

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

THE AUSTIN BULLDOG	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	
LEE LEFFINGWELL, MAYOR,	§	
CHRIS RILEY, COUNCIL MEMBER	§	
PLACE 1, MIKE MARTINEZ, MAYOR	§	
PRO TEM, PLACE 2, RANDI SHADE,	§	250th JUDICIAL DISTRICT
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	§	
<i>Defendants.</i>	§	TRAVIS COUNTY, TEXAS

PLAINTIFF’S SECOND AMENDED PETITION

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

SUMMARY OF THE CASE

1. a. This case explores the issue of whether there are “local government records”¹ that are not included within the meaning of “public information”² and, therefore, not subject to the procedural or substantive provisions of the Texas Public Information Act (TPIA). Specifically, Plaintiff asserts that correspondence created or received by Austin City Council

¹ See Tex. Local Gov’t Code section 201.003(8) defining a “local government record” as “any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of the state, created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business.” (emphasis added); Tex. Local Gov’t Code section 201.005 (“DECLARATION OF RECORDS AS PUBLIC PROPERTY; ACCESS. (a) Local government records created or received in the transaction of official business ... are declared to be public property and are subject to the provisions of this subtitle and Subchapter J, Chapter 441, Government Code.

² Tex. Gov’t Code section 552.002(a)(2) defines “public information” to include records collected, assembled, or maintained in connection with the transaction of official business “... for a governmental body and the governmental body owns the information or has a right of access to it.”

members in the transaction of official business is “public information” even if the Council members created or received such correspondence through email addresses owned personally by the Council members. Because such official Council correspondence is a “local government record,” the correspondence is owned by the City and is subject to the TPIA. The defendants wrongfully withheld public information from plaintiff.

b. 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 “Defendant Records Custodians” are:

(1) Lee Leffingwell is sued in his official capacity as Mayor for the City of Austin and as the custodian of records created or received by him in the transaction of public business. Mayor Leffingwell has been served.

(2) Chris Riley is sued in his official capacity as Austin Council Member Place 1 and as the custodian of records created or received by him in the transaction of public business. Council Member Riley has been served.

(3) Mike Martinez is sued in his official capacity as Austin Council Member Place 2 and as the custodian of records created or received by him in the transaction of public business. Council Member Martinez has been served.

(4) Laura Morrison is sued in her official capacity as Austin Council Member Place 4 and as the custodian of records created or received by her in the transaction of public

business. Council Member Morrison has been served.

(5) Bill Spelman is sued in his official capacity as Austin Council Member Place 5 and as the custodian of records created or received by him in the transaction of public business. Council Member Spelman has been served.

(6) Sheryl Cole, Mayor Pro Tem, is sued in her official capacity as Austin Council Member Place 6 and as the custodian of records created or received by her in the transaction of public business. Mayor Pro Tem Cole has been served.

b. Defendant is 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.

c. 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.

Exhibit P-2.

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.” Exhibit P-4. 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. Exhibit P-3. 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." Exhibit P-5.

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." Exhibit P-1. 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. On April 7, 2011, the Council adopted a new "policy" requiring Council members to

place emails about public business, sent or received on their “personal communication devices” onto a city computer server so the City could comply with the TPIA and make those public records available to the public. Exhibit P-6. Four months later, the City Manager adopted a similar policy related to emails City staff members sent or received on their personal communication devices. Exhibit P-7. The policy leaves it to each City employee to decide whether the email has “administrative value” and should be forwarded to a City email account.

12. Despite the showmanship the Council displayed in adopting the new policy, certain Council members and the City Manager refused, *again*, to release publicly the emails about public business they had hidden on their personal email accounts in 2009.

13. 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.

14. 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. Since the City’s cover letter indicated that emails from personal email accounts were provided only “voluntarily,” the Austin Bulldog is left to assume that these individuals believe they have no legal duty to disclose these public records but can choose, by themselves, which public records the public can see and which they cannot see.

CAUSES OF ACTION

COUNT 1 – Order Records Custodians to File Government Records with the City

15. Pursuant to the terms of the Local Government Records Act (LGRA) and their own Austin City Code, as a records Custodian, each Defendant City Council Members and City Manager have a ministerial duty to turn over to the city records management system, the local government records created or received by the Council Members or City Manager—whether on their personal communication systems, or the City’s communication systems—so those records can be maintained under the terms of the LGRA and can become available for public disclosure under the terms of the TPIA. In addition, the Defendant Records Custodians lack any authority to exclusively possess these local government records. The actions of the Defendant Records Custodians violated The Austin Bulldog’s right of access to these records under the TPIA.

16. a. The Austin Bulldog asks the Court to issue appropriate writs of mandamus to require the Defendant Records Custodians to deliver to the City of Austin Records Management Officer the local government records in their possession or control for the time period required, in Records Retention Schedules, for such records to be maintained by the City.

b. The Austin Bulldog also asks the Court to issue a permanent injunction prohibiting the Defendant Records Custodians, their successors in office and the City Manager of Austin, from withholding from the Austin Records Management system, the local government records created or received by these Austin officials, including those government records created or received on personal communication systems.

17. Based on hard evidence and on good-faith belief, The Austin Bulldog asserts that the Austin Mayor, Council Members, and City employees routinely transact public business via email, text messages, and SPARK messages using both City-provided communication systems and personal communication systems³ controlled personally by City officials and employees.

³ As used in this pleading, “Personal Communication System” means any device, computer
Plaintiff’s Second Amended Petition
Page 7 of 15

Without doubt, the SPARK secret message system was established to avoid retention of certain public records and the public disclosure of this method of correspondence with Council members *regardless of the content of such messages*. After pointing out that “all emails sent to your City of Austin address are discoverable and subject to open records requests,” the city staff instructions for the use of SPARK includes the comment, “...be sure to disable the ‘chat history’ function” so the SPARK messages will not be saved for public disclosure and provided instructions for how to “delete all previous conversations.” It should be noted that Council Member Laura Morrison declined to use SPARK for this very reason.

18. a. These public-business communications are “local government records.” The Local Government Records Act (LGRA) section 201.003(8) defines a "local government record" without regard to whether the record was created on government-provided communication systems or on personal communication systems controlled by public officials and employees. If a city official or employee creates or receives a record in the transaction of public business, it's a “local government record.” (Tex. Local Gov't Code section 201.003(8) defining a “local government record” as “any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of the state, created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business. (emphasis added).

program, or web-based system such as Gmail, Yahoo, AOL, Roadrunner, or e-mail/chat programs (including the City's SPARK software) used to create Correspondence in the transaction of official business that is not directly collected, assembled, or maintained in the records of the City of Austin.

b. And these emails, text messages, and SPARK messages are classified as “correspondence” that, by law, must be retained by the City for a minimum of 5 years (if “pertaining to the formulation, planning, implementation, modification, or redefinition of the policies, programs, services, or projects” of the City) or a minimum of 2 years (if “pertaining to or arising from the routine administration or operation of the policies, programs, services, and projects” of the City). (*See* Austin Records Control Schedule for COA Record Series Nos. GAR-02-20A, GAR02-05A).

19. But Austin government records—created or received via the personal communication systems or SPARK—are being withheld from public disclosure by Austin officials and employees who unlawfully exercise exclusive personal possession of these records and who fail or refuse to turn these records over to the Austin Records Management Officer for inclusion in the City’s records management system. *See* Tex. Local Gov’t Code section 202.008. Once these records are in the City’s records management system, they are easily available to the public under the TPIA.

20. a. By law, the Mayor and each Council Member is the custodian of the emails, text messages, and SPARK messages involved in the transaction of public business of their individual offices that were withheld from the response to The Austin Bulldog’s request. These Defendant Records Custodians asked or permitted the City Attorney to feign “the City’s” inability to get access to these local government records even though these public records are in the possession and control of the Austin Mayor and Council Members.

b. LGRA Section 201.003(2) defines Custodian. (“Custodian” means the appointed or elected public officer who by the state constitution, state law, ordinance, or administrative policy is in charge of an office that creates or receives local government records.”). In addition,

Austin's Records Management Ordinance, City Code section 2-11-1(b)(1), specifically names the "city councilmember's office" as a "Department" subject to the Ordinance and defines, in 2-11-1(b)(2), a "Department Director" to include "the officer...in charge of a department." City Code section 2-11-6(B)(2) requires the councilmember to "maintain the department's records in accordance with the records management plan."

21. a. Instead of turning over these City records, to be maintained in accordance with the City's records management plan, the Mayor and Council Members "alienated" these local government records, i.e., they claimed exclusive personal title and possession over these records that pertain to public business. In doing so, they exceed their authority. A public official can be ordered by the Court to cease violating the law.

b. Because these public records do not belong exclusively to the Mayor or Council Members even though they wrote them using their personal communication systems, these records are "public information" under the TPIA.

(1) *See* Tex. Local Gov't Code section 201.005 ("DECLARATION OF RECORDS AS PUBLIC PROPERTY; ACCESS. (a) Local government records created or received in the transaction of official business ... are declared to be public property and are subject to the provisions of this subtitle and Subchapter J, Chapter 441, Government Code. (b) A local government officer or employee does not have, by virtue of the officer's or employee's position, any personal or property right to a local government record even though the officer or employee developed or compiled it.") (emphasis added).

(2) These public records were created by City officials and employees in the course of them performing their official duties (in other words, "for" the City). Since the City owns these records, pursuant to the LGRA section 201.005, the City has a right of access to these

records. *See* Tex. Local Gov't Code section 201.009 (“Local government records are subject to Chapter 552, Government Code [the TPIA]”); Tex. Local Gov't Code section 203.021 (duty of City Council to establish and maintain a records management program); Tex. Local Gov't Code section 202.005(a) (“The governing body may demand and receive from any person any local government record in private possession created or received by the local government the removal of which was not authorized by law”). The TPIA defines “public information” to include records collected, assembled, or maintained in connection with the transaction of official business “... for a governmental body and the governmental body owns the information or has a right of access to it.” Tex. Gov't Code section 552.002(a)(2).

c. It is a violation of the Local Government Records Act, section 202.008 for a public officer, including the Council members, to destroy or fail to deliver records as required by the Act. Destroying (by automatically deleting or not saving) SPARK messages that are included in the definition of “local government records” violates the law. (Local Gov't Code, section 202.008 (“PENALTY: DESTRUCTION OR ALIENATION OF RECORD. An officer or employee of a local government commits an offense if the officer or employee knowingly or intentionally violates this subtitle or rules adopted under it by destroying or alienating a local government record in contravention of this subtitle or by intentionally failing to deliver records to a successor in office as provided by Section 201.006(a). An offense under this section is a Class A misdemeanor.”).

d. It is also a violation of the Local Government Records Act, section 202.009 for an individual, including the Council members, to *possess* a government record without complying with the Act. (Local Gov't Code, section 202.009(a) (“PENALTY: POSSESSION OF RECORD BY PRIVATE ENTITY. (a) A private college or university, a private museum or

library, a private organization of any other type, or an individual commits an offense if the entity knowingly or intentionally acquires or possesses a local government record. An offense under this subsection is a Class A misdemeanor.”).

COUNT 2 – Mandamus to Provide Public Records

22. Defendant City and Council-Member Custodians violated The Austin Bulldog’s right under the TPIA—without requesting a ruling by the Attorney General—when the Defendants denied The Austin Bulldog copies of emails, text messages, and SPARK messages written between the Council members or with the City Manager. Under the TPIA, emails about public business, including such emails created or received on the Council Member’s personal communication system, are “public information” subject to public disclosure. So are SPARK messages.

23. The Austin Bulldog also challenges whether the City of Austin even provided all of the requested documents created or received on the *City computers* during the time period from January 1, 2010 to January 27, 2011. First, the City’s response to The Austin Bulldog’s request does not reveal the existence of, let alone provide a copy of SPARK messages between Council Members or the City Manager. In addition, the City withheld emails related to invitations Council members received related to their official positions, but continued to withhold those records even after the Attorney General ruled the records were subject to disclosure. In addition, Council Members withheld emails written or received in 2009 constituting communications between Council Members or the City Manager transacting public business.

24. The Austin Bulldog asks the Court to issue a writ of mandamus requiring the City of Austin to exercise its ownership rights and right of access to these records, pursuant to the Local Government Records Act (including section 202.005), to obtain the local government records,

referenced above, from the Defendant Records Custodians. The Austin Bulldog asks the Court to order the City of Austin, upon receipt of such documents, to “promptly” provide copies of those records to The Austin Bulldog pursuant to the terms of the Texas Public Information Act.

25. Upon obtaining evidence in discovery, The Austin Bulldog expects to prove that “local government records” (specifically emails and SPARK messages) created or received on the City computer servers—that are required by the Local Government Records Act and related state rules to be retained for a minimum of 5 years or 2 years—either were not provided as required by the TPIA or were unlawfully deleted from the server or otherwise made unavailable for public inspection.

COUNT 3 – Redacted Email Addresses of City Officials

26. 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

27. 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. order the Defendant Austin Mayor and City Council Members (and their successors in office) to turn over the local government records (that Defendants created or received on Defendants' personal communication systems) to the City Manager (the TPIA "officer for public information") included within the scope of the records requests made by the Austin Bulldog (on January 19, 2011, January 27, 2011, and May 1, 2011;

b. enjoin the Defendant Austin Mayor and City Council Members (their successors in office) and Austin employees from withholding local government records in the future—including those on the SPARK system or those created or received by Austin officials or employees on their personal communication systems—from the City Manager (the TPIA "officer for public information");

c. order the Defendant City of Austin to obtain the requested emails and text messages from the Mayor and Council Members and provide those records to The Austin Bulldog;

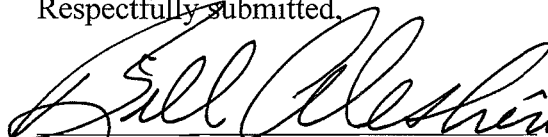
d. order the Defendant City Manager Marc Ott to provide to The Austin Bulldog copies of any local government records that were collected on the City's computer server during 2010 (as requested by The Austin Bulldog on January 19th or 27th, 2011, May 1, 2011) that the City has not yet provided, including the invitations to Council Members that were withheld, and email addresses of Council Members and City Manager that were redacted;

e. 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 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; and

f. 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,



Bill Aleshire
State Bar No. 24031810
Jason Ray
State Bar No. 24000511
RIGGS ALESHIRE & RAY, P.C.
700 Lavaca St., Suite 920
Austin, Texas 78701
512 457-9806
512 457-9066 facsimile

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 April 23, 2012.

James E. Cousar
Thompson & Knight, LLP
98 San Jacinto Blvd., Suite #1900
Austin, Texas 78701-4238
512 469-6112
512 469-6180
James.Cousar@tklaw.com



Bill Aleshire

Levinski, Robert

From: Coleman, Glen
Sent: Wednesday, July 08, 2009 9:22 AM
To: Council Executive Assistants
Subject: FW: Spark FAQ

Hello,

In case you are new - all emails sent to your City of Austin address are discoverable and subject to open records request.

In the heat of a Council meeting you may wish to communicate sensitive constituent information with your Council Member that would not be appropriate for all of us to enjoy in The Statesman the next day. For these situations we use a chatting application called "Spark". Spark is often used when a constituent wishes to relate information to a Council Member that might be considered private or personal and your Council Member can not leave the dais.

To set up Spark on your and your Council Member's computers, please contact John Regalado x 4.1480 . Once installed, be sure to disable the "chat history" function. You may use the link below.

Cheers All -

- glen coleman

Policy Aide, Council Member Randi Shade
Austin City Council Place Three
512 974-1374

From: Taylor, Heath
Sent: Wednesday, July 08, 2009 8:53 AM
To: Coleman, Glen
Subject: Spark FAQ

I have create the FAQ documentation for disabling Spark Chat history.

<http://im.ci.austin.tx.us/faq/index.php?action=artikel&cat=1&id=18&artlang=en>

Let me know if you have any questions.
-Heath

--
Heath Taylor, RHCE
Network Systems Administrator Sr.
Communications and Technology Management -- City of Austin
Office: (512)974-7797, Pager: (512)802-6774

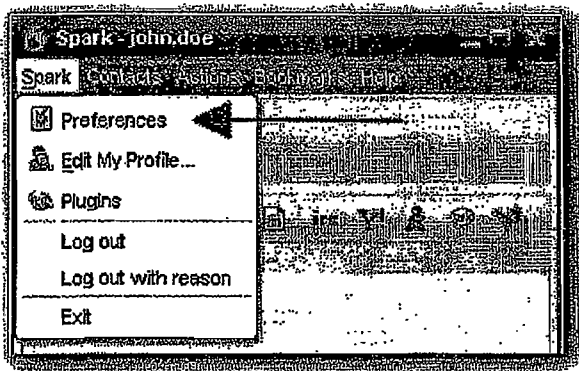


Spark

ID #1017

How do I disable Spark chat history from being saved on my computer?

Click on the Spark menu option on the top left of the roster menu. Then Click Preferences.



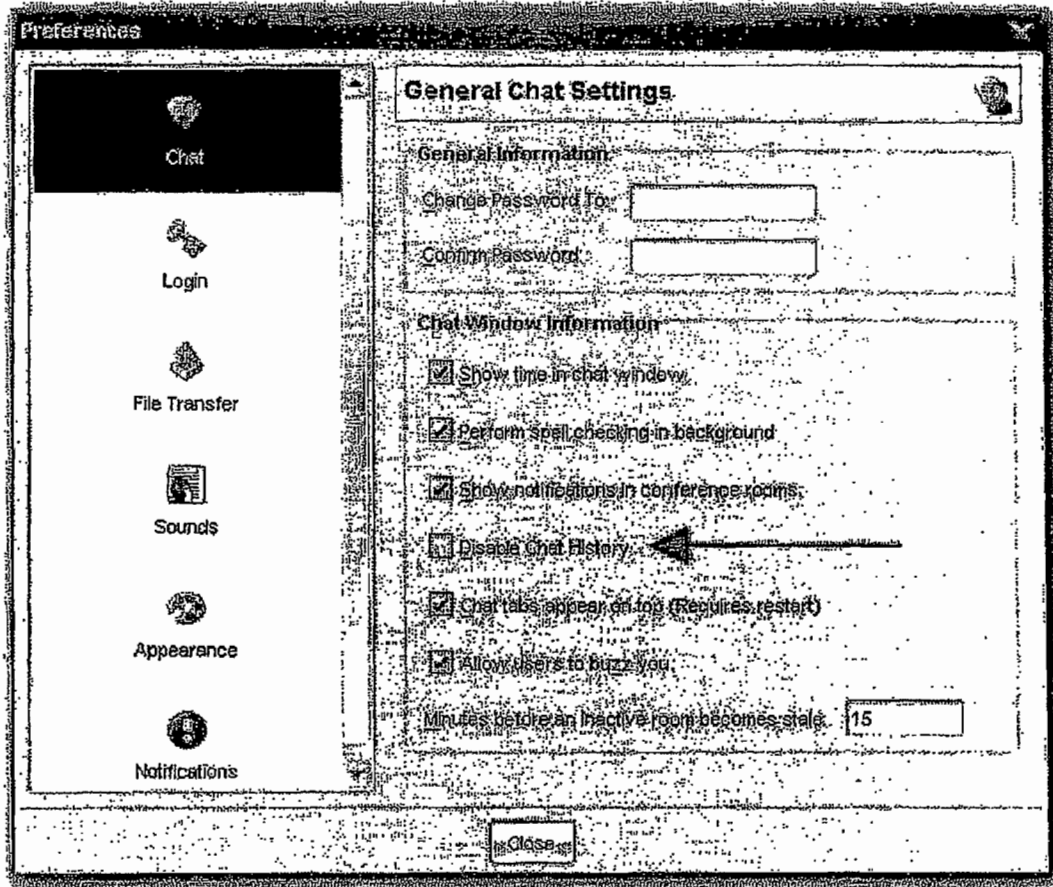
Make sure are on the Chat icon in the left pane.

To disable Spark chat history...

Click the check box next to "Disable Chat History".

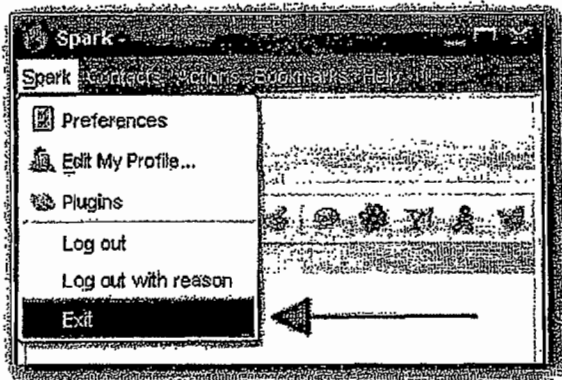
Another window will pop up asking you "Delete all previous conversations?". Click Yes to delete all your previous chat conversations. Note: Once you do this you will not be able to get the chat logs back.

Make sure there is a check mark in the box. Click the close button.



Now you will need to exit Spark and Start the program again.

Click on the Spark menu option on the top left of the roster menu. Then Click Exit.



Start Spark as you normally would after the program exits.

Levinski, Robert

From: Levinski, Robert
Sent: Wednesday, July 08, 2009 12:41 PM
To: Coleman, Glen; Council Executive Assistants
Subject: RE: Spark FAQ

Thanks, Glen. I bet everyone will appreciate you bringing that program to their attention.

As an fyi to the other offices, I thought I'd let everyone know a decision our office made several months ago. Our office chose to opt out of using Spark to communicate with Laura on the dais.

On one hand, it is nice to be able to communicate with your boss instantly like if she needs some quick information or even some water. On the other hand, we were uncomfortable using a program that may not comply with the intent of the public information act.

Nowadays, we just use email or talk to her directly.

Thanks,
Bobby

From: Coleman, Glen
Sent: Wednesday, July 08, 2009 9:22 AM
To: Council Executive Assistants
Subject: FW: Spark FAQ

Hello,

In case you are new - all emails sent to your City of Austin address are discoverable and subject to open records request.

In the heat of a Council meeting you may wish to communicate sensitive constituent information with your Council Member that would not be appropriate for all of us to enjoy in The Statesman the next day.

For these situations we use a chatting application called "Spark".

Spark is often used when a constituent wishes to relate information to a Council Member that might be considered private or personal and your Council Member can not leave the dais.

To set up Spark on your and your Council Member's computers, please contact John Regalado x 4.1480 . Once installed, be sure to disable the "chat history" function. You may use the link below.

Cheers All -

- glen coleman

Policy Aide, Council Member Randi Shade
Austin City Council Place Three
512 974-1374

From: Taylor, Heath
Sent: Wednesday, July 08, 2009 8:53 AM

From: Matustik, David
To: Carvell, Kyle
Subject: FW: Open Records Request
Date: Wednesday, January 19, 2011 2:42:43 PM
Attachments: [inn_120x60_small_white_square6_0.png](#)

FYI...

From: Ken Martin [<mailto:ken@theaustinbulldog.org>]
Sent: Wednesday, January 19, 2011 2:42 PM
To: Leffingwell, Lee; mike.martinez@ci.austin.tx.us; Riley, Chris; Shade, Randi; Morrison, Laura; Spelman, William; Cole, Sheryl
Cc: Matthews, Douglas; Matustik, David
Subject: Open Records Request

Dear Mayor and Council Members,

Please acknowledge receipt of this request by e-mailing me at 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 provide me with copies of the following records, either electronically via pdf e-mailed to me at ken@theaustinbulldog.org or on paper:

1. Records of any meeting that you attended with any council member(s) (or the Mayor), from January 1, 2010 to the date of this request. In this request, "meeting" means any occasion in which conversation about official City business occurred, but does not include any publicly posted City Council meeting or publicly posted committee or commission meeting. The requested records include:
 - a. Any paper or electronic calendar showing the date and time of each such meeting;
 - b. Agendas, minutes, memoranda, notes, recordings, or any other record about what was discussed during each meeting.
2. 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.
3. Certificates of course completions or other records documenting that you have taken training as required by Section 551.005 of the Texas Open Meetings Act.
4. Records reflecting any discussion or decision about whether the City of Austin should join in the federal lawsuit, *Asgeirsson, et al. v. Abbott, et al.*, or *City of Alpine v. Wilson* or any similar lawsuit filed on behalf of the elected officials of some cities to challenge the validity of the Texas Open Meetings Act.

If you need clarification of this request, please e-mail me at ken@theaustinbulldog.org

If you believe that any of the above requested information is not subject to disclosure, please e-mail me at ken@theaustinbulldog.org or call me at 512-474-1022 so that we may avoid the City of Austin having to request an open records opinion or ruling from



the Attorney General.

I agree to pay the reasonable cost of providing this public information as provided by the TPIA. However, considering that this information is requested by a member of the news media and disclosure of this information is in the public interest because information primarily benefits the general public, I therefore request a waiver of all fees and charges pursuant to Section 552.267 of the Texas Public Information Act.

Please contact me at 512-474-1022 or e-mail me at ken@theaustinbulldog.org when this information is being delivered via e-mail or paper copies are ready to be picked up.

Ken Martin
Founder, Editor & Publisher
The Austin Bulldog



Investigative journalism in the public interest
An initiative of the Austin Investigative Reporting Project, a 501(c)(3) nonprofit

Phone O: 512-474-1022
e-mail ken@theaustinbulldog.org
web www.theaustinbulldog.org
<http://twitter.com/AustinBulldog>
<http://www.linkedin.com/in/kenmartinaustin>
P.O. Box 4400 Austin TX 78765



City of Austin

Law Department

City Hall, 301 West 2nd Street, P.O. Box 1088
Austin, Texas 78767-8828
(512) 974-2268

Writer's Direct Line
(512) 974-2918

Writer's Fax Line
(512) 974-2912

February 22, 2011

VIA ELECTRONIC MAIL

Mr. Bill Aleshire
Riggs, Aleshire & Ray, P.C.
700 Lavaca, Suite 920
Austin, Texas 78701

Re: Public Information Act Request submitted to the City of Austin by Mr. Ken Martin on January 19, 2011

Dear Bill:

This is a follow-up to my letter dated February 15, 2011 wherein I provided you with an update on the City's progress in responding to Mr. Martin's January 19, 2011 request for information.

I am writing to inform you that the City has completed the collection, copying and redacting of personal email information on the remaining information responsive to Mr. Martin's request for information. Mr. Martin can pick this information up from the City's Public Information Office after 4:00 p.m. today. I believe you received the updated cost estimate letter on Friday which reflects that \$687.60 will be due at that time.

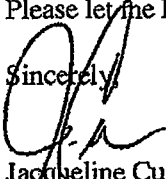
As you know, the City has requested a ruling from the Attorney General (ID#414099) relating to any non-city related information on city owned equipment and is seeking a ruling that allows the City to withhold any such information since it is not public information. As I informed the Attorney General and demonstrated with representative samples, this information generally relates to holiday plans and sporting events.



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. As such, this information does not fit the definition of public information under the Texas Public Information Act since the City has no right of access. As you are probably aware, there are currently several court cases pending on this issue. See *City of Dallas v. The Dallas Morning News*, 281 S.W.3d 708 (Tex. App. – Dallas 2009); *Tommy Adkisson and Bexar County v. Attorney General of Texas*, D-1-GN-10-002120; *City of Lubbock v. Attorney General of Texas*, D-1-GV-09-001569, 419th District Court, Travis County.

Please let me know if you have any questions.

Sincerely,



Jacqueline Cullom
Assistant City Attorney

cc: Texas Attorney General Greg Abbott

From: Ken Martin [ken@theaustinbulldog.org]
Sent: Sunday, May 01, 2011 8:23 PM
To: public.information@ci.austin.tx.us; lee.leffingwell@ci.austin.tx.us;
mike.martinez@ci.austiin.tx.us; Chris Riley; Randi Shade; Laura Morrison;
bill.spelman@ci.austin.tx.us; Sheryl Cole
Cc: Bill Aleshire
Subject: Open Records Request No. 16

Dear Kyle Carvell and Mayor and Council Members as Custodian of the Records of Your Offices:

Please acknowledge receipt of this request by e-mailing me at 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:

E-mails, text messages, letters, memoranda, notes, or other forms of written communication from the mayor or council members or city manager to (or copied to, or blind copied to) any council member(s) or the mayor or the city manager from January 1, 2009 through December 31, 2009.

This includes all forms of written communication involving the conduct of city business, including written communication sent or received on city equipment and accounts or sent or received on personal e-mail or text message accounts.

This request includes all such written communication regardless of whether other persons also were sent the communication.

This includes records that may be included in the in boxes or sent files, as well as archive files, subject matter files, or delete files.

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; Local Government Code, Title 6, Subtitle C; and the City of Austin's Local Government Records Control Schedule for the mayor and council offices.

This request does not include any communications that qualify for exception due to attorney-client privilege.

This does not include Routine Correspondence and Internal Memoranda that is only required to be retained until its administrative value expires, such as correspondence and internal memoranda including letters of transmittal, requests for publications, internal meeting notices, and similar routine matters. (See City of Austin Records Control Schedule GR1000-26c.)

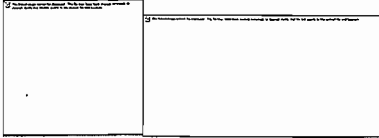
I would prefer to receive copies of these records via e-mail in pdf format, if possible. If the volume of records makes e-mailing impracticable, I would prefer to receive these records on a computer disk (CD) using a pdf format.

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. 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



Investigative journalism in the public interest
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e-mail ken@theaustinbulldog.org
web 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



City of Austin

NEWS RELEASE

Communications and Public Information Office

301 W. Second St., Austin, TX 78701

June 8, 2011

Ken Martin
P.O. Box 4400
Austin, TX 78765

RE: PIR 8926; Your Reference # 16

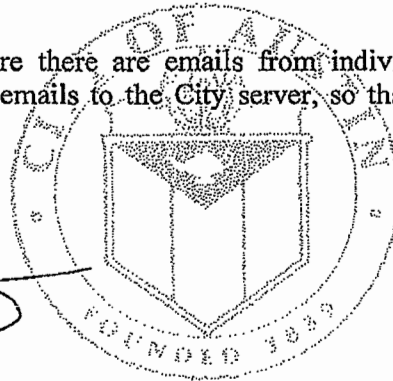
Dear Mr. Martin:

In response to your above-referenced Public Information Act request, the City is providing one disk with all of the responsive information.

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.

Very truly yours,

Kyle Carvell
Public Information Specialist
City of Austin



*The City of Austin is committed to compliance with the Americans with Disabilities Act.
Reasonable modifications and equal access to communications will be provided upon request.*



RESOLUTION NO.

WHEREAS, the administration of government in a manner that is open and accessible to the public is a highly valued principle of the Austin City Council; and

WHEREAS, the Austin City Council believes that conducting the City's business in an open and transparent manner is essential to the public interest; and

WHEREAS, the current law regarding many open government issues has been complicated by changing technologies and means of communication, as evidenced by the divergent positions taken by the Texas Attorney General and the Texas courts on issues such as the treatment of information on private electronic devices; and

WHEREAS, although the law regarding personal electronic devices is unsettled in Texas, the Austin City Council desires to bring clarity to city operations by establishing a policy that ensures the public's access to government; **NOW, THEREFORE,**

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

The City Council establishes the following policy regarding the conduct of city business through written communication on personal communication devices:

1. City accounts shall be used to conduct city business.
2. If circumstances require a City official or employee subject to this resolution to conduct city business on a non-city account, the official or employee shall promptly forward the associated electronic communications to a city account. Once forwarded to a city account, the communication will be public information as set out in the Texas Public Information Act.
3. This policy applies to the Mayor and all members of the City Council, and all city employees directly appointed by the City Council, including the City Manager, the City Clerk, the City Auditor, the Chief Judge of the Municipal Court, and the Municipal Court Clerk. This policy does not waive any exception under the Texas Public Information Act.

BE IT FURTHER RESOLVED:

That the City Manager is directed to develop a policy regarding the conduct of city business on personal communication devices by all other city employees and report progress back to the City Council within 30 days.

BE IT FURTHER RESOLVED:

That the City Clerk is directed to develop a policy regarding the conduct of city business on personal communication devices by members of city boards and commissions with sovereign authority, and report progress to the City Council within 30 days.

BE IT FURTHER RESOLVED

That the City Manager and the City Clerk are directed to work with the Communications and Technology Management Department to estimate implementation costs of all policies



developed pursuant to this resolution.

This policy applies to all communications occurring immediately after the adoption of this resolution.

ADOPTED: _____, 2011 ATTEST: _____
 Shirley A. Gentry
 City Clerk

CITY of AUSTIN Administrative Bulletin



Title **CITY ELECTRONIC COMMUNICATIONS**

Administrative Bulletin Number **08-06**

Effective Date **August 4, 2011**

Revised **___ Annually ___X_ As Needed**

Prepared by **Human Resources Department**

Original Date **8/4/2011** **Revised** **xxxx**

Manager's Approval

PURPOSE

I. Purpose

To establish a consistent policy for processing written communications using electronic communication devices.

POLICY

II. Policy

Existing and emerging electronic communications technologies have become an integral part of the ability of City employees to efficiently and effectively conduct City business. Such technology has the potential to enhance employee productivity and provide a higher level of service to the citizens of Austin. However, with such technology in the work environment, the City must ensure it continues to meet its legal obligations with respect to public information and records retention. To that end, the following protocol will be followed:

- City employees must use City accounts to transmit written communications involving City business whenever feasible.
- If circumstances require employees to use personal communication device accounts to communicate regarding City business, the communications, which include but not limited to e-mail messages, text messages, images and attachments, should be forwarded to City accounts, unless there is no administrative value in retaining the communication.

<<Personal Communication Devices>>



- To determine whether a written communication involves City business and must be forwarded, City employees should consult the applicable records retention schedule and forward only those communications that fall into a category of retention that is greater than the Administrative Value ("AV") designation.
- Once a communication has been forwarded to a City account, the communication should be maintained according to the applicable records retention schedule. Any application needed to facilitate this transfer of information back to a city account is the responsibility of the employee and their service provider.
- Department Directors should ensure that this administrative policy is communicated to all department employees and have latitude to decide how that communication should occur (department meeting, training, supervisor meetings, etc).

DEFINITIONS

III. Definitions

Administrative Value (AV): The Administrative Value retention period is generally associated with routine or administrative business documents. The retention period is tied to the usefulness of the records for the conduct of current or future administrative business.

City Account: Any account issued to an employee by the city whose access to or use of electronic mail and/or computer use is funded by the City or is available through equipment owned or leased by the City.

Personal Account: Any account used by an employee for communication that is not issued by the City.

Personal Devices: Any device used by the employee for communication that is not issued by the city.

ROLES AND RESPONSIBILITIES

IV. Roles and Responsibilities

CORRESPONDING PROCEDURES AND POLICIES

"Records Retention Schedule": A city department or division's record control schedule adopted pursuant to Local Gov't Code § 203.041 and Section 2-11-09 of the City of Austin Records Management Code

FORMS

V. Forms

None