory Judgments Act, Chapter 37 of Tex. Civ. Prac. & Rem Code. In a suit against the City of Austin, the City Manager, and members of the Austin City Council, venue is mandatory in District Court in Travis County.

FACTS

The Open Records Requests

5. a. On January 19, 2011, The Austin Bulldog filed an open records request addressed to and served directly to each of the Defendant Records Custodians (the Mayor and Council Members) and the City of Austin for:

E-mails, letters, memoranda, notes, or other forms of written communication from you to (or copied to, or blind copied to) any council member(s) or the Mayor or the City Manager from January 1, 2010 to the date of this request. This request includes all such written communication regardless of whether other persons also were sent the communication. If any e-mails within the scope of this request were initially deleted, then this request applies to any backup copy of such e-mail(s) that are subject to retention under Texas Government Code Chapter 441 or Local Government Code, Title 6, Subtitle C.

b. On January 27, 2011, The Austin Bulldog requested the same records for the time period from January 19, 2011 to January 27, 2011.

c. On May 1, 2011, the Austin Bulldog made an open records request to the Council and City for emails and other written communications “from the mayor or council members or city manager to ... any council member(s) or the mayor or the city manager from January 1, 2009 through December 31, 2009.” The request made it clear that the communications included any that involved city business regardless of whether the communication was written on city equipment or sent or received on personal email accounts.

The City’s Response

6. On February 22, 2011, the City of Austin, through the City Attorney’s Office, notified The Austin Bulldog that records had been collected pursuant to January 19th and January 27th requests and were ready to be picked up. In that notice, the City said:

Please note that the documents provided in response to your request do not include any information that is not assembled, collected, or maintained by the

City of Austin as public information. The City is not providing any emails or other forms of communication not created on city-owned equipment. The City does not have access to any city official's personal cell phone or personal computer.

7. In response to The Austin Bulldog's May 1st request for the 2009 emails, on June 8, 2011, the City responded. The cover letter for the response from city Public Information Specialist Kyle Carvell, said in part, "Please note that in the instance where there are emails from individual's personal email accounts, those individuals *voluntarily* forwarded the emails to the City server, so that they could be included in the City's response to your request."

8. The City's response did not mention SPARK. SPARK is described by a City employee as "a chatting application" to conceal constituent communications "that would not be appropriate for all of us to enjoy in The Statesman the next day." The City has not provided the SPARK communications nor is the City currently restrained from using that system in the future.

9. In their Answer filed on April 11, 2011, the Defendants claimed the requested records "had been released to [the Austin Bulldog] or is in the process of being released." But even after the Attorney General ruled, in OR2011-05507, that the City could not withhold emailed invitations related to their positions as Council members, the City has failed to provide the additional records.

10. In addition, the City redacted the email addresses used by Council members and City Manager in transacting the public business represented in those emails. The City claims authority to do so under TPIA section 552.137 which makes confidential an email address of "a member of the public that is provided for the purpose of communicating electronically with a governmental body." The Bulldog challenges this practice.

11. In regard to the Bulldog's request for 2009 emails, several Council members apparently thought they have and choice and decided not provide emails they wrote or received in 2009 in

the transaction of city business. Even the emails from 2009 that were provided—like the emails provided relating to the request for 2010 emails—were redacted—at no small expense—to hide the personal email address of the Council members and City staff who were communicating with each other about official business.

12. No emails written or received in 2009 on personal email accounts were disclosed by Council members Martinez, Cole, or Spelman nor from City Manager Marc Ott. However, the City asserts that all requested emails have been disclosed, since the lawsuit was filed.

CAUSES OF ACTION

COUNT 1 – Redacted Email Addresses of City Officials

13. The email addresses used by City Council members or other City officials, including the City Manager, in the transaction of business of the City of Austin are not confidential because such city officials' emails are not from or to "members of the public" for whom personal email addresses must be redacted under TPIA section 552.137. These are email addresses of government officials transacting public business and, as such, are public information. The Austin Bulldog asks the Court to hold that such email addresses used by city officials to transact city business are not confidential. The Austin Bulldog asks the Court to order the City Manager to provide copies of the emails without redaction of any email address used by any member of the City Council or the City Manager in transaction of City business.

ATTORNEY FEES

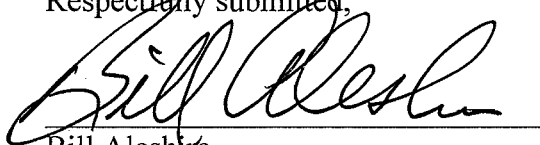
14. Plaintiff has retained legal counsel to enforce its rights under the Texas Public Information Act. Plaintiff asks the Court to order the Defendants to pay reasonable and necessary attorney fees and costs to Plaintiff, pursuant to Tex. Gov't Code section 552.323.

PRAYER

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

- a. to hold that personal email addresses used by City officials in the transaction of City business are not confidential under TPIA section 552.137, and to order the City, and specifically the City Manager to provide copies of the emails without redaction of any email address used by any member of the City Council or the City Manager in transaction of City business, within the scope of the Austin Bulldog's open records requests at issue in this case;
- b. to grant to Plaintiff reasonable and necessary attorney fees pursuant to Tex. Gov't Code section 552.323; and
- c. to grant to Plaintiff such other and further relief, at law and in equity, to which it shows itself to be justly entitled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on the parties, through counsel of record, via e-service on May 22, 2013.

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