CAUSE NO. D-1-GN-11-000639

THE AUSTIN BULLDOG *Plaintiff*,	§	IN THE DISTRICT COURT
v.	§	
LEE LEFFINGWELL, MAYOR, CHRIS RILEY, COUNCIL MEMBER PLACE 1, MIKE MARTINEZ, MAYOR PRO TEM, PLACE 2, RANDI SHADE, COUNCIL MEMBER, PLACE 3, LAURA MORRISON, COUNCIL MEMBER PLACE 4, BILL SPELMAN, COUNCIL MEMBER PLACE 5, SHERYL COLE, COUNCIL MEMBER, PLACE 6, and the City of AUSTIN	§	250th JUDICIAL DISTRICT
Defendants.	§	TRAVIS COUNTY, TEXAS

DEFENDANT CITY OF AUSTIN'S FIRST AMENDED PLEA TO THE JURISDICTION AND GENERAL DENIAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the City of Austin ("City"), a Defendant in the above styled cause, and files this its First Amended Plea to the Jurisdiction, and subject thereto, its General Denial to Plaintiff's Second Amended Petition. The City would respectfully show as follows.

INTRODUCTION

1. The City of Austin ("City") is a home rule municipal corporation. In this action, the City has been sued by "The Austin Bulldog," (Plaintiff") a d/b/a name for the Austin Investigative Reporting Project, a Texas Non-Profit Corporation. Plaintiff alleges claims and seeks relief under two statutes: Chapter 552, TEX. GOV'T CODE, the Texas Public Information Act ("TPIA") and Chapter 201, et. seq. TEX. LOC. GOV'T CODE, the Local Government Records Act ("LGRA"). Plaintiff seeks mandatory injunctions under TPIA and under LGRA requiring the City to obtain and handle documents in a certain way and to turn over certain documents to

Plaintiff, plus an award of attorneys fees under TPIA and the Uniform Declaratory Judgments Act ("UDJA").

2. In addition to suing the City, Plaintiff purports to sue the Mayor of Austin, five City Council Members, and the City Manager ("the Official Capacity Defendants") in their respective official capacities. The Official Capacity Defendants are filing separate Pleas to the Jurisdiction and General Denials, since neither TPIA nor LGRA creates a private cause of action against public officials in their official capacity. TPIA creates a private cause of action against governmental bodies only, and LGRA creates no private cause of action against officials or governmental bodies.

3. For the reasons set forth in more detail below, the City asserts a Plea to the Jurisdiction and raises the issue of standing with respect to all of Plaintiff's claims and allegations under LGRA and any related ordinances or rules. With respect to Plaintiff's claims under TPIA, the City asserts a Plea to the Jurisdiction on the grounds of mootness, since the information requested by Plaintiff under TPIA has been released to Plaintiff by the City, and the relief Plaintiff seeks under TPIA therefore cannot be granted.

PLAINTIFF'S CLAIMS UNDER LGRA

4. LGRA is a Texas administrative statute that requires local governments in Texas, including cities, to adopt record retention policies. On its face, LGRA neither creates nor recognizes a private cause of action or private right of enforcement. Although LGRA and TPIA deal with public records, Texas courts have distinguished between their roles, noting that TPIA "does not enforce the rules regarding retention and preservation of records." *Cearly v. Smith*, 2007 WL 3173303, (Tex. App.-Tyler 2007, no pet.). In denying a request for mandamus that

government records be preserved in accordance with LGRA requirements, the court of appeals in *Cearly* stated:

> *"The statutory writ of mandamus, if issued, only allows a trial court to compel a governmental body to make public information available for inspection." Id.*

The court implicitly recognized that LGRA confers no standing on private litigants to compel local governments to store, organize, and retain local government records in a particular manner.

5. Plaintiff asserts in Paragraph 1, Second Amended Petition: *"This case explores whether there are local government records that are not within the meaning of 'public information' and therefore not subject to the procedural and substantive provisions of the Texas Public Information Act (TPIA)."* Stated another way, Plaintiff is asking the court to graft certain local administration provisions of LGRA – which has no private enforcement mechanism – onto TPIA, which does. Plaintiff's apparent goal is to bring more records within the ambit of TPIA, whether or not those records are "public information" under TPIA. While Plaintiff's arguments are cleverly worded, a close review and comparison of the two acts will reveal that they serve two different public policy functions and cannot be mixed and matched by a court for a litigant's convenience.

LGRA'S ENFORCEMENT MECHANISMS

6. As discussed above, in enacting LGRA the legislature established certain minimum standards for maintenance of public records of local governments. The Act provides for an extensive administrative mechanism of adopting and approving local government records ordinances and policies. LGRA does not provide for private enforcement and creates no personal cause of action, but this does not mean that LGRA lacks enforcement mechanisms and remedies:

- Under LGRA, the governing body of a municipality may demand from any person a local government record that is wrongfully held by such person, and may petition the district court for relief if that person refuses to deliver the record. (LGRA §202.005(a) and (b)).
- Under LGRA, a court may also grant emergency relief when a governing body brings a claim to recover a public record. (LGRA §202.005(c))
- Executive and administrative officers of the Texas State Library and Archives Commission ("the TSLAC") may demand and recover any local government record of permanent value in private possession. (LGRA §202.005(d) and (e)).
- LGRA also provides for criminal penalties for certain violations of the Act. (LGRA §§202.008 and 202.009).

The fact that the Act provides for multiple enforcement mechanisms makes the absence of a "citizen suit" provision even more conspicuous.

PUBLIC AND PRIVATE ENFORCEMENT MECHANISMS

7. When the Legislature intends to create a private right of action to enforce a Texas law, it generally does so with clear language. *See, eg,* TPIA; the Texas Open Meetings Act (Chapter 251, TEX. GOV'T CODE); The Whistleblower Act (Chapter 251, TEX. GOV'T CODE); The Ethics in Government Act (§571, TEX. GOV'T CODE) authorizing private complaints to the Texas Ethics Commission; the Prevailing Wage Statute (Chapter 2258, TEX. GOV'T CODE); the Capitol View Corridors Statute (Chapter 3151, TEX. GOV'T CODE); and The County and Municipal Purchasing Acts (Chapters 262 AND 252, TEX. LOC. GOV'T CODE). Even statutes with private enforcement do not afford all available remedies to private litigants. While TPIA does create

some private remedies, the Attorney General has noted that it "does not provide a civil remedy for the release of confidential information." (TEX. ATTY. GEN. OPIN. JC-0561 (2002).

8. In many Texas statutes establishing standards for local and state public administration, including LGRA, the legislature has declined to create a private cause of action or citizen enforcement mechanism. These include The Municipal Budget Act (Ch. 102, TEX. LOC. GOV'T CODE); the County Budget Act (Ch. 111, TEX. LOC. GOV'T CODE); The Local Government Financial Disclosure Act (Ch 145, TEX. LOC. GOV'T CODE); the statute regulating sale and lease of municipal property (§253, TEX. LOC. GOV'T CODE); the nepotism statute (Ch. 573, TEX. LOC. GOV'T CODE); and the statute on state contract standards and funds management (Ch. 2261, TEX. GOV'T CODE). Under those statutes, authority to enforce for the statutes' remedial terms is generally delegated to a public official or public prosecutor.

9. As noted by the Texas Supreme Court, *"if a cause of action and remedy for its enforcement are derived not from the common law, but from a statute, the statutory provisions are mandatory and exclusive, and must be complied with in all respects or the action is not maintainable." Tex Cat. Prop. Ins. Ass'n v. Council of Co-owners*, 706 S.W. 2d 644-46 (Tex. 1986). In this case, LGRA's statutory remedies are exclusive and they preclude private enforcement. LGRA's provision cannot be grafted onto other statutes which do allow citizen suits concerning the policies and actions of local governments. Nothing in LGRA or TPIA authorizes litigants to borrow LGRA definitions and policies in a way that would enhance rights and remedies that only exist under the authority of TPIA.

PLAINTIFF LACKS STANDING UNDER LGRA

10. In this case, Plaintiff seeks to "bootstrap" a TPIA right to obtain "public information" (as defined in TPIA) into standing to obtain judicial relief not available under TPIA. In addition to seeking "public information" under TPIA, Plaintiff asks this court to order

a governmental body and public officials to obtain, store, manage and preserve records in accordance with what Plaintiff believes are applicable LGRA schedules and procedures. Plaintiff lacks standing to assert these claims.

11. Standing to bring a particular claim or cause of action is a component of subject matter jurisdiction, a requirement based on the Texas Constitution's explicit separation of powers provisions. "*We therefore hold that standing, as a component of subject matter jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court.*" *Texas Association of Businesses v. Texas Air Control Board*, 852 S.W.2d 440, 445-46 (Tex 1993). Stated another way, standing is a constitutional predicate to a court's exercise of subject matter jurisdiction in a lawsuit. *See Texas Dept. of Transportation v. City of Sunset Valley*, 146 S.W. 3d 637, 646 (2004).

12. When a statute clearly creates enforcement rights for private litigants, standing seldom is an issue. In other "public rights" cases, a plaintiff must allege and prove a right distinct from the general public's interest before he can proceed with a civil action against a governmental body or official capacity defendant. As explained by the United States Supreme Court, the "particularized injury" requirement requires more than an individual's personal interest in or concern about a public policy. The standing requirement is not met unless:

> *"plaintiffs...demonstrate a personal stake in the outcome...Abstract injury is not enough. The plaintiff must show that he has sustained or is in immediate danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural or hypothetical."* City of Los Angeles v. Lyons, *461 U.S. 95, 101-02 (1983) (internal citations omitted).

13. In recent years, the Texas Supreme Court has become increasingly explicit on the absence of generic citizen standing to require government officials to act:

> *Generally, "a citizen lacks standing to bring a lawsuit challenging the lawfulness of governmental acts."* Andrade v. NAACP of Austin, *345 S.W.3d 1, 6 (Tex. 2011). This is because "[g]overnments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review."* Bland Indep. Sch. Dist. V. Blue, *34 S.W.3d 547, 555 (Tex. 2000) (alteration in original) (citing* Osborne v. Keith, *177 S.W.2d 198, 200 (Tex. 1944)). "Thus, '[s]tanding doctrines reflect in many ways the rule that neither citizens nor taxpayers can appear in court simply to insist that the government and its officials adhere to the requirements of law."* Andrade, *345 S.W.3d at 7 (quoting CHARLES ALAN WRIGHT ET AL. FEDERAL PRACTICE AND PROCEDURE § 3531.10 (3d ed. 2008)).*
>
> Andrade v. Venable, *372 S.W. 3d 134, 136 (Tex. 2012).*

14. Beyond the absence of any private enforcement provisions in LGRA, nothing in the statute or Texas law waives the constitutional requirement that any person seeking to enforce a statute against governmental bodies or public officials establish a particularized direct injury separate from that of the public. This Plaintiff has not established a particularized direct injury sufficient to meet the constitutional standard for standing to enforce LGRA.

PLAINTIFF'S LGRA CLAIMS SEEK TO COMPEL OFFICIAL ACTION

15. Plaintiff alleges the following claims and claims for relief under LGRA:

- That the Mayor and Council Defendants "alienated" local government records in violation of LGRA by not turning over various texts, e-mails and other electronic communications from personal electronic devices when Plaintiff sought those communications from the City under TPIA. (*Second Amended Petition, paragraph 21(a)*).
- Based on the criminal provisions of LGRA, Plaintiff seeks injunctive relief from this court in the form of specific orders to

the Official Capacity Defendants and the City (*Second Amended Petition, paragraph 24*).

- Plaintiff invokes LGRA to ask this court to order that communications on private devices of the Official Capacity Defendants be turned over to the City, to be maintained by the City and retained for time periods set out in the City's record retention schedules, as well as a permanent injunction requiring the Official Capacity Defendants and "employees" of the City not to "withhold local government records in the future…from the Austin Records Management Officer." (*Second Amended Petition, Prayer for Relief items "a," "b," "c" and "d," emphasis added*).

This would be exactly the type of intrusion into local public administration that the Texas Supreme Court and U.S. Supreme Court addressed by making standing and the "particularized injury" rule a jurisdictional requirement. Having access to a filing fee simply does not create standing to invoke judicial intervention into day-to-day governmental functions.

16. In Austin, under the City's Records Management Program Ordinance, Sec. 2-1-1 of the City Code, the City Clerk is the statutory records management officer. Under *Hooten*, local governments and local public officials enjoy full discretion in designing, adopting and administering local records management programs. These state created responsibilities and functions delegated to local public officials are not "ministerial" in nature.

17. In one of the few reported cases arising under LGRA, the El Paso Court of Appeals made it clear that the duties of a "records management officer" under the Act (in that case a county elected official) are discretionary rather than ministerial.

> "...*elected county officers...are designated the "records management officers: for their respective offices and are granted authority to develop and administer their records management programs. TEX. LOC. GOV'T CODE ANN. Sec. 203.002. In that regard, the county clerk, as the records management officer for the office, is chiefly responsible for the administration of a records management program and the protection and preservation of the records of the office. (footnote omitted) Sec. 203.002, 203.023. Accordingly, we find that in performing these functions, the County Clerk has the exclusive and absolute discretion to develop policies and records management procedures that will preserve records in the most efficient and cost effective manner*...Hooten v. Enriquez, *863 S.W.2d 522, 530-31 (Tex. App.- El Paso 1993, no writ) (emphasis added*).

18. Plaintiff has not alleged a personal stake in the City's administration of its records management policies or the type of particularized injury necessary to establish constitutional standing for the mandatory injunctive relief it is requesting under LGRA. Plaintiff has shown no real and immediate threat of injury from the challenged official conduct, which consists of administrative decisions and discretionary activities under local city records management policies. Plaintiff is in the same position as any other corporation with respect to the City's record keeping practices and its administrative policies. It has asserted neither a property right in the policies, nor a liberty interest, nor any other constitutionally recognized interest or right distinct from those of the general public. As a result, Plaintiff lacks standing to assert claims for relief under LGRA, and this court lacks subject matter jurisdiction over such claims.

THE UDJA DOES NOT CREATE JURISDICTION WHERE NO VALID UNDERLYING CAUSE OF ACTION EXISTS

19. Plaintiff incorrectly invokes UDJA as a basis for the requested declaratory and injunctive relief. The requirement that a plaintiff, especially in a public rights case, show a particularized injury derives from the Texas Constitution, and not from any statute or rule of

procedure. This requirement is not superseded by UDJA. *See Texas Association of Businesses*, *supra*, 852 S.W.2d at 446-47. A procedural statute like the UDJA does not create jurisdiction where none otherwise exists. Courts need not apply a separate "justiciable interest" analysis to UDJA claims found untenable under another statute. *Patterson v. Planned Parenthood of Houston*, 971 S.W. 2d 439, 442 (Tex. 1998). Plaintiff cannot revive a nonjurisdictional claim under LGRA by invoking UDJA's provision allowing a court to address and resolve certain controversies that are within its jurisdiction.

PLAINTIFF'S CLAIMS UNDER TPIA ARE MOOT BECAUSE THE REQUESTED PUBLIC INFORMATION HAS BEEN RELEASED

20. Plaintiff's First Amended Petition seeks additional documents responsive to three PIA requests that Plaintiff filed with the City on January 19, 2011, January 27, 2011 and May 1, 2011 (the "three PIA requests.") Specifically, Plaintiff seeks both additional e-mails and other electronic communications on City servers sent from or exchanged by the Official Capacity Defendants on specified dates, and certain electronic communications that those officials exchanged on personal electronic devices (such as personal computers, or personal smart phones or blackberries). Plaintiff alleges that responsive public information has not been released as TPIA requires, and seeks a writ of mandamus ordering the Official Capacity Defendants to "turn over" the information from their personal electronic devices to the "Austin Records Management Officer" (PRAYER, part "a"), an injunction requiring those Official Capacity Defendants "and Austin employees" to turn over such records from personal devices in the future (PRAYER, part "b"), and an order to the City to "obtain the requested e-mails" from the Official Capacity Defendants and "turn them over to" Plaintiff (PRAYER, part "c"). Plaintiff also asks the Court to order the City to turn over to the Plaintiff public information on the City's computer server that Plaintiff believes to be responsive to the three PIA requests, but that Plaintiff alleges has not yet

been turned over. (PRAYER, part "d"). Finally, Plaintiff asks the court to hold that certain private e-mail addresses are not confidential and should not be redacted when the underlying e-mail is released.

21. These claims for relief are now moot or are legally unfounded. Information on the "City Server" responsive to the three PIA requests has been turned over, save and except certain non-public business communications among the Official Capacity Defendants, a representative sample of which were submitted to the Attorney General. Pursuant to Attorney General Letter Ruling OR 2011-05507, April 20, 2011, most of those e-mails were found not to be public information, with the exception being released to Plaintiff. The City acknowledges that the initial response to the first two PIA requests was incomplete, in part because of the broad scope of requests, and in part because the requests required personal searches by the Official Capacity Defendants themselves, and then assisted, extensive searches of multiple City e-mail accounts. The searches eventually included e-mail files misleadingly labeled "deleted" under the City's software, but which in fact held e-mails which are recoverable when properly searched. Ultimately, to ensure a comprehensive response, the City performed multiple searches with trained personnel to obtain accurate results. As a result of these diligent, technician assisted searches, the City asserts that it is not aware of other public information responsive to Plaintiff's public information requests that has not already been released to Plaintiff.

22. Based on a good faith effort and repeated electronic searches, the City represents on information and belief that the information on the City server responsive to the three PIA requests has been released to Plaintiff. Accordingly, the relief sought by Plaintiff in part "d" of the Prayer relating to information on the City server is moot.

23. The three PIA requests also specifically sought certain information from the personal electronic devices of the Official Capacity Defendants. The City initially had no documents responsive to this request. As the City advised Plaintiff, the decision of the Dallas Court of Appeals in *City of Dallas v. Dallas Morning News*, 281 S.W. 3d 711 (Tex. App.- Dallas 2009, no pet.) addresses whether such information on personal electronic devices is subject to TPIA. The court of appeals reviewed a district court order requiring the City of Dallas to produce to the plaintiff newspaper certain e-mails from personal electronic device of the then Mayor of Dallas, none of which had been sent through or kept on the City server. The court held that a "governmental body" under TPIA "does not include Mayor Miller or any City employee." (Id. At 714). (emphasis added). The court further noted that the requested e-mails were not public information unless they were "collected, assembled, or maintained in connection with the transaction of official public business (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information and has a right of access to it." Id. Based on the record from the trial court, the court of appeals concluded that the plaintiff newspaper had failed to meet its burden to establish that e-mails on the mayor's personal electronic device were public information, even if they related to city business. The court of appeals remanded the case to the district court, where it remains in litigation.

24. As a result of *City of Dallas*, the law in Texas on whether e-mails related to public business on personal electronic devices is or is not "public information" remains unsettled. Other lawsuits against the Attorney General of Texas addressing the same issue are currently pending. While the Attorney General of Texas has broadly opined that "personal device" information is public information, those opinions have never come to grips with the question of how and by what authority a governmental body, whether a school board, municipality, or state agency, owns

or has a right of access to electronic information on an employee's personal electronic device when the governmental body neither collects, assembles, maintains, nor owns the information.

25. In responding to the first two PIA requests, the City initially did not release to Plaintiff any information existing on the personal electronic devices of the Official Capacity Defendants, since the City in fact did not own or have access to that information at the time. Further, that information clearly was not collected, assembled or maintained by the City. After adoption of a city policy in April 2011, the Official Capacity Defendants voluntarily gathered the electronic information responsive to the first two PIA requests that existed on their personal electronic devices, and either forwarded that information to a City e-mail address or otherwise entered it into a City server, thereby making the information "public information." Information from the Official Capacity Defendants' personal electronic devices that became "public information" under TPIA was then processed by the City's public information office, redacted as required by TPIA to prevent the release of private e mail addresses, and delivered to Plaintiff in April 2011. "Personal device" information responsive to Plaintiff's May 1, 2011 TPIA request was also delivered to Plaintiff.

26. As pointed out in Plaintiff's Second Amended Petition, the City has since adopted policies pursuant to which City officials and employees are directed to use City accounts to conduct city business, and to forward to a City account any electronic communications relating to city business that is conducted using a non-city account. *See Exs. P-6 and P-7, Plaintiff's Second Amended Petition.* Accordingly, the substance of the policy change which Plaintiff asks the Court to order the City to implement as a dubious proposition of law has already been voluntarily adopted as City of Austin policy.

27. In releasing this information to Plaintiff, the City does not agree or admit that information relating to City business is "public information" under the Act if it exists only on a personal electronic device. But, when information related to City business is received and stored on a City server, it becomes public information and is subject to TPIA. Forwarding such information from a personal device to a city service is now required under city policy.

28. When the information requested in a PIA has been released to the requestor, the litigation seeking that information becomes moot, and the case should be dismissed without an award of attorney's fees or declaratory or injunctive relief. *Dallas Morning News v. City of Arlington,* 2011 WL 182886 (Tex. App.-Austin 2011, no pet).

29. In "Count 3" of Plaintiff's Second Amended Petition, Plaintiff specifically prays that the Court order Defendant Ott (the City Manager) to provide unredacted copies of certain e-mails to or from government officials which, if released without redaction, would show the personal account e-mail addresses of those officials. Pursuant to Section 552.137 of TPIA, City has redacted those addresses in accordance with the decisions and specific directions of the Attorney General of Texas. The very Open Records Letter Ruling in which the Attorney General largely sustained the City's position in this litigation (OR 2011-05507) specifically directed the City to redact the e-mail addresses Plaintiff now seeks. Defendant specifically denies that TPIA requires release to Plaintiff of the unredacted private e-mail addresses.

GENERAL DENIAL

30. Subject to the foregoing Plea to the Jurisdiction, City generally denies and places in issue all allegations in Plaintiff's First Amended Petition.

SUMMARY AND CONCLUSION

Plaintiff's claims for relief against the City under LGRA should be dismissed for lack of subject matter jurisdiction and lack of standing, since LGRA affords no private cause of action and since Plaintiff has alleged no particular injury apart from the interests of the public at large. Plaintiff's claims for relief against the City under TPIA should be dismissed as moot since the information responsive to the two PIA requests at issue has been released to Plaintiff. In the absence of an actionable claim for relief under LGRA, and given the mootness of the TPIA claim, Plaintiff has no right to attorney's fees or other relief under UDJA.

PRAYER

Wherefore, premises considered, Defendant City of Austin respectfully prays for relief as follows:

A. That Plaintiff's claims under LGRA be dismissed for want of jurisdiction.

B. That Plaintiff's claims under TPIA be dismissed as moot.

C. That Plaintiff take nothing by its petition, and that all claims for relief be denied.

D. That Defendant be granted all other relief, legal and equitable, to which it may be entitled.

Respectfully submitted,

By: James E. Cousar

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ATTORNEYS FOR CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was sent to:

ATTORNEYS FOR PLAINTIFF
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✓	Regular Mail
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on the 26th day of September, 2012.

James E. Cousar