

DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

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261ST JUDICIAL DISTRICT COURT

V.

KEN PAXTON,  
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

**PLAINTIFF'S PRE-TRIAL BRIEF**

TO THE HONORABLE COURT:

Plaintiff, David A. Escamilla, in his capacity as Travis County Attorney, files this brief in anticipation of the trial set before the Court on August 8, 2017.

**I. INTRODUCTION**

This suit is brought pursuant to Tex. Gov't Code § 552.324, to challenge a letter ruling of the Attorney General (OR2016-21139) and to seek a judgment that the information at issue is not subject to disclosure under the Texas Public Information Act, TEX. GOV'T CODE §§552.001, *et seq.* (the "PIA").

Throughout this brief, David A. Escamilla, Travis County Attorney, will be referred to as Plaintiff; Ken Paxton, Texas Attorney General, will be referred to as Defendant; and Intervenor Tara Coronado Cunningham will be referred to as Tara Coronado.

**II. THE CHRONOLOGY OF EVENTS**

On April 1, 2016, Chet Edward Cunningham signed a Deferred Prosecution Agreement in connection with criminal cause number C-1-CR-13-180014.

On April 6, 2016, that criminal case was dismissed.

On April 11, 2016, Plaintiff received from Tara Coronado an open records request for “the full plea agreement” made in connection with cause number C-1-CR-13-180014. The only document responsive to this request was a Deferred Prosecution Agreement.

On April 22, 2016, Plaintiff asked Defendant for a ruling that this agreement was excepted from disclosure by §552.108(a)(1) of the Public Information Act.

On May 6, 2016, in Letter Ruling OR2016-10351, Defendant ruled that this Deferred Prosecution Agreement is excepted from disclosure by §552.108(a)(1).

On May 11, 2016, Plaintiff received from Tara Coronado a second open records request for “the plea agreement for C-1-CR-13-180014[.]” As with the first request, the only document responsive to this request was the Deferred Prosecution Agreement.

On May 20, 2016, Plaintiff denied Ms. Coronado’s request, based on Defendant’s previous determination in Letter Ruling OR2016-10351 that the Deferred Prosecution Agreement is excepted from disclosure by §552.108(a)(1) of the Public Information Act.

On June 1, 2016, Tara Coronado, claiming that the Deferred Prosecution Agreement had been amended, asked for it a third time.

On June 14, 2016, Plaintiff informed Ms. Coronado that the Deferred Prosecution Agreement had not been amended and once again denied her request to release the Deferred Prosecution Agreement, relying on Defendant’s previous determination in Letter Ruling OR2016-10351.

On July 12, 2016, Plaintiff received an open records request from Laura Bates seeking:

public records that pertain to cause number C-1-CR-13-180014, styled "The State of Texas v. Chet Cunningham," including, but not limited to, all investigative reports, statements, witness statements, court documents, filings, memorandums [*sic*], plea paperwork, any written documentation of investigation and proceedings in this case, specifically including all paperwork regarding the Deferred Prosecution Agreement and any correspondence regarding such Agreement.

The Deferred Prosecution Agreement sought by Ms. Bates is the same agreement requested by Tara Coronado in April, May, and June of 2016.

On July 15, 2016, since Ms. Bates asked for information other than the Deferred Prosecution Agreement, Plaintiff requested a ruling from Defendant that the information sought by Ms. Bates is excepted from disclosure by Section 552.108(a)(1). In this request for a ruling, Plaintiff informed Defendant that he had previously determined in Letter Ruling OR2016-10351 that the Deferred Prosecution Agreement is excepted from disclosure.

On September 19, 2016, Defendant issued Letter Ruling OR2016-21139, permitting Plaintiff to withhold, pursuant to Section 552.108(a)(1), all of the information requested by Ms. Bates *except for the Deferred Prosecution Agreement* - the very information that Defendant had, just four months before in Letter Ruling OR2016-10351, determined is excepted from disclosure.

On September 20, 2016, Plaintiff received Defendant's ruling.

On September 26, 2016, Plaintiff filed this suit against Defendant, challenging the determination concerning the Deferred Prosecution Agreement.

On February 22, 2017, Tara Coronado, as requestor, filed her Application for Intervention.

### III. DEFERRED PROSECUTION

One tool Plaintiff uses in exercising his broad prosecutorial discretion in determining which cases to prosecute is Deferred Prosecution. When, in the prosecutor's discretion, Deferred Prosecution is warranted, a Deferred Prosecution Agreement is prepared, which includes conditions tailored to the individual defendant. The Agreement is typically in effect for 12-24 months. After the defendant agrees to these conditions and signs the Deferred Prosecution Agreement, the criminal case against defendant is dismissed. The Deferred Prosecution Agreement is not presented to the judge presiding over the criminal case for approval or filed with the court.

If the defendant fulfills the conditions of the Agreement, the criminal case will not be refiled, and defendant has the option of having the records relating to this case expunged. If the defendant does not fulfill the conditions of the Agreement, the criminal case will be refiled and the prosecution of the charge will resume.

Prior to September 19, 2016, Defendant consistently ruled that, if the Deferred Prosecution Agreement was still in effect, it is excepted from public disclosure pursuant to section 552.108(a)(1), and that if the Agreement had run its course without any violation of its conditions, then it is excepted from disclosure by section 552.108(a)(2).

This law and practice, at least as to section 552.108(a)(1), was radically changed by Defendant when he issued Letter Ruling OR2016-21139 on September 19, 2016, ruling that the public release of information provided to the defendant in a criminal case cannot interfere with the detection, investigation, or prosecution of crime.

#### **IV. THE DEFERRED PROSECUTION AGREEMENT IS EXCEPTED FROM DISCLOSURE BY SECTION 552.108(a)(1)**

##### **A. Release of the Deferred Prosecution Agreement will interfere with the prosecution of crime**

When Plaintiff requested a decision from Defendant after Tara Coronado made her first open records request for the Deferred Prosecution Agreement, Plaintiff asserted that it is excepted from disclosure by section 552.108(a)(1) of the PIA, which provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

Tex. Gov't Code §552.108(a)(1).

Since the criminal case in which the DPA was made had been dismissed, Plaintiff could have relied on section 552.108(a)(2), which excepts from disclosure “information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]”

However, Plaintiff relied on section 552.108(a)(1) because there was a possibility that the criminal case could be refiled if Mr. Cunningham did not fulfill the conditions of the Deferred Prosecution Agreement. If the case were to be refiled, it might result in a conviction or deferred adjudication.

In response to Plaintiff's first request, Defendant ruled that the Deferred Prosecution Agreement is excepted from disclosure by section 552.108(a)(1). However,

for reasons known only to Defendant, four months later Defendant reversed his decision, finding that the Deferred Prosecution Agreement cannot be withheld under section 552.108(a)(1).

One of the purposes of the section 552.108 exception is to ensure that excessive publicity does not result in due process violations, thereby endangering the prosecution. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. App. – Houston [14th Dist.] 1975), *writ ref'd per curiam*, 538 S.W.2d 559 (Tex. 1976).

[REDACTED]

Another purpose of section 552.108 is to prevent the release of information that would undermine a prosecutor's efforts, in the exercise of his or her prosecutorial discretion, to detect, investigate, or prosecute crime. *See, City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App. – Austin 2002, no pet.). [REDACTED]

[REDACTED]

[REDACTED]

**B. Letter Ruling OR2016-10351 is a “Previous Determination” that the Deferred Prosecution Agreement is excepted from release**

When a governmental entity receives a request for information it believes is excepted from public disclosure under the PIA, it must ask Defendant for a decision

about whether the information is excepted from disclosure, unless there has been a “previous determination” that the information need not be released. Tex. Gov’t Code §552.301(a).

When Defendant issues written decisions in response to requests from governmental entities, his decisions must “maintain uniformity in the application, operation, and interpretation” of the PIA. Tex. Gov’t Code § 552.011.

Included in the types of written decisions Defendant is authorized to issue are Letter Rulings. Letter Rulings must be based on established law and practice. Thus, Defendant does not use Letter Rulings to change the law regarding the Public Information Act.

After Tara Coronado’s first open records request for the Deferred Prosecution Agreement, Plaintiff, in compliance with section 552.301(a), requested a decision from the Defendant that it was excepted from public disclosure by section 552.108(a)(1). In response, Defendant issued Letter Ruling OR2016-10351 (May 6, 2016), deciding that the Deferred Prosecution Agreement is excepted from disclosure pursuant to section 552.108(a)(1). That the law and practice regarding the applicability of this exception to a Deferred Prosecution Agreement whose terms had not yet expired was so well-established was demonstrated by Defendant’s issuing Letter Ruling OR2016-10351 as a memorandum opinion because Plaintiff’s “request does not present a novel or complex issue.”

Indeed, for years, Defendant had consistently ruled that a Deferred Prosecution Agreement, whose terms had not expired, falls within this exception. Indeed, just six

days after Defendant ruled that Plaintiff was not required to release the Cunningham Deferred Prosecution Agreement to Tara Coronado, he ruled that another Deferred Prosecution Agreement sought from Plaintiff was excepted from disclosure under §552.108(a)(1) because its release would interfere with the detection, investigation, or prosecution of a crime. See Letter Ruling OR2016-10900 (May 12, 2016). In fact, each time Defendant had been presented with this issue, he ruled that a Deferred Prosecution Agreement, whose term has not expired, is excepted by §552.108(a)(1). *See also*, OR2016-06950, OR2016-02695, OR2013-06134 and OR2011-09492.

Tara Coronado's fourth request for the DPA also included a request for the prosecutor's entire file, thereby requiring Plaintiff to request another ruling from Defendant. Even though Defendant had previously determined on May 6, 2016, that Plaintiff could withhold the DPA, Defendant determined that Letter Ruling OR2016-10351 is not a "previous determination" and concluded that the release of the DPA would not interfere with the detection, investigation, or prosecution of crime because Mr. Cunningham had received a copy of the agreement. Thus, Defendant ruled that Plaintiff must release the DPA. *See* Letter Ruling OR2016-21139 (September 19, 2016).

In issuing Letter Ruling OR2016-21139, Defendant departed from the established law and practice on which Letter Ruling OR2016-10351 was based, and changed the law regarding the applicability of section 552.108(a)(1) to Deferred Prosecution Agreements. Such a radical change in the law and practice accomplished by a Letter Ruling violates the PIA's mandate that Defendant "maintain uniformity in the application, operation, and interpretation" of the PIA. Tex. Gov't Code § 552.011. It also violates Defendant's

policy that Letter Rulings be based on established law and practice, rather than being a means for changing law and practice.

Additionally, Defendant in deciding that Letter Ruling OR2016-10351 (May 6, 2016) is not a “previous determination” failed to follow Open Records Decision No. 673, an opinion issued by John Cornyn when he was Attorney General. In ORD No. 673, Attorney General Cornyn explains in detail what constitutes a “previous determination”, since that term is not defined by statute. After Defendant has ruled that information is excepted from disclosure and that same information is again requested under the PIA, a governmental entity can rely on Defendant’s ruling as a “previous determination” under section 552.301(a) if the following are true:

1. the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
2. the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;
3. the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and
4. the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.

ORD 673 at pp.6-7.

Letter Ruling OR2016-10351 (May 6, 2016) meets all four criteria. There is no dispute that the first three criteria were met as Tara Coronado, first in her own name and then again through Laura Bates, requested the same Deferred Prosecution Agreement from Plaintiff, and Defendant ruled in Letter Ruling OR2016-10351 that this

agreement is excepted from disclosure under section 552.108(a)(1). As to the fourth criterion, Defendant, in Letter Ruling OR2016-21139, asserted that the law, facts, and circumstances on which Letter Ruling OR2016-10351 was based had changed, and thus, concluded that Letter Ruling OR2016-10351 is not a “previous determination.” However, Defendant did not identify in Letter Ruling OR2016-21139 what law, facts, and circumstances had changed since May 6, 2016.

In the course of this lawsuit, Plaintiff discovered why Defendant did not reveal what had changed since May 6, 2016, since nothing changed. Defendant now admits that the law on which Letter Ruling OR2016-10351 was based has not changed since its issuance, and does not contend that the facts or circumstances on which Letter Ruling OR2016-10351 was based have changed. Thus, there is no basis in law or fact to support Defendant’s ruling in Letter Ruling OR2016-21139 (September 19, 2016) that his Letter Ruling OR2016-10351 (May 6, 2016) is not a previous determination. As such, Defendant should not have revisited, let alone reversed, the ruling in Letter Ruling OR2016-10351 that the DPA is excepted from disclosure by section 552.108(a)(1).

Moreover, Defendant was wrong in concluding that the release of the DPA would not interfere with the detection, investigation, or prosecution of crime simply because a copy was provided to Mr. Cunningham. If this were the test, then all information provided by the prosecutor to the defendant’s attorney in a criminal case under the Michael Morton Act (Texas Code of Criminal Procedure article 39.14) would have to be released to the public. But such information is not subject to release, as Defendant recognized by his ruling in OR2016-21139 that all the other documents in the

State's file pertaining to the prosecution of Mr. Cunningham that were requested by Tara Coronado are excepted from disclosure by section 552.2018(a)(1).

## V. CONCLUSION

By responding to numerous requests from Plaintiff over the span of several years, Defendant established the law and practice that section 552.108(a)(1) excepts from disclosure a Deferred Prosecution Agreement, whose terms have not expired, because the release of such agreements would interfere with the detection, investigation, or prosecution of crime. Defendant, without warning and, more importantly, without any legal or factual justification, departed from this established law and practice when he issued Letter Ruling OR2016-21139 on September 19, 2016. Defendant got it right the first time he was asked about the Cunningham Deferred Prosecution Agreement since its release will interfere with Plaintiff's prosecution of crime, as the evidence that will be presented at trial will show.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify by my signature above that, in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure, on July 10, 2017, a redacted version of the foregoing was emailed and an unredacted version was mailed (CM-RRR), to:

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