

CAUSE NO. D-1-GN-16-004769

DAVID A. ESCAMILLA,
Travis County Attorney
Plaintiff

§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

v.

OF TRAVIS COUNTY

§

KEN PAXTON
State of Texas Attorney General
Defendant

261st JUDICIAL DISTRICT

**THE AUSTIN BULLDOG’S PETITION IN INTERVENTION
IN OPPOSITION TO PLAINTIFF’S MOTION
TO SEAL COURT RECORDS AND TO CLOSE COURTROOM**

Summary of Intervention and Opposition to Sealing Court Records

1. Pursuant to TRCP 76a(3), the Austin Investigative Reporting Project (a nonprofit corporation), d/b/a The Austin Bulldog, a member of the news media, intervenes to oppose the Plaintiff’s Motion to Seal Court Records and to Close the Courtroom, and in opposition to even holding the hearing on the Motion, for reasons set out below.

PARTIES

2. a. Intervenor, The Austin Bulldog, is a nonprofit corporation and news media outlet in Travis County who may be served through its attorney of record in this case.

b. Plaintiff is Travis County Attorney David A. Escamilla.

c. Defendant is the Attorney General of Texas Ken Paxton and has been served.

THE ORIGINAL LAWSUIT

3. The Travis County Attorney sued the Attorney General of Texas pursuant to the Texas Public Information Act (Tex. Gov’t Code ch 552) seeking to withhold disclosure of a Deferred Prosecution Agreement of one criminal defendant Chet Cunningham, which the Attorney General ruled in OR2016-21139 was subject to public disclosure.

4. The Attorney General filed a General Denial.

5. On February 1, 2017, the Travis County Attorney filed a Motion to Seal Court Records and Close the Courtroom regarding Motion(s) for Summary Judgment and Responses which have not yet been filed in the underlying lawsuit. Defendant Attorney General has not filed a Response to Plaintiff's Motion to Seal. In other words, there are no "Court Records" filed, nor to the best of Intervenor's knowledge, even presented to the Court to review *in camera* to which the Motion to Seal would apply.

INTERVENOR'S INTEREST IN THE LAWSUIT/MOTION TO SEAL

6. TRCP 76a(3) says that "any person may intervene and be heard concerning the sealing of court records...." TRCP 76a(4) says that "Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing plea in intervention" (which Intervenor has done via e-filing). Intervenor is currently working on a series of stories about child custody and abuse cases, but also generally has an interest, as member of the news media, in seeing that court records retain the presumption of openness to the public. While Intervenor finds it inexplicable why the Travis County Attorney would seek to withhold from public scrutiny an agreement the County Attorney made to defer prosecution of a person accused of abuse in the first place, Intervenor particularly objects to the broad, over-broad motion to seal every bit of future filed Motions for Summary Judgment and Responses regarding this case.

INTERVENOR'S OPPOSITION TO MOTION TO SEAL

Opposition to Hearing Based on Invalid Notice of Hearing

7. Intervenor, in good-faith reliance on Plaintiff's Motion to Seal, notes that Plaintiff failed to comply with the mandatory notice requirements of TRCP 76a(3), which says, in part, "Immediately after posting such notice [with the County Clerk], the movant shall file a verified

copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.” Apparently, the Plaintiff did not file notice with the Supreme Court Clerk. Pursuant to TRCP 76a(4), hearing cannot be held less than 14 days after the motion is filed “and notice if posted.” Proper notice was not yet posted, so this hearing cannot proceed.

8. Therefore, no hearing should proceed until and unless the Plaintiff complies with the notice requirements of TRCP 76a.

Opposition to Order to Seal Records that are not “Court Records”

9. Plaintiff’s Motion seeks to seal the entirety of Motion(s) for Summary Judgment, all exhibits/affidavits, and all Responses *that have not yet been filed*, nor to the best of Intervenor’s knowledge, been presented to the Court for *in camera* review. Such overly broad sealing of records is improper under TRCP 76a. The first determination the Court should make is whether the records are even “court records”—how can the Court make such a determination if the records sought to be sealed have not been filed or even submitted to the Court for review? TRCP 76a permits “court records” to be sealed under certain circumstances. The determination that the records at issue (the as-yet unfiled Motions for Summary Judgment, exhibits and Responses) are “court records” is a threshold determination which may be made based on an *in camera* review of the records. *See Eli Lilly and Co. v. Biffle*, 868 S.W.2d 806, 809 (Tex. App.—Dallas 1993) (“The trial court must determine whether the documents are court records based upon evidence presented, which may inescapably include the documents themselves submitted *in camera* for the trial court’s determination.”).

10. This raises the issue of whether *the entirety* of the Motion for Summary Judgment and whether *all* exhibits to the Motions meet the strict criteria for being sealed from public disclosure.

Until “court records” exist, the Court cannot exercise its discretion under TRCP 76a to seal the records. Even if the referenced Motion(s) for Summary Judgment with exhibits and the Responses were filed and before the Court for review, the Motion is overly broad since it seeks to seal the motion in their entirety. At a minimum, there is a “less restrictive means” than sealing the entirety of the Motions for Summary Judgment, to permit appropriate redaction of those motions and exhibits, assuming there is any justification at all to seal any part of such motions. *See* TRCP 76a(1)(b) (noting that court records are “presumed to be open to the general public and may be sealed *only* upon a showing of all of the following” including (b) “no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.”)

Opposition on the Merits to the Motion to Seal

11. Plaintiff’s Motion to Seal fails to articulate—or to support by any evidence at all—any “specific, serious and substantial interest which clearly outweighs” the presumption of openness of court records or any probable adverse effect the sealing will have upon the general public health and safety. Plaintiff’s Motion fails to identify, let alone provide evidence, what “interest” there is at issue with disclosure of as-yet unfiled Motions for Summary Judgment and whose interest that is that outweighs the presumption of openness of court records. Plaintiff’s Motion to Seal is conclusory and merely cites the standards of Rule 76a, without articulating or proving what “interest” by whom is to be protected by sealing—not the disputed Deferred Prosecution Agreement—but Motions for Summary Judgment, exhibits and Responses that have yet to be created or filed. Without creation and review of the Motions for Summary Judgment, the Plaintiff cannot demonstrate compliance with the Rule 76a standard for sealing court records.

Opposition to Closing Courtroom

12. Not only does Plaintiff seek to advance-seal records that have not been created and filed

for review by the Court, Plaintiff's Motion seeks the extraordinary requirement that the public, and members of the press such as Intervenor, be excluded from the courtroom when the Motion for Summary Judgment are argued before the Court. Although the public's right to attend civil proceedings is recognized under Texas law and grounded in the First Amendment, this right is not absolute. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 600 & n.5 (1980) (Stewart, J., concurring); *Dall. Morning News v. Fifth Court of Appeals*, 842 S.W.2d 655, 657 (Tex. 1992); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 650-51 (S.D. Tex. 1996); *In re Samsung Telecomms. of Am., Inc.*, No. 05-99-01960-CV (Tex. App.—Dallas 1999, orig. proceeding) (no pub.; 12-2-99). A trial court may close its courtroom to protect the dissemination of certain sensitive information to the public. See, e.g., *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1179 (6th Cir. 1983) (civil courtroom can be closed to protect disclosure of documents implicating certain privacy rights of participants or third parties, trade secrets, or issues involving national security); *In re Samsung Telecomms. of Am., Inc.*, No. 05-99-01960-CV (no pub.) (civil courtroom can be closed to protect trade secrets).

13. Plaintiff's Motion fails to explain how whatever protected "interest" of unidentified person(s) would be harmed by permitting the public to observe the court proceedings when the Motions for Summary Judgment are argued. Plaintiff's Motion fails to explain why the entirety of the argument that the parties may make during such a hearing must be sealed from public observation. Therefore, Plaintiffs have failed to plead or prove sufficient grounds for closing the courtroom.

PRAYER

For these reasons, Intervenor asks the Court to refuse to hold the hearing on Plaintiff's Motion to Seal Court Records and to Close the Courtroom for failure of Plaintiff to post required

Notice of Hearing. In the alternative, Intervenor asks the Court to deny Plaintiff's Motion to Seal Court Records and to Close the Courtroom. Intervenor asks the Court to award Intervenor all other relief by law or in equity to which Intervenor is entitled.

Respectfully submitted,



Bill Aleshire
Bar No. 24031810
AleshireLAW, P.C.
700 Lavaca, Suite 1400
Austin, Texas 78701
Telephone: (512) 320-9155
Cell: (512) 750-5854
Facsimile: (512) 320-9156
Bill@AleshireLaw.com
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been served on Defendants by e-mail on this 21st day of February, 2017.

ATTORNEYS FOR PLAINTIFFS

Tim Labadie
Texas State Bar No. 11784853
Assistant Travis County Attorney
P.O. Box 1748
Austin, Texas 78767
512 854-5864
512 843-9316 (fax)
tim.labadie@traviscountytexas.gov

ATTORNEYS FOR DEFENDANTS

Matthew Entsminger
Assistant Attorney General
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: 512 475-4151
Fax: 512 457-4686
Matthew.entsminger@oag.texas.gov

NON-PARTY REQUESTOR (Courtesy Notice)

Laura Bates
lbates@safeaustin.org


