

DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

V.

KEN PAXTON,  
STATE OF TEXAS ATTORNEY GENERAL

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261ST JUDICIAL DISTRICT COURT

TRAVIS COUNTY, TEXAS

**PLAINTIFF'S RESPONSE IN OPPOSITION TO  
TARA CORONADO'S MOTION TO STRIKE**

TO THE HONORABLE COURT:

Plaintiff, David A. Escamilla, in his capacity as Travis County Attorney, files this response in opposition to the Motion to Strike filed herein by Tara Coronado, Intervenor.

Tara Coronado is asking the Court to strike from Plaintiff's Second Amended Petition exceptions based on Texas Government Code sections 552.103, 552.107, and 552.108(a)(2) because these exceptions were not raised when a ruling was requested from the Attorney General. See Tex. Gov't Code §552.326. However, strictly applying section 552.326 in this case would work a result both inequitable and unjust since Plaintiff followed the procedure for excepting Deferred Prosecution Agreements from disclosure devised by the Attorney General in 2013.

Between February 15, 2013 and April 15, 2013, the Travis County Attorney's Office (TCAO) requested rulings from the Attorney General (AG) that four different Deferred Prosecution Agreements were excepted from disclosure under the Public Information Act by section 552.108(a)(2) since each of the criminal cases had been dismissed and did not result in a conviction or deferred adjudication. The AG ruled that

each agreement should be released because, as long as the term of the agreement had not concluded, there was a possibility that the criminal case could be refiled and result in a conviction or deferred adjudication. In response, the TCAO, between May 1, 2013 and June 21, 2013, filed the following four lawsuits challenging the AG's rulings:

No. D-1-GV-13-000431; *David Escamilla v. Greg Abbott*<sup>1</sup>

No. D-1-GV-13-000551; *David Escamilla v. Greg Abbott*<sup>2</sup>

No. D-1-GV-13-000550; *David Escamilla v. Greg Abbott*<sup>3</sup>

No. D-1-GV-13-000561; *David Escamilla v. Greg Abbott*<sup>4</sup>

By early November 2013, each case was resolved without the TCAO being required to release a single Deferred Prosecution Agreement. No. D-1-GV-13-000431 was dismissed after the AG issued an amended ruling allowing the information to be withheld under § 552.101.<sup>5</sup> No. D-1-GV-13-000551 was dismissed after the requestor withdrew her request for information.<sup>6</sup>

Soon after these suits were filed, Kimberly Fuchs, then the Chief of Open Records Litigation, informed the TCAO that § 552.108(a)(2) should be asserted only when the term of the Deferred Prosecution Agreement has concluded and that, if the term has not concluded, §552.108(a)(1) should be the basis for excepting the agreement from disclosure.<sup>7</sup> After the TCAO showed the AG that the term of the DPA that was the

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<sup>1</sup> See Exhibit 1, a certified copy of Plaintiff's Original Petition filed in No. D-1-GV-13-000431.

<sup>2</sup> See Exhibit 2, a certified copy of Plaintiff's Original Petition filed in No. D-1-GV-13-000551.

<sup>3</sup> See Exhibit 3, a certified copy of Plaintiff's Original Petition filed in No. D-1-GV-13-000550.

<sup>4</sup> See Exhibit 4, a certified copy of Plaintiff's Original Petition filed in No. D-1-GV-13-000561.

<sup>5</sup> See OR2013-06434A, attached as Exhibit 5, and a certified copy of the Agreed Order of Dismissal, attached as Exhibit 6.

<sup>6</sup> See the certified copy of the Agreed Order of Dismissal, attached as Exhibit 7.

<sup>7</sup> See Exhibits A and B, attached to the Affidavit of Tim Labadie (Exhibit 8).

subject of No. D-1-GV-13-000561 had concluded, an Agreed Final Judgment was rendered allowing the TCAO to withhold the agreement pursuant to §552.108(a)(2).<sup>8</sup>

However, the term of the DPA that was the subject of No. D-1-GV-13-000550 had not yet concluded. Because the TCAO had asserted §552.108(a)(2) rather than §552.108(a)(1) as a basis for excepting the DPA from disclosure, the AG, through Matt Entsminger, requested that the TCAO submit a new brief explaining why §552.108(a)(1) should apply instead of §552.108(a)(2).<sup>9</sup>

Thereafter, the AG agreed that the TCAO could withhold the agreement on this basis with the understanding that the TCAO should, in the future, assert §552.108(a)(1) when the term of the DPA had not concluded, and §552.108(a)(2) when the term had concluded. The TCAO agreed to follow this required course of action, and even suggested that it assert both §552.018(a)(1) and §552.018(a)(2) as exceptions to disclosure. But the AG insisted that only one exception be asserted, depending on whether the term of the DPA had concluded, indicating that if both were asserted, both would be rejected because they were considered by the AG to be mutually exclusive.

With these understandings and agreements, an Agreed Final Judgment was rendered in No. D-1-GV-13-000550 allowing the TCAO to withhold the DPA pursuant to §552.108(a)(1).<sup>10</sup>

Both the TCAO and the AG honored their agreements for about two and a half years. During that period, in reliance upon the AG's 2013 statements, the TCAO would

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<sup>8</sup> See the certified copy of the Agreed Final Judgment, attached as Exhibit 9.

<sup>9</sup> See Exhibit C to the Affidavit of Tim Labadie (Exhibit 8).

<sup>10</sup> See the certified copy of the Agreed Final Judgment, attached as Exhibit 10.

assert only §552.108(a)(1) when the term of the DPA had not concluded, and the TCAO would assert only §552.108(a)(2) when the term of the DPA had concluded. And each time, regardless of the exception assert by the TCAO, the AG ruled that the DPA was excepted from disclosure.<sup>11</sup> Had the AG informed the TCAO that the agreements made in 2013 would no longer be honored, the TCAO, in this case, would have asserted exceptions to disclosure other than §552.108(a)(1).

That this change was coming could not have been foreseen by the TCAO. Indeed, after Tara Coronado first requested the Cunningham DPA on April 11, 2016, the TCAO sought from the AG an exception based on §552.108(a)(1), since the term has not concluded, in accordance with the 2013 agreements and understandings. And true to his word, the AG, on May 6, 2016 ruled that the TCAO could withhold the DPA.<sup>12</sup> Moreover, just six days later, the AG allowed the TCAO to withhold another DPA.<sup>13</sup>

Not permitting the TCAO to assert exceptions other than §552.108(a)(1) would be inequitable and unjust because the TCAO relied on the AG's 2013 agreements and limited its exceptions to one.

However, there is yet another reason such a limitation would work an unjust result. In response to Tara Coronado's first open records request,<sup>14</sup> the AG ruled that the TCAO could withhold Deferred Prosecution Agreement pursuant to

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<sup>11</sup> See Exhibits A-D, attached to the Affidavit of Elizabeth Hanshaw Winn (Exhibit 11), and Exhibits A-H, attached to the Declaration of Ann-Marie Sheely (Exhibit 12).

<sup>12</sup> See OR2016-10351, attached as Exhibit 13.

<sup>13</sup> See OR2016-10900, attached as Exhibit H to the Declaration of Ann-Marie Sheely (Exhibit 12).

<sup>14</sup> See Exhibit 14.

§552.108(a)(1).<sup>15</sup> Three months later, Laura Bates asked for the DPA and many other documents not previously requested by Ms. Coronado.<sup>16</sup> In response to the TCAO's request for a ruling as to these other documents, the AG, who was not asked to rule on whether the DPA had to be released<sup>17</sup> since he had already said it didn't, took it upon himself to reverse himself without respecting the AG's own established principles concerning previous determinations.<sup>18</sup>

Section 55.011 of the PIA requires the AG to "maintain uniformity in the application, operation, and interpretation" of the PIA. To fulfill this duty, the AG is given the authority issue "comprehensive written decisions and opinions" concerning matters under the PIA. Tex. Gov't Code § 552.011.

When a governmental entity receives a request for information it believes is excepted from disclosure under the PIA, and if there has not been a "previous determination" that the information need not be disclosed, the governmental entity must ask the AG if one or more the PIA's exceptions apply. Tex. Gov't Code §552.301(a).

Because of the absence of a statutory definition of "previous determination," and so that governmental entities "can identify what constitutes a previous determination in order to ascertain whether the Act requires the governmental body to request a decision from [the Attorney General]," the Attorney General devised four criteria that must be

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<sup>15</sup> See OR2016-10351, attached as Exhibit 13.

<sup>16</sup> See Exhibit 15.

<sup>17</sup> See July 15, 2016 letter from Ann-Marie Sheely, Assistant County Attorney, to Justin Gordon, Assistant Attorney General, attached as Exhibit 16.

<sup>18</sup> See OR2016-21139, attached as Exhibit 17.

met before a ruling will constitute a “previous determination” enabling the governmental entity to withhold information without requesting another ruling. Open Records Decision No. 673 (2001).<sup>19</sup> Thus, OR2016-10351 constitutes a previous determination that the Deferred Prosecution Agreement is excepted from disclosure if:

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.

There is no dispute that the first three criteria were met as both Ms. Coronado and Ms. Bates requested the same Deferred Prosecution Agreement from the TCAO, and the AG ruled in Letter Ruling OR2016-10351 that this agreement is excepted from disclosure under section 552.108(a)(1).<sup>20</sup> As to the fourth criterion, the AG has admitted that the law on which Letter Ruling OR2016-10351 was based has not changed since its

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<sup>19</sup> Attached as Exhibit 18.

<sup>20</sup> See Defendant's admissions in response to Requests for Admissions Nos. 1, 5, 6, 10, 12, and 13, attached as Exhibit D to the Affidavit of Tim Labadie (Exhibit 8).

issuance,<sup>21</sup> and does not contend that the facts or circumstances on which Letter Ruling OR2016-10351 was based have changed.<sup>22</sup>

Since Letter Ruling OR2016-10351 constitutes a "previous determination", the TCAO relied on this ruling and did not assert additional exceptions when Laura Bates made her open records request. Had the TCAO had any inkling that the AG would, without warning, abruptly change the AG's established practice in treating open records requests for Deferred Prosecution Agreements or would not comply with Open Records Decision No. 673, the TCAO would have asserted numerous exceptions to disclosure.

Accordingly, equity and justice require that the Court deny Tara Coronado's Motion to Strike.

Respectfully submitted,

DAVID ESCAMILLA  
TRAVIS COUNTY ATTORNEY

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

ATTORNEY FOR PLAINTIFF

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<sup>21</sup> See Defendant's admission in response to Plaintiff's RFA No. 14, attached as Exhibit D to the Affidavit of Tim Labadie (Exhibit 8).

<sup>22</sup> See Defendant's answers to Plaintiff's interrogatories 2 and 3, attached as Exhibit D to the Affidavit of Tim Labadie (Exhibit 8). Incredibly, Defendant states that he does not possess personal knowledge of the facts and circumstances surrounding the Deferred Prosecution Agreement - which raises the question of how he could have determined that those facts and circumstances had changed.

**CERTIFICATE OF SERVICE**

I hereby certify by my signature above that on June 26, 2017, the foregoing was emailed, in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure, to:

Bill Aleshire

Email: Bill@AleshireLaw.com

Attorney for Tara Coronado Cunningham, Intervenor

Matthew Entsminger, Assistant Attorney General

Email: matthew.entsminger@oag.texas.gov.

Attorney for Ken Paxton, Texas Attorney General, Defendant



# EXHIBIT 1

NO. D-1-GV-13-000431

DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

V.

GREG ABBOTT,  
STATE OF TEXAS ATTORNEY GENERAL

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53rd  
JUDICIAL DISTRICT COURT

TRAVIS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff David A. Escamilla, in his capacity as Travis County Attorney, files this Original Petition for declaratory judgment.

**I. INTRODUCTION**

This suit is brought pursuant to Tex. Gov't Code § 552.324, to challenge a letter ruling of the Attorney General (OR2013-06434) and to seek a declaratory judgment that the information at issue is exempt from disclosure under the Texas Public Information Act, TEX. GOV'T CODE §§552.001, *et seq.* (the "Act").

**II. DISCOVERY CONTROL PLAN**

Discovery in this case is intended to be conducted under Level 2 of Rule 190.3 of the Texas Rules of Civil Procedure.

**III. PARTIES**

Plaintiff David A. Escamilla ("Escamilla") is the Travis County Attorney. The Travis County Attorney's Office is a governmental body subject to the provisions of the Act.

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on 6-23-17



VELVA L. PRICE

DISTRICT CLERK

By Deputy Amalia Rodriguez-Mendoza

290174



Plaintiff's Original Petition  
Page 1

Defendant Greg Abbott ("Abbott") is the Attorney General of the State of Texas. He may be served with process at the Price Daniel, Sr. Building, 209 W. 14th Street, 8th Floor, Austin, Texas 78701. The telephone number for the Office of the Attorney General is 512.463.2100. The Attorney General's Open Government Hotline is 877.673.6839.

#### **IV. NOTICE TO REQUESTORS**

Margaret Lalk requested the information at issue. Pursuant to section 552.325 of the Texas Public Information Act, she is not named here as a defendant. By copy of this petition (sent to her by certified mail - return receipt requested), Margaret Lalk is provided notice as follows: (1) that this lawsuit has been filed; (2) that she has the right to intervene in the lawsuit or to choose not to participate in the lawsuit; (3) that the Texas Attorney General is named as defendant; and (4) that the name, address and telephone number of the Attorney General are as set forth above. Margaret Lalk's address is P. O. Box 92212, Austin, Texas 78709.

#### **V. JURISDICTION AND VENUE**

This is an action for declaratory judgment pursuant to Texas Civil Practice and Remedies Code § 37.001 *et seq.*, and section 552.324 of the Texas Government Code brought to determine an actual, justiciable controversy between plaintiff and defendant based on the facts stated below. Venue is proper in Travis County.

#### **VI. FACTS**

On or about February 15, 2013, Escamilla received an open records request from Margaret Lalk, seeking "copies of all records regarding MICHAEL EUGENE MCNEES . . . pertaining to an arrest in April of 2012 for assault." See Exhibit 1. On February 15, 2013,



Escamilla requested from Abbott a decision concerning the disclosure of the Deferred Prosecution Agreement with Michael McNees, pursuant to Tex. Gov't Code § 552.301. See Exhibit 2.

In this request for an Attorney General's decision, Escamilla asserted that the Deferred Prosecution Agreement is excepted from disclosure by virtue of §552.108(a)(2) of the Act, which states:

- (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 . . .
- (2) it is 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[.]

Section 552.301(e)(1)(D) of the Act requires a governmental body that requests an attorney general's decision to submit a copy of the information requested or a representative sample of the information. Escamilla, in compliance thereof, submitted to the Attorney General a copy of the Deferred Prosecution Agreement.

Even though cause number C-1-CR-12-401671, the criminal case filed against Michael McNees, was dismissed on November 9, 2012, and did not result in a conviction or a deferred adjudication, Abbott ruled that the Deferred Prosecution Agreement is not exempt from disclosure pursuant to §552.108(a)(2) of the Act because "this case could ultimately result in a conviction or deferred adjudication."

## **VII. RELIEF SOUGHT**

Plaintiff, David A. Escamilla, Travis County Attorney, prays that the defendant be cited to appear and answer herein. Plaintiff further requests that upon the trial of the



merits, the Court render a declaratory judgment that the Deferred Prosecution Agreement sought by Margaret Lalk is excepted from disclosure by the section 552.108(a)(2) of the Texas Public Information Act and may be withheld by Plaintiff; that the Court award Plaintiff reasonable attorney's fees incurred in bringing this action; and that Plaintiff recover all costs of court. Plaintiff further requests such other and further relief, legal and equitable, to which he shows himself to be justly entitled.

Respectfully submitted,

DAVID ESCAMILLA  
TRAVIS COUNTY ATTORNEY

BY: 

Tim Labadie  
State Bar No. 11784853  
P. O. Box 1748  
Austin, Texas 78767  
TEL: (512) 854-9513  
FAX: (512) 854-4808

ATTORNEY FOR PLAINTIFF



# EXHIBIT 2

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D-1-GV-13-000551  
NO. \_\_\_\_\_

DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

§ 345TH JUDICIAL DISTRICT COURT

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GREG ABBOTT,  
STATE OF TEXAS ATTORNEY GENERAL

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TRAVIS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff David A. Escamilla, in his capacity as Travis County Attorney, files this suit under the Public Information Act (PIA), Tex. Gov't Code Chapter 552, to challenge a letter ruling of the Attorney General (OR2013-08992) and seeking to withhold information that is exempt from disclosure under the PIA.

**I. DISCOVERY CONTROL PLAN**

Discovery in this case is intended to be conducted under Level 2 of Rule 190.3 of the Texas Rules of Civil Procedure.

**II. PARTIES**

Plaintiff David A. Escamilla ("Escamilla") is the Travis County Attorney. The Travis County Attorney's Office is a governmental body subject to the provisions of the Act.

Defendant Greg Abbott ("Abbott") is the Attorney General of the State of Texas. He may be served with process at the Price Daniel, Sr. Building, 209 W. 14th Street, 8th

Plaintiff's Original Petition  
Page 1

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on 6-23-17

293212



VELVA L. PRICE  
DISTRICT CLERK  
By Deputy Amalia Rodriguez-Mendoza



06/17/2013  
FILED 06/18/2013 01:17 PM Travis County District Clerk, Amalia Rodriguez-Mendoza

Floor, Austin, Texas 78701. The telephone number for the Office of the Attorney General is 512.463.2100. The Attorney General's Open Government Hotline is 877.673.6839.

### **III. NOTICE TO REQUESTOR**

Sunny Woodall requested the information at issue. Pursuant to section 552.325 of the PIA, she is not named here as a defendant. By copy of this petition (sent to her by certified mail - return receipt requested), Sunny Woodall is provided notice as follows: (1) that this lawsuit has been filed; (2) that she has the right to intervene in the lawsuit or to choose not to participate in the lawsuit; (3) that the Texas Attorney General is named as defendant; and (4) that the name, address and telephone number of the Attorney General are as set forth above. Sunny Woodall's address is 2012 Lake Air Dr. Suite D Waco, TX 76710.

### **IV. JURISDICTION AND VENUE**

This suit is authorized by sections 552.324 and 552.325 of the PIA brought to determine an actual, justiciable controversy between plaintiff and defendant based on the facts stated below. Venue is proper in Travis County.

### **V. FACTS**

On or about March 20, 2013, Escamilla received an open records request from Sunny Woodall, seeking records pertaining to the arrest of and criminal case filed against A. J. Sunday. On March 27, 2013, Escamilla, pursuant to PIA § 552.301, requested from Abbott a decision concerning the disclosure of the file pertaining to cause number C-1-CR-12-205705, the criminal action filed against Mr. Sunday. Escamilla asserted that the Deferred Prosecution Agreement with Mr. Sunday is excepted from disclosure by virtue





of §552.108(a)(2) of the PIA, which states:

- (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 . . .
- (2) it is 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[.]

Section 552.301(e)(1)(D) of the PIA requires a governmental body that requests an attorney general's decision to submit a copy of the information requested or a representative sample of the information. Escamilla, in compliance thereof, submitted to the Attorney General a copy of the Deferred Prosecution Agreement.

Even though cause number C-1-CR-12-205705, the criminal case filed against A. J. Sunday, was dismissed on December 12, 2012, and did not result in a conviction or a deferred adjudication, Abbott ruled that the Deferred Prosecution Agreement is not exempt from disclosure pursuant to §552.108(a)(2) of the PIA because "this case could ultimately result in a conviction or deferred adjudication." Escamilla received this ruling on May 31, 2013.

## **VI. RELIEF SOUGHT**

Plaintiff, David A. Escamilla, Travis County Attorney, prays that the defendant be cited to appear and answer herein. Plaintiff further requests that upon the trial of the merits, the Court order that the Deferred Prosecution Agreement sought by Sunny Woodall is excepted from disclosure by the section 552.108(a)(2) of the PIA and may be withheld by Plaintiff; that the Court award Plaintiff reasonable attorney's fees incurred in bringing this action; and that Plaintiff recover all costs of court. Plaintiff further requests

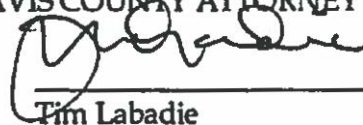


such other and further relief, legal and equitable, to which he shows himself to be justly entitled.

Respectfully submitted,

DAVID ESCAMILLA  
TRAVIS COUNTY ATTORNEY

BY:



Tim Labadie  
State Bar No. 11784853  
P. O. Box 1748  
Austin, Texas 78767  
TEL: (512) 854-9513  
FAX: (512) 854-4808

ATTORNEY FOR PLAINTIFF



# EXHIBIT 3

NO. \_\_\_\_\_

DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

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261ST  
JUDICIAL DISTRICT COURT

V.

GREG ABBOTT,  
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff David A. Escamilla, in his capacity as Travis County Attorney, files this suit under the Public Information Act (PIA), Tex. Gov't Code Chapter 552, to challenge a letter ruling of the Attorney General (OR2013-08046) and seeking to withhold information that is exempt from disclosure under the PIA.

**I. DISCOVERY CONTROL PLAN**

Discovery in this case is intended to be conducted under Level 2 of Rule 190.3 of the Texas Rules of Civil Procedure.

**II. PARTIES**

Plaintiff David A. Escamilla ("Escamilla") is the Travis County Attorney. The Travis County Attorney's Office is a governmental body subject to the provisions of the Act.

Defendant Greg Abbott ("Abbott") is the Attorney General of the State of Texas. He may be served with process at the Price Daniel, Sr. Building, 209 W. 14th Street, 8th

Plaintiff's Original Petition  
Page 1

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on 6-23-17



VELVA L. PRICE  
DISTRICT CLERK  
By Deputy: Amalia Rodriguez-Mendoza



Floor, Austin, Texas 78701. The telephone number for the Office of the Attorney General is 512.463.2100. The Attorney General's Open Government Hotline is 877.673.6839.

### **III. NOTICE TO REQUESTOR**

Doug Johnson requested the information at issue. Pursuant to section 552.325 of the PIA, he is not named here as a defendant. By copy of this petition (sent to him by certified mail - return receipt requested), Doug Johnson is provided notice as follows: (1) that this lawsuit has been filed; (2) that he has the right to intervene in the lawsuit or to choose not to participate in the lawsuit; (3) that the Texas Attorney General is named as defendant; and (4) that the name, address and telephone number of the Attorney General are as set forth above. Doug Johnson's address is 4703 Pimlico Drive, Del Valle, Texas 78617.

### **IV. JURISDICTION AND VENUE**

This suit is authorized by sections 552.324 and 552.325 of the PIA brought to determine an actual, justiciable controversy between plaintiff and defendant based on the facts stated below. Venue is proper in Travis County.

### **V. FACTS**

On or about March 5, 2013, Escamilla received an open records request from Doug Johnson, seeking "all information associated with case number 12-24231. The arrested is named Todd Adam Piccirello[.]" On March 13, 2013, Escamilla, pursuant to PIA § 552.301, requested from Abbott a decision concerning the disclosure of the Deferred Prosecution Agreement with Todd Adam Piccirello, asserting it is excepted from disclosure by virtue of §552.108(a)(2) of the PIA, which states:



- (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 . . .
- (2) it is 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[.]

Section 552.301(e)(1)(D) of the PIA requires a governmental body that requests an attorney general's decision to submit a copy of the information requested or a representative sample of the information. Escamilla, in compliance thereof, submitted to the Attorney General a copy of the Deferred Prosecution Agreement.

Even though cause number C-1-CR-12-401671, the criminal case filed against Todd Adam Piccirello, was dismissed on January 11, 2013, and did not result in a conviction or a deferred adjudication, Abbott ruled that the Deferred Prosecution Agreement is not exempt from disclosure pursuant to §552.108(a)(2) of the PIA because "this case could ultimately result in a conviction or deferred adjudication." Escamilla received this ruling on May 16, 2013.

## **VI RELIEF SOUGHT**

Plaintiff, David A. Escamilla, Travis County Attorney, prays that the defendant be cited to appear and answer herein. Plaintiff further requests that upon the trial of the merits, the Court order that the Deferred Prosecution Agreement sought by Doug Johnson is excepted from disclosure by the section 552.108(a)(2) of the PIA and may be withheld by Plaintiff; that the Court award Plaintiff reasonable attorney's fees incurred in bringing this action; and that Plaintiff recover all costs of court. Plaintiff further requests



such other and further relief, legal and equitable, to which he shows himself to be justly entitled.

Respectfully submitted,

DAVID ESCAMILLA  
TRAVIS COUNTY ATTORNEY

BY:

  
Tim Labadie

State Bar No. 11784853

P. O. Box 1748

Austin, Texas 78767

TEL: (512) 854-9513

FAX: (512) 854-4808

ATTORNEY FOR PLAINTIFF



# EXHIBIT 4



NO. \_\_\_\_\_

DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

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201ST JUDICIAL DISTRICT COURT

V.

GREG ABBOTT,  
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff David A. Escamilla, in his capacity as Travis County Attorney, files this suit under the Public Information Act (PIA), Tex. Gov't Code Chapter 552, to challenge a letter ruling of the Attorney General (OR2013-08992) and seeking to withhold information that is exempt from disclosure under the PIA.

**I. DISCOVERY CONTROL PLAN**

Discovery in this case is intended to be conducted under Level 2 of Rule 190.3 of the Texas Rules of Civil Procedure.

**II. PARTIES**

Plaintiff David A. Escamilla ("Escamilla") is the Travis County Attorney. The Travis County Attorney's Office is a governmental body subject to the provisions of the Act.

Defendant Greg Abbott ("Abbott") is the Attorney General of the State of Texas. He may be served with process at the Price Daniel, Sr. Building, 209 W. 14th Street, 8th

Plaintiff's Original Petition  
Page 1

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on 6-23-17

293476



VELVA L. PRICE

DISTRICT CLERK

By Deputy *Amalia Rodriguez-Mendoza*



Floor, Austin, Texas 78701. The telephone number for the Office of the Attorney General is 512.463.2100. The Attorney General's Open Government Hotline is 877.673.6839.

### **III. NOTICE TO REQUESTOR**

Duane Daniels requested the information at issue. Pursuant to section 552.325 of the PIA, he is not named here as a defendant. By copy of this petition (sent to him by certified mail - return receipt requested), Duane Daniels is provided notice as follows: (1) that this lawsuit has been filed; (2) that he has the right to intervene in the lawsuit or to choose not to participate in the lawsuit; (3) that the Texas Attorney General is named as defendant; and (4) that the name, address and telephone number of the Attorney General are as set forth above. Duane Daniels's address is P. O. Box 6219, Austin, Texas 78762.

### **IV. JURISDICTION AND VENUE**

This suit is authorized by sections 552.324 and 552.325 of the PIA brought to determine an actual, justiciable controversy between plaintiff and defendant based on the facts stated below. Venue is proper in Travis County.

### **V. FACTS**

On or about March 29, 2013, Escamilla received an open records request from Duane Daniels, seeking, among other things, "All documents executed by the state or the defense as part of deferred prosecution, or similar, agreements, along with attachments and exhibits and accompanying documentation which is integral thereto" pertaining to Cause No. C-1-CR-11-204295; State of Texas v. Thomas Schuller. On April 15, 2013, Escamilla, pursuant to PIA § 552.301, requested from Abbott a decision concerning the disclosure of these records. Escamilla asserted that the Deferred Prosecution Agreement



with Thomas Schuller is excepted from disclosure by virtue of §552.108(a)(2) of the PIA, which states:

- (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 . . .
- (2) it is 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[.]

Section 552.301(e)(1)(D) of the PIA requires a governmental body that requests an attorney general's decision to submit a copy of the information requested or a representative sample of the information. Escamilla, in compliance thereof, submitted to the Attorney General a copy of the Deferred Prosecution Agreement.

Even though cause number C-1-CR-11-204295, the criminal case filed against Thomas Schuller, was dismissed on September 14, 2011, and did not result in a conviction or a deferred adjudication, Abbott ruled that the Deferred Prosecution Agreement is not exempt from disclosure pursuant to §552.108(a)(2) of the PIA because "this case could ultimately result in a conviction or deferred adjudication." Escamilla received this ruling on June 13, 2013.

#### **VL RELIEF SOUGHT**

Plaintiff, David A. Escamilla, Travis County Attorney, prays that the defendant be cited to appear and answer herein. Plaintiff further requests that upon the trial of the merits, the Court order that the Deferred Prosecution Agreement sought by Duane Daniels is excepted from disclosure by the section 552.108(a)(2) of the PIA and may be withheld by Plaintiff; that the Court award Plaintiff reasonable attorney's fees incurred in

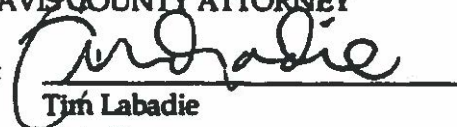


bringing this action; and that Plaintiff recover all costs of court. Plaintiff further requests such other and further relief, legal and equitable, to which he shows himself to be justly entitled.

Respectfully submitted,

DAVID ESCAMILLA  
TRAVIS COUNTY ATTORNEY

BY:



Tim Labadie  
State Bar No. 11784853  
P. O. Box 1748  
Austin, Texas 78767  
TEL: (512) 854-9513  
FAX: (512) 854-4808

ATTORNEY FOR PLAINTIFF



# EXHIBIT 5

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ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 20, 2013

Ms. Elizabeth Hanshaw Winn  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767-1748

OR2013-06434A

Dear Ms. Winn:

This office issued Open Records Letter No. 2013-06434 (2013) on April 19, 2013. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on April 19, 2013. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 492518.

The Travis County Attorney's Office (the "county attorney's office") received a request for all records regarding the arrest of a specified person for a specified charge. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by section 261.201 of the Family Code, which provides in relevant part:

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<sup>1</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

[T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Texas Department of Family and Protective Services] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

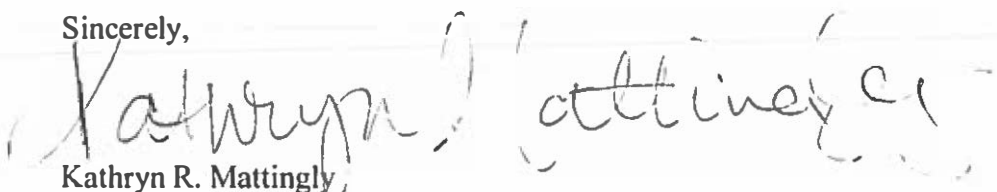
Fam. Code § 261.201(a), (k). Upon review, we find the submitted information was used or developed in an investigation of alleged abuse of a child, and is, therefore, within the scope of section 261.201 of the Family Code. *See id.* § 261.001(1)(A) (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of chapter 261). You inform us the requestor is the attorney of a parent of the child victim at issue in the submitted information. However, the submitted report reflects this parent is suspected of having committed some of the alleged abuse at issue. Accordingly, the submitted information may not be provided to this requestor pursuant to section 261.201(k). *See id.* § 261.201(k) (parental exception to section 261.201(a) inapplicable where parent alleged to have committed abuse or neglect at issue). Thus, the submitted information is confidential under section 261.201 of the Family Code and must

be withheld in its entirety under section 552.101 of the Government Code.<sup>2</sup> As our ruling is dispositive of the submitted information, we need not consider your remaining arguments against disclosure.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly  
Assistant Attorney General  
Open Records Division

KRM/bhf

Ref: ID# 482518

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

---

<sup>2</sup> Although you indicate you have released some of the requested information to the requestor, we note that because section 261.201(a) protects all "files, reports, records, communications, audiotapes, videotapes, and working papers" relating to an investigation of alleged or suspected child abuse, the county attorney's office must not release any information in such cases. See Fam. Code § 261.201(a).



# EXHIBIT 6

NOTICE SENT: FINAL INTERLOCUTORY ~~NONE~~  
DISP PARTIES: HL  
DISP CODE: CVD/CLS 4615  
REDACT PGS: \_\_\_\_\_  
JUDGE DWCLERK LAM

DC

BK13196 PG1248

No. D-I-GV-13-000431

DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

V.

GREG ABBOTT,  
STATE OF TEXAS ATTORNEY GENERAL

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53rd JUDICIAL DISTRICT COURT

TRAVIS COUNTY, TEXAS

Filed in The District Court  
of Travis County, Texas  
on 7/10/13  
at 9:46 AM  
Amalia Rodriguez-Mendoza, Clerk

**AGREED ORDER OF DISMISSAL**

On this date, Plaintiff David Escamilla, Travis County Attorney, and Defendant Greg Abbott, Attorney General of Texas, moved that this cause be dismissed. This cause is an action under the Public Information Act, Tex. Gov't Code Ann. ch. 552. Plaintiff timely filed this lawsuit challenging the Attorney General's open records ruling, OR2013-06434. After the petition was filed, the Attorney General issued an amended letter ruling, OR2013-06434A. This amended ruling moots the issue in the lawsuit. Accordingly, the parties request that the Court enter this Agreed Order of Dismissal.

The Court is of the opinion that the entry of an agreed order of dismissal is appropriate.

The Court, therefore, orders that Plaintiff's cause of action against Defendant is dismissed in all respects.

SIGNED this the 10 day of July, 2013.

  
PRESIDING JUDGE

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on 6-23-17



VELVA L. PRICE

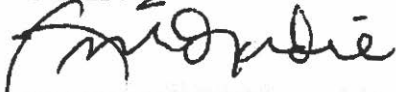
DISTRICT CLERK

By Deputy: quiza-Limon



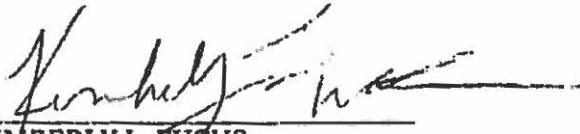
Agreed Order of Dismissal  
Cause No. D-I-GV-13-000431

AGREED:



TIMOTHY R. LABADIE  
State Ba No. 11784853  
Assistant Travis County Attorney  
P.O. Box 1748  
Austin, Texas 78767-1748  
Telephone: (512) 854-9513  
Facsimile: (512) 854-4808

ATTORNEY FOR PLAINTIFF



KIMBERLY L. FUCHS  
State Bar No. 24044140  
Chief, Open Records Litigation  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, TX 78711-2548  
Telephone: (512) 475-4195  
Facsimile: (512) 320-0167  
ATTORNEY FOR DEFENDANT



# EXHIBIT 7

Notice sent: Final Interlocutory (None)  
Disp Parties: All  
Disp code: CVD / CLS 4615  
Redact pgs: \_\_\_\_\_  
Judge GJS Clerk RT

DC

BK13266 PG490

Filed in The District Court  
of Travis County, Texas

LM SEP 04 2013

At 2:12 M.  
Amalia Rodriguez-Mendoza, Clerk

Cause No. D-1-GV-13-000551

**DAVID ESCAMILLA, TRAVIS  
COUNTY ATTORNEY,**

*Plaintiff,*

v.

**GREG ABBOTT,  
ATTORNEY GENERAL OF TEXAS,  
*Defendant,***

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**IN THE DISTRICT COURT**

**345th JUDICIAL DISTRICT**

**TRAVIS COUNTY, TEXAS**

**AGREED ORDER OF DISMISSAL**

On this date, Plaintiff David Escamilla, Travis County Attorney, and Defendant Greg Abbott, Attorney General of Texas, moved that this cause be dismissed. This cause is an action under the Public Information Act, Tex. Gov't Code Ann. ch. 552. Plaintiff timely filed this lawsuit challenging the Attorney General's open records ruling, OR2013-08992. The parties now represent to the Court that: (1) pursuant to Tex. Gov't Code § 552.327, the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn its request for information (2) in light of this withdrawal, the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

**IT IS THEREFORE ORDERED that:**

1. Because the request was withdrawn, no information will be released in reliance on Letter Ruling OR2013-08992. Letter Ruling OR2013-08992 should not be cited as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. All costs of court are taxed against the parties incurring same.
3. This cause is hereby DISMISSED without prejudice.

Agreed Order of Dismissal  
Cause No. D-1-GV-13-000551

Page 1



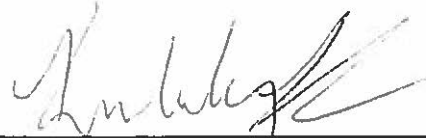
IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that Plaintiff's cause of action against Defendant is dismissed in all respects.

SIGNED this the 4<sup>th</sup> day of Sept., 2013.

  
PRESIDING JUDGE

AGREED: -

  
**TIMOTHY R. LABADIE**  
State Bar No. 11784853  
Assistant Travis County Attorney  
P.O. Box 1748  
Austin, Texas 78767-1748  
Telephone: (512) 854-9513  
Facsimile: (512) 854-4808  
**ATTORNEY FOR PLAINTIFF**

  
**KIMBERLY L. FUCHS**  
State Bar No. 24044140  
Chief, Open Records Litigation  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, TX 78711-2548  
Telephone: (512) 475-4195  
Facsimile: (512) 320-0167  
**ATTORNEY FOR DEFENDANT**

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on



10-23-17  
VELVA L. PRICE

DISTRICT CLERK

By Deputy:





# EXHIBIT 8

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DAVID A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

V.

KEN PAXTON,  
STATE OF TEXAS ATTORNEY GENERAL

§  
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261ST JUDICIAL DISTRICT COURT

TRAVIS COUNTY, TEXAS

**AFFIDAVIT OF TIM LABADIE**

STATE OF TEXAS       §  
                                 §  
COUNTY OF TRAVIS   §

BEFORE ME, the undersigned notary public, on this day, personally appeared Tim Labadie, know to me to be the person whose name is subscribed hereto, who, being by me first duly sworn upon his oath, stated the following:

1.       “My name is Tim Labadie. I am over twenty-one years of age, I am of sound mind and I am authorized to make this affidavit. All the statements contained herein are within my personal knowledge and are true and correct.

2.       “I am employed by the Travis County Attorney’s Office and I am the attorney representing David Escamilla, Travis County Attorney, in this case.

3.       “Between May 1, 2013 and June 21, 2013, I filed the following four lawsuits on behalf of David Escamilla, Travis County Attorney, challenging rulings of the Attorney General that four different Deferred Prosecution Agreements were not excepted from disclosure pursuant to §552.018(a)(2) of the Public Information Act. These lawsuits were No. D-I-GV-13-000431; *David Escamilla v. Greg Abbott*, No. D-I-GV-13-000550; *David Escamilla v. Greg Abbott*, No. D-I-GV-13-000551; *David Escamilla v. Greg Abbott*, and No. D-I-GV-13-000561; *David Escamilla v. Greg Abbott*.



4. “The attorney representing the Attorney General in each of these cases, except No. D-1-GV-13-000550, was Kimberly Fuchs, then the Chief of Open Records Litigation. Matthew Entsminger represented the Attorney General in No. D-1-GV-13-000550.

5. “While these suits were pending, I spoke with Kimberly Fuchs about resolving these lawsuits. She informed me that it was the position of the Attorney General that §552.108(a)(2) should be asserted only when the term of the Deferred Prosecution Agreement has concluded and that, if the term has not concluded, §552.108(a)(1) should be the basis for excepting the agreement from disclosure. She also told me that we could resolve these cases favorably to the County Attorney if the County Attorney would, for future requests for a Deferred Prosecution Agreement, assert §552.108(a)(1) if the agreement’s term had not concluded and §552.108(a)(2) if the agreement’s term had concluded. When I suggested that the County Attorney assert both, alternatively, Ms. Fuchs said that if we did, the Attorney General would reject both, as these exceptions, according to Ms. Fuchs, are mutually exclusive. Thus, on behalf of the County Attorney, I agreed that, for future requests for rulings about Deferred Prosecution Agreements, the County Attorney would assert §552.108(a)(1) if the agreement’s term had not concluded and §552.108(a)(2) if the agreement’s term had concluded, and that we would not assert these exceptions in the alternative.

6. “Attached as Exhibit A is a true and correct copy of an email dated July 19, 2013, from me to Elizabeth Winn, the attorney who was handling open record requests for the County Attorney at that time. Attached as Exhibit B is a true and correct copy of an email dated July 19, 2013 from me to Kimberly Fuchs.


7. “No. D-1-GV-13-000431 was dismissed after the Attorney General’s Office issued an amended ruling allowing the information to be withheld under § 552.101.

8. "No. D-1-GV-13-000551 was dismissed after the requestor withdrew her request for information.

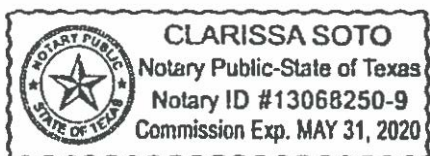
9. "No. D-1-GV-13-000561 had was resolved by an Agreed Final Judgment allowing the Travis County Attorney's Office to withhold the agreement pursuant to §552.108(a)(2) after I informed Kimberly Fuchs that the term of the Deferred Prosecution Agreement had expired without any violation of its conditions.

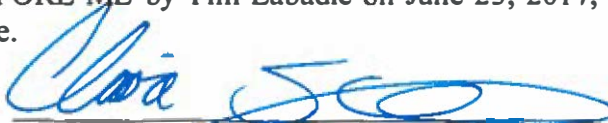
10. "Since the term of the Deferred Prosecution Agreement that which was the subject of No. D-1-GV-13-000550, had not been completed, I was asked by Matthew Entsminger to submit a new brief explaining why §552.108(a)(1) excepted the agreement from disclosure. Exhibit C is a true and correct copy of the new brief I provided to Mr. Entsminger. Thereafter, an Agreed Final Judgment was rendered in No. D-1-GV-13-000550, allowing the County Attorney to withhold the DPA pursuant to §552.108(a)(1).

11. "Attached as Exhibit D is a true and correct copy of Ken Paxton's response to Plaintiff's Request for Disclosure, First Request for Admissions, and First Set of Interrogatories."

  
TIM LABADIE

SUBSCRIBED AND SWORN TO BEFORE ME by Tim Labadie on June 23, 2017, to certify which witness my hand and seal of office.



  
Notary Public in and for the State of Texas

## Tim Labadie

---

**From:** Tim Labadie  
**Sent:** Friday, July 19, 2013 4:34 PM  
**To:** Elizabeth Winn  
**Subject:** pia cases

Elizabeth,

I have been speaking to Kim Fuchs at the AG's office about our Deferred Prosecution Agreement (DPA) cases. She has suggested that I explain our position so that she might be able to craft a resolution to the lawsuits.

Kim also told me that future problems could be avoided if we rely on 552.108(a)(1) rather than (a)(2) if the term of the DPA hasn't expired. (Turns out that in one our pending cases, the DPA term was over by the time the PIA request was made.

Here's what I've drafted to send to Kim. Let me know if you see any problems with it:

As you know, in both GV-13-000561 and GV-13-000550, we are claiming that a Deferred Prosecution Agreement is exempt from disclosure under § 552.108(a)(2) of the PIA, which exempts "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."

As I understand the Attorney General's position, § 552.108(a)(2) is applicable only to information pertaining to a closed case that did not result in a conviction or deferred adjudication. If the case is not closed, according to the Attorney General, then a governmental body must rely on § 552.108(a)(1), which exempts from disclosure information the release of which "would interfere with the detection, investigation, or prosecution of a crime."

The reason we relied on § 552.108(a)(2) rather than § 552.108(a)(1) is that the criminal cases against Thomas Schuller and Todd Piccirello were dismissed after the Deferred Prosecution Agreements were made. So both cases were closed by dismissal and neither case resulted in a conviction or deferred adjudication.

The Attorney General has rejected the application of § 552.108(a)(2) to a Deferred Prosecution Agreement, reasoning that "should the defendant fail to adhere to the terms of the agreement, the case could ultimately result in a conviction or deferred adjudication." See ORD2013-09881 at p. 3. While this is close to being a correct understanding of a Deferred Prosecution Agreement, it misses a significant aspect of such an arrangement. After the prosecutor and the defendant agree to defer prosecution, the criminal case, rather than remaining pending during the term of the agreement, is dismissed. If the defendant fulfills the terms of the agreement, nothing more is done by the prosecutor. If the defendant does not fulfill the terms of the agreement, the prosecutor can file a new criminal case with a new criminal number rather than reviving the first criminal case, since it was closed by dismissal.

EXHIBIT <sup>1</sup>A

In this respect, a dismissal following a Deferred Prosecution Agreement is no different from a dismissal without a Deferred Prosecution Agreement. In both cases, another criminal action can be filed against the defendant. This begs the question of whether the Attorney General's office requires a governmental body to rely upon § 552.108(a)(1) when a criminal case is dismissed without a Deferred Prosecution Agreement?

I would also bring to your attention that in the Thomas Schuller matter (GV-13-000561), the term of the Deferred Prosecution Agreement (18 months) had expired and he had complied with its provisions by the time the PIA request was made. This agreement was signed on September 14, 2011 and the criminal case was dismissed the same day. The 18-month period of this agreement started on September 15, 2011, the day of the dismissal, and ended on March 14, 2013. On March 29, 2013, Duane Daniels made his request under the PIA for the documents pertaining to the criminal case against Mr. Schuller. Moreover, I have been informed that Mr. Schuller complied with the Deferred Prosecution Agreement. Thus, even if the criminal case against Mr. Schuller was not closed when it was dismissed on September 14, 2011, it was closed by the time Mr. Daniels made his request for documents pertaining to this case.

I hope this information is useful for determining an appropriate resolution to GV-13-000561 and GV-13-000550.

**Tim Labadie**

---

**From:** Tim Labadie  
**Sent:** Friday, July 19, 2013 4:53 PM  
**To:** 'Fuchs, Kimberly'  
**Subject:** GV-13-000561 & 550

Kim,

As you know, in both GV-13-000561 and GV-13-000550, we are claiming that a Deferred Prosecution Agreement is exempt from disclosure under § 552.108(a)(2) of the PIA, which exempts "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."

As I understand the Attorney General's position, § 552.108(a)(2) is applicable only to information pertaining to a closed case that did not result in a conviction or deferred adjudication. If the case is not closed, according to the Attorney General, then a governmental body must rely on § 552.108(a)(1), which exempts from disclosure information the release of which "would interfere with the detection, investigation, or prosecution of a crime."

The reason we relied on § 552.108(a)(2) rather than § 552.108(a)(1) is that the criminal cases against Thomas Schuller and Todd Piccirello were dismissed after the Deferred Prosecution Agreements were made. So both cases were closed by dismissal and neither case resulted in a conviction or deferred adjudication.

The Attorney General has rejected the application of § 552.108(a)(2) to a Deferred Prosecution Agreement, reasoning that "should the defendant fail to adhere to the terms of the agreement, the case could ultimately result in a conviction or deferred adjudication." See ORD2013-09881 at p. 3. While this is close to being a correct understanding of a Deferred Prosecution Agreement, it misses a significant aspect of such an arrangement. After the prosecutor and the defendant agree to defer prosecution, the criminal case, rather than remaining pending during the term of the agreement, is dismissed. If the defendant fulfills the terms of the agreement, nothing more is done by the prosecutor. If the defendant does not fulfill the terms of the agreement, the prosecutor can file a new criminal case with a new criminal number rather than reviving the first criminal case, since it was closed by dismissal.

In this respect, a dismissal following a Deferred Prosecution Agreement is no different from a dismissal without a Deferred Prosecution Agreement. In both cases, another criminal action can be filed against the defendant. This begs the question of whether the Attorney General's office requires a governmental body to rely upon § 552.108(a)(1) when a criminal case is dismissed without a Deferred Prosecution Agreement?

I would also bring to your attention that in the Thomas Schuller matter (GV-13-000561), the term of the Deferred Prosecution Agreement (18 months) had expired and he had

1  
EXHIBIT B

complied with its provisions by the time the PIA request was made. This agreement was signed on September 14, 2011 and the criminal case was dismissed the same day. The 18-month period of this agreement started on September 15, 2011, the day of the dismissal, and ended on March 14, 2013. On March 29, 2013, Duane Daniels made his request under the PIA for the documents pertaining to the criminal case against Mr. Schuller. Moreover, I have been informed that Mr. Schuller complied with the Deferred Prosecution Agreement. Thus, even if the criminal case against Mr. Schuller was not closed when it was dismissed on September 14, 2011, it was closed by the time Mr. Daniels made his request for documents pertaining to this case.

I hope this information is useful for determining an appropriate resolution to GV-13-000561 and GV-13-000550.

I have amended the petition in GV-13-000561 and will soon be faxing a copy to you.

Thanks,  
Tim

**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> ST., SUITE 420  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
AUSTIN, TEXAS 78767

(512) 854-9513  
FAX: (512) 854-4808



**ENFORCEMENT DIVISION**

SHARON TALLEY, DIRECTOR

TIM LABADIE

NEIL KUCERA

ANNALYNN COX

GARY D. MARTIN

RYAN FITE

September 12, 2013

Mr. Matthew R. Entsminger  
Office of the Attorney General of Texas—Open Records Litigation  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Cause No. D-1-GV-13-000550; *David A. Escamilla, Travis County Attorney v. Greg Abbott, Attorney General* (Related to Original Request from Doug Johnson on 03/05/2013) - Supplemental Brief

Dear Mr. Entsminger:

Per your request, we are hereby submitting a new brief in the above-referenced cause, in reference to the original request from Doug Johnson on March 5, 2013.

**Background**

On behalf of the Travis County Sheriff's Office, and under Government Code section 552.301, David A. Escamilla, Travis County Attorney, requested a ruling regarding an open records request received from Doug Johnson on March 5, 2013 for "all information associated with case number 12-24231," which relates to criminal charges against Todd Adam Piccirello. On May 16, 2013, your office, in part, ruled that Escamilla must release the deferred prosecution agreement, one of the documents responsive to the open records request. By this agreement, Mr. Piccirello is subject to certain conditions until the expiration of one year from January 11, 2013. Even though the criminal case against Todd Adam Piccirello was dismissed, Abbott rejected the application of §552.108(a)(2) to a Deferred Prosecution Agreement, reasoning that "should the defendant fail to adhere to the terms of the agreement, the case could ultimately result in a conviction or deferred adjudication." On June 17, 2013, Escamilla filed suit against Abbott challenging this ruling. On August 20, 2013, your office requested a brief as to why §552.108(a)(1) should apply instead. Further, we were advised that a copy to the requestor is not necessary.

**Brief**

As a result of negative rulings relating to a non-concluded deferred prosecution

agreement, we hereby object to the release of the deferred prosecution agreement in Case Number 12-24231, related to cause number C-1-CR-12-401671, in which the deferred prosecution agreement period has not concluded. We contend that this agreement is exempt from disclosure pursuant to §552.108(a)(1) of the Government Code, which states in pertinent 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:

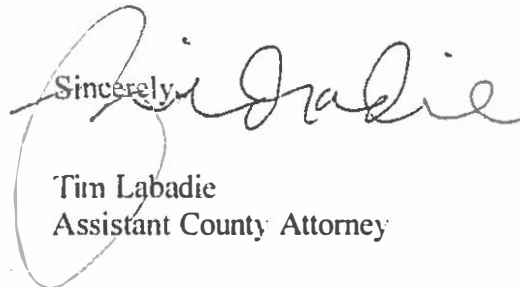
(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

The requested information is excepted from disclosure because, while the criminal case against Mr. Piccirello was dismissed after the execution of a deferred prosecution agreement, Mr. Piccirello remains obligated to fulfill the terms of that agreement until January 10, 2014. While it is unlikely that a new criminal case will be filed against Mr. Piccirello, such could happen if he does not fully comply with the terms of the deferred prosecution agreement. Thus, release of the deferred prosecution agreement would interfere with the detection, investigation, or prosecution of crime.

If you agree that the deferred prosecution agreement is exempt from disclosure under §552.108(a)(1), we hope to receive a ruling to withhold this agreement. Additionally, we would appreciate it if your office would prepare a protective order to prevent the release of the deferred prosecution agreement.

If you have any questions, please contact me at (512) 854-5864, or by e-mail at [tim.labadie@co.travis.tx.us](mailto:tim.labadie@co.travis.tx.us).

Sincerely,



Tim Labadie  
Assistant County Attorney



DAVID A. ESCAMILLA, TRAVIS  
COUNTY ATTORNEY,  
*Plaintiffs,*

v.

KEN PAXTON, ATTORNEY GENERAL  
OF TEXAS,  
*Defendant.*

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

261st JUDICIAL DISTRICT

**DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUESTS FOR  
DISCLOSURE, FIRST REQUEST FOR ADMISSIONS, AND FIRST SET OF  
INTERROGATORIES**

To: Plaintiff David A. Escamilla, Travis County Attorney, by-and-through his attorney of record Tim Labadie, Assistant Travis County Attorney, P.O. Box 1748, Austin, Texas 78767.

**I. REQUESTS FOR DISCLOSURE**

1. The name, address, and telephone number of any potential parties.

**Response:** Defendant is not aware of any other potential parties.

2. The legal theories and, in general, the factual bases of the responding parties claims or defenses.

**Response:** Plaintiff bears the burden of demonstrating an express, recognized exception to disclosure applies to the information at issue. *Thomas v. Cornyn*, 71 S.W.3d 473, 480–81 (Tex. App.—Austin 2002, no pet.). A governmental body may not withhold a deferred prosecution agreement pursuant to the law enforcement exception, Tex. Gov't Code § 552.108(a)(1), if the agreement has been negotiated with, executed by, and provided to the criminal defendant. The release of such information would not interfere with the detection, investigation, or prosecution of crime.

3. The name, address, and telephone number of persons having knowledge of relevant facts and a brief statement of each identified person's connection with the case.

**Response:** Persons having personal knowledge of the relevant facts which support the claimed exception to disclosure are under the control or knowledge of Plaintiff. Plaintiff has the burden of establishing the applicability of any exception to disclosure that would protect the information at issue from public release. At this time, Defendant knows of no persons not already known to Plaintiff who would

EXHIBIT D

have knowledge of the relevant facts. Defendant will supplement as necessary under the rules of procedure.

4. For any testifying expert...

**Response:** None.

5. All documents, electronic information, and tangible items that you have in your possession, custody, or control and may use to support your claims or defenses.

**Response:** Attorney General Open Records Letter Ruling OR2016-21139 (2016).

## **II. REQUESTS FOR ADMISSIONS**

1. On April 22, 2016, you received from the Travis County Attorney's Office a request for a ruling concerning an open records request made of it by Tara Coronado to obtain a copy of a Deferred Prosecution Agreement made in connection with cause number C-1-CR-13-180014.

**ADMIT**

2. Attached hereto as Exhibit A is a true and correct copy of the request for ruling mentioned in RFA No. 1.

**ADMIT**

3. On May 6, 2016, you issued memorandum opinion No. OR2016-10351 in response to the request for ruling mentioned in RFA No. 1.

**ADMIT**

4. Attached hereto as Exhibit B is a true and correct copy of OR2016-10351.

**ADMIT**

5. On May 6, 2016, you ruled in OR2016-10351 that, pursuant to section 552.108(a)(1) of the Government Code, the Travis County Attorney's Office could withhold from disclosure the Deferred Prosecution Agreement made in connection with cause number C-1-CR-13-180014.

**ADMIT**

6. On July 15, 2016, you received from the Travis County Attorney's Office a request for a ruling concerning an open records request made of it by Laura Bates to obtain, among other documents, a copy of a Deferred Prosecution Agreement made in connection with cause number C-1-CR-13-180014.

**ADMIT**

7. Attached hereto as Exhibit C is a true and correct copy of the request for ruling mentioned in RFA No. 6.

**ADMIT**

8. On September 19, 2016, you issued OR2016-21139 in response to the request for ruling mentioned in RFA No. 6.

**ADMIT**

9. Attached hereto as Exhibit D is a true and correct copy of OR2016-21139.

**ADMIT**

10. On September 19, 2016, you ruled in OR2016-21139 that the Travis County Attorney's Office had to release the Deferred Prosecution Agreement made in connection with cause number C-1-CR-13-180014.

**ADMIT – with the exception of the “date of birth of a member of the public,” which the Attorney General ruled the County must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.**

11. The Deferred Prosecution Agreement that is the subject of OR2016-10351 is the same Deferred Prosecution Agreement that is the subject of OR2016-21139.

**Cannot admit or deny – The Attorney General does not retain and cannot identify the specific records that were at issue in prior open records rulings, and cannot admit or deny the records submitted in those two instances were identical.**

12. At the time the Travis County Attorney's Office received the open records request from Laura Bates for the Deferred Prosecution Agreement made in connection with cause number C-1-CR-13-180014, the Travis County Attorney's Office had previously requested and received a ruling from you concerning this Deferred Prosecution Agreement.

**ADMIT**

13. At the time the Travis County Attorney's Office received the open records request from Laura Bates for the Deferred Prosecution Agreement made in connection with cause number C-1-CR-13-180014, you had previously ruled that this Deferred Prosecution Agreement is excepted from disclosure under the Public Information Act.

**ADMIT**

14. The law on which OR2016-10351 was based has not changed since the issuance of OR2016-10351.

**ADMIT**

15. The facts on which OR2016-10351 was based have not changed since the issuance of OR2016-10351.

**Cannot admit or deny – The Attorney General is not aware of any change in the “facts on which OR2016-10351 was based”; however, any facts surrounding the deferred prosecution agreement at issue or the underlying criminal matter are known to the County and are not known to the Attorney General. The Attorney General is aware only that Plaintiff sought a second open records ruling from the Attorney General concerning the deferred prosecution agreement.**

16. The circumstances on which OR2016-10351 was based have not changed since the issuance of OR2016-10351.

**Cannot admit or deny – The Attorney General is not aware of any change in the “circumstances on which OR2016-10351 was based”; however, any circumstances surrounding the deferred prosecution agreement at issue or the underlying criminal matter are known to the County and are not known to the Attorney General. The Attorney General is aware only that Plaintiff sought a second open records ruling from the Attorney General concerning the deferred prosecution agreement.**

17. OR2016-21139 is an Open Records Letter Ruling.

**ADMIT**

18. Open Records Letter Rulings are based on established law.

**ADMIT**

19. You do not change the law regarding the Public Information Act by Open Records Letter Rulings.

**ADMIT**

### **III. INTERROGATORIES**

1. If your answer to RFA No. 14 is anything other than an admission, please state what was the law that OR2016-10351 was based, the changes to that law, when that law was changed, and why the law was changed.

**Answer to RFA No. 14 is an admission.**

2. If your answer to RFA No. 15 is anything other than an admission, please identify all facts on which OR2016-10351 was based that you contention have changed since the issuance of OR2016-10351.

**The Attorney General does not contend the facts on which OR2016-10351 was based have necessarily changed. The Attorney General does not possess personal knowledge of the facts surrounding the deferred prosecution agreement at issue. The Attorney General is aware only that Plaintiff sought a second open records ruling from the Attorney General concerning the deferred prosecution agreement.**

3. If your answer to RFA No. 16 is anything other than an admission, please identify all circumstances on which OR2016-10351 was based that have changed since the issuance of OR2016-10351.

**The Attorney General does not contend the circumstances on which OR2016-10351 was based have necessarily changed. The Attorney General does not possess personal knowledge of the circumstances surrounding the deferred prosecution agreement at issue. The Attorney General is aware only that Plaintiff sought a second open records ruling from the Attorney General concerning the deferred prosecution agreement.**

4. Please identify all of your rulings prior to OR2016-21139 wherein you ruled that a Deferred Prosecution Agreement could not be withheld under section 552.108(a)(1).

**Objection: Not within the scope of discovery. Interrogatory seeks irrelevant information that will not lead to admissible evidence. The narrow question of law before the Court concerns whether the particular requested information at issue is subject to a recognized exception to required disclosure under the Public Information Act. Prior informal open records letters rulings have no bearing on this question of law.**

**Objection: Burdensome and overbroad. The Attorney General does not retain and cannot identify the specific records that were at issue in prior open records rulings. Moreover, the Attorney General may determine section 552.108 does not apply to a submitted record for any number of reasons unrelated to the content of the record itself, such as for procedural violations of the Public Information Act.**

5. Please describe in detail the procedure or mechanism you employed or followed to change the law on which OR2016-10351 was based.

**Objection: Form. The Attorney General did not “change the law on which OR2016-10351 was based.”**

**Objection: Not within the scope of discovery. Interrogatory seeks irrelevant information that will not lead to admissible evidence. The narrow question of law before the Court concerns whether the particular requested information at issue is subject to a recognized exception to required disclosure under the Public Information Act. Prior informal open records letters rulings have no bearing on this question of law.**

#### **IV. REQUESTS FOR PRODUCTION**

1. If your answer to RFA No. 14 is anything other than an admission, please produce all documents and tangible things that support, relate to, or pertain to your contention that the law on which OR2016-10351 was based has changed since the issuance of OR2016-10351.

**Answer to RFA No. 14 is an admission.**

2. If your answer to RFA No. 15 is anything other than an admission, please produce all documents and tangible things that support, relate to, or pertain to your contention that the facts on which OR2016-10351 was based have changed since the issuance of OR2016-10351.

**The Attorney General does not contend the facts on which OR2016-10351 was based have necessarily changed. The Attorney General does not possess personal knowledge of the facts surrounding the deferred prosecution agreement at issue. The Attorney General is aware only that Plaintiff sought a second open records ruling from the Attorney General concerning the deferred prosecution agreement.**

3. If your answer to RFA No. 16 is anything other than an admission, please produce all documents and tangible things that support, relate to, or pertain to your contention that the circumstances on which OR2016-10351 was based have changed since the issuance of OR2016-10351.

**The Attorney General does not contend the circumstances on which OR2016-10351 was based have necessarily changed. The Attorney General does not possess personal knowledge of the circumstances surrounding the deferred prosecution agreement at issue. The Attorney General is aware only that Plaintiff sought a second open records ruling from the Attorney General concerning the deferred prosecution agreement.**

Respectfully submitted,

KEN PAXTON  
Attorney General of Texas

JEFFREY C. MATEER  
First Assistant Attorney General

BRANTLEY STARR  
Deputy First Assistant Attorney General

JAMES E. DAVIS  
Deputy Attorney General for Civil Litigation

NICHOLE BUNKER-HENDERSON  
Chief, Administrative Law Division

/s/ Matthew R. Entsminger

MATTHEW R. ENTSMINGER  
State Bar No. 24059723  
Chief, Open Records Litigation  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4151  
Facsimile: (512) 457-4686  
matthew.entsminger@oag.texas.gov

ATTORNEYS FOR DEFENDANT KEN PAXTON,  
ATTORNEY GENERAL OF TEXAS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served, on January 6, 2017, on the following attorney-in-charge, by e-mail:

TIM LABADIE  
State Bar No. 11784853  
Assistant Travis County Attorney  
P. O. Box 1748  
Austin, Texas 78767  
Telephone: (512) 854-5864  
Facsimile: (512) 854-9316  
Email: tim.labadie@traviscountytexas.gov

ATTORNEY FOR PLAINTIFF

/s/ Matthew R. Entsminger  
MATTHEW R. ENTSMINGER  
ATTORNEY FOR DEFENDANT



**VERIFICATION**

STATE OF TEXAS

§

COUNTY OF TRAVIS

§

§

BEFORE ME, the undersigned notary public, on this day personally appeared Debbie Lee, who by me being first duly sworn, stated upon their oath that the above interrogatories are true and correct and are within their personal knowledge.

SUBSCRIBED AND SWORN TO BEFORE ME, on this 6<sup>th</sup> day of January, 2017.

Debbie Lee



Margaret Evins  
NOTARY PUBLIC,  
IN AND FOR THE STATE OF TEXAS

# EXHIBIT 9

Notice sent: Final Interlocutory NoneDisp Parties: ANDisp code: CVD / CLS 4611

Redact pgs: \_\_\_\_\_

Judge TS Clerk RT

Cause No. D-1-GV-13-000561

Filed in The District Court  
of Travis County, Texas

OCT 30 2013

At 8.44A M.  
Amalia Rodriguez-Mendoza, ClerkDAVID A. ESCAMILLA,  
Travis County Attorney,  
*Plaintiff,*

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
*Defendant.*

IN THE DISTRICT COURT

201st JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

**AGREED FINAL JUDGMENT**

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which David A. Escamilla, Travis County Attorney (County Attorney), sought to withhold certain information from public disclosure. All matters in controversy between Plaintiff, the County Attorney, and Defendant, Greg Abbott, Attorney General of Texas, (Attorney General) arising out of this lawsuit have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Mr. Duane Daniels, on OCT. 11, 2013, informing him of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement allowing the County Attorney to withhold the information at issue. The requestor was also informed of his right to intervene in the



suit to contest the withholding of this information. A copy of the certified mail receipt is attached to this motion.

The requestor has not filed a motion to intervene. Tex. Gov't Code § 552.325(d) requires the Court to allow a requestor a reasonable period to intervene after notice is attempted by the Attorney General. A copy of the certified mail receipt is attached to this agreed final judgment.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

**IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:**

1. The County Attorney and the Attorney General have agreed that in accordance with the PIA and under the facts presented, the information at issue, the deferred prosecution agreement pertaining to Thomas Shuller, can be withheld from the requestor pursuant to Tex. Govt. Code Section 552.108(a)(2).
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims between the County Attorney and the Attorney General and is a final judgment.

SIGNED the 30<sup>th</sup> day of October, 2013.

  
PRESIDING JUDGE

*Tim Spalak*

Agreed Final Judgment  
Cause No. D-1-GV-13-000561

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on 6-23-17

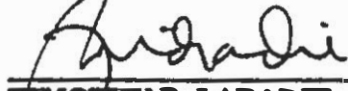
Page 2 of 3



VELVA L. PRICE  
DISTRICT CLERK  
By Deputy *Joseph R. Rimm*

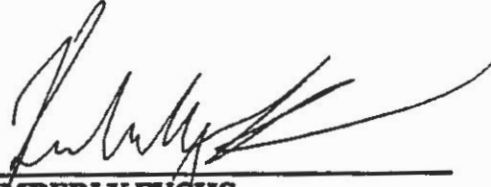


AGREED:



**TIMOTHY R. LARADIE**  
State Bar No. 11784853  
Assistant County Attorney  
P.O. Box 1748  
Austin, Texas 78767-1748  
Telephone: (512) 854-9513  
Facsimile: (512) 854-4808

ATTORNEY FOR PLAINTIFF



**KIMBERLY FUCHS**  
State Bar No. 24044140  
Chief, Open Records Litigation  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4195  
Facsimile: (512) 320-0167

ATTORNEY FOR DEFENDANT



# EXHIBIT 10

Notice sent: Final interlocutory None

DC

SK13319 PG500

DispParties: ALL

Disp code: CVD/CLS 4/6/11

Redact pgs: \_\_\_\_\_

Judge SKH Clerk VM

CAUSE NO. D-1-GV-13-000550

Filed in The District Court  
of Travis County, Texas

NOV 12 2013

At S. Hernandez M.  
Angela Rodriguez-Mendoza, Clerk

DAVID A. ESCAMILLA, TRAVIS  
COUNTY ATTORNEY  
Plaintiff,

v.

GREG ABBOTT, ATTORNEY  
GENERAL OF TEXAS  
Defendant.

§ IN THE DISTRICT COURT OF

§ 261st JUDICIAL DISTRICT

§ TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552. All matters in controversy between Plaintiff David A. Escamilla, Travis County Attorney (the County Attorney) and Defendant, Greg Abbott, Attorney General of Texas (the Attorney General) have been resolved, and the parties agree to the entry and filing of an agreed final judgment.

Texas Government Code section 552.325(d) requires the Court to allow the requestor of information a reasonable period of time to intervene after notice of the intent to enter into settlement is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by certified letter to the requestor, Mr. Doug Johnson, on 10/1/13, providing reasonable notice of this setting (see attached certified mail receipt). The requestor was informed of the parties' agreement that County Attorney may withhold the information at issue in this suit. The requestor was also informed of his right to intervene in the suit to contest the withholding of the information. The requestor has neither informed the parties of his intention to intervene, nor has a motion to intervene been filed.

P103



After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties in this suit.

**IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:**

1. The County Attorney and the Attorney General have agreed that, in accordance with the PLA and under the facts presented, the information at issue in this suit is generally excepted from disclosure pursuant to Tex. Gov't Code § 552.108(a)(1) (hereinafter, the Excepted Information);

2. With the exception of basic information, which must be released to the requestor pursuant to Tex. Gov't Code § 552.108(c), the County Attorney may withhold the Excepted Information described in Paragraph 1 of this order;

3. All court cost and attorney fees are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between the County Attorney and the Attorney General in this cause and is a final judgment.

SIGNED this 12<sup>th</sup> day of November, 2013.

  
JUDGE PRESIDING

I, VELVA L. PRICE, District Clerk,  
Travis County, Texas, do hereby certify that this is  
a true and correct copy as same appears of  
record in my office. Witness my hand and seal of  
office on 6-23-17



VELVA L. PRICE

DISTRICT CLERK

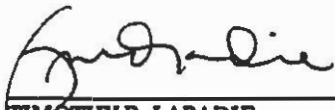
By Deputy: 

P243



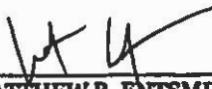


AGREED:



**TIMOTHY R. LABADIE**  
State Bar No. 11784853  
Assistant County Attorney  
P.O. Box 1748  
Austin, Texas 78767-1748  
Telephone: (512) 854-9513  
Facsimile: (512) 854-4808  
tim.labadie@co.travis.tx.us

**ATTORNEY FOR PLAINTIFF**



**MATTHEW R. ENTSMINGER**  
State Bar No. 24059723  
Assistant Attorney General  
Open Records Litigation  
Administrative Law Division  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4151  
Facsimile: (512) 457-4686  
matthew.entsminger@texasattorneygeneral.gov

**ATTORNEY FOR DEFENDANT**

P 3 of 3



# EXHIBIT 11

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

**AFFIDAVIT OF ELIZABETH HANSHAW WINN**

THE STATE OF TEXAS §  
§  
COUNTY OF TRAVIS §

Before me, the undersigned authority, personally appeared Elizabeth Hanshaw Winn, known to me to be the person whose name is subscribed to this affidavit, and, being first duly sworn, deposed as follows:

1. "My name is Elizabeth Hanshaw Winn, I am over twenty-one years of age, I am of sound mind and I am authorized to make this affidavit. All the statements contained herein are within my personal knowledge and are true and correct.

2. "I am an Assistant County Attorney, employed by the Travis County Attorney's Office. From September 2012 to January 2015, I was the Assistant County Attorney assigned to handle requests made under the Texas Public Information Act.

3. "In 2013 it was my practice to assert §552.108(a)(2) as the basis for excepting Deferred Prosecution Agreements from disclosure under the Public Information Act, asserting that since the criminal case is dismissed after the signing of a

Deferred Prosecution Agreement, the request relates to a criminal prosecution that did not result in a conviction or deferred adjudication.

4. "In July 2013, after our office filed four lawsuits challenging four Attorney General rulings that §552.108(a)(2) was not applicable when the term of the Deferred Prosecution Agreement had not been completed, I was informed by Tim Labadie, another Assistant Travis County Attorney, that the Attorney General's office had instructed us to assert §552.108(a)(2) only when the term of the Deferred Prosecution Agreement had ended and to assert §552.108(a)(1) when the term had not ended.

5. "Attached as Exhibit A is a true and correct copy of my March 24, 2014 letter to the Attorney General's office seeking a ruling that a Deferred Prosecution Agreement being sought under the PIA was excepted from disclosure pursuant to §552.108(a)(2) since the term of the agreement had expired. Attached as Exhibit B is a true and correct copy of the Attorney General's ruling that the information could be withheld pursuant to §552.108(a)(2).

6. "Attached as Exhibit C is a true and correct copy of my June 3, 2014 letter to the Attorney General's office seeking a ruling that a Deferred Prosecution Agreement being sought under the PIA was excepted from disclosure pursuant to §552.108(a)(2) since the term of the agreement had expired. Attached as Exhibit D is a true and correct copy of the Attorney General's ruling that the information could be withheld pursuant to §552.108(a)(2)."



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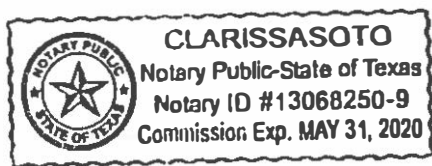
Elizabeth Hanshaw Winn  
Assistant Travis County Attorney


THE STATE OF TEXAS

COUNTY OF TRAVIS

On this day personally appeared the person known to me to be Elizabeth Hanshaw Winn, who, after have been duly sworn, stated that she is over the age of 21 years, that she is competent to make an oath, that she has read the above and foregoing affidavit of Elizabeth Hanshaw Winn, that she has personal knowledge of all facts and matters stated in this affidavit, and that all facts and matters stated therein are true and correct.

SWORN TO AND SUBSCRIBED before me on June 23, 2017.



  
Notary Public, State of Texas  
My commission expires: 5/31/2020

**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRANGER BLDG., SUITE 420  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
AUSTIN, TEXAS 78767

(512) 854-9513  
FAX: (512) 854-4808



**TRANSACTIONS DIVISION**

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

MARY ETTA GERHARDT

TENLEY A. ALDREDGE

JAMES M. CONNOLLY

DANIEL BRADFORD

ELIZABETH H. WINN

† Member of the College  
of the State Bar of Texas

March 24, 2014

**Hand Delivered**

Ms. Amanda Crawford, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request from **Gene Anthes** on **3/12/2014**—Request for Ruling and  
Supplemental Brief

Dear Ms. Crawford:

On behalf of the Travis County Attorney's Office, and under Government Code section 552.301, we request a ruling for this open records request. Below is our supplemental brief setting forth the exceptions to disclosure.

By copy of this letter, we are informing the requestor that we wish to withhold the requested information, and that we are asking for a decision from your office.

**The requested information is excepted from disclosure under section 552.108(a)(2).**

Government Code section 552.108(a)(2) states:

(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 . . .

(2) it is 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[.]

Here, the requested information relates to a criminal investigation that resulted in a deferred prosecution agreement, and the terms of the deferred prosecution agreement

EXHIBIT A

have been completed without the case concluding in a conviction or deferred adjudication. Accordingly, we assert that this information may be withheld under Government Code section 552.108(a)(2). We have sent a representative sample for your review.

In conclusion, we ask that you rule on whether the enclosed information must be released to the requestor. If you have any questions, please contact me at (512) 854-4168, or by e-mail at [elizabeth.winn@co.travis.tx.us](mailto:elizabeth.winn@co.travis.tx.us).

Sincerely,

Elizabeth Hanshaw Winn  
Assistant County Attorney

Enclosures: request letter, the requested information.

c:

Gene Anthes  
Gunter & Bennett, P.C.  
600 West Ninth Street  
Austin, Texas 78701  
(via email [gene@gunterandbennett.com](mailto:gene@gunterandbennett.com), without enclosures)

Tex. Atty. Gen. Op. OR2014-05290 (Tex.A.G.), 2014 WL 1654911

Office of the Attorney General

State of Texas  
Informal Letter Ruling No.

**OR2014**

-

**05290**

March 31, 2014

**\*I** Re: Request for a copy of the deferred prosecution agreement regarding a named individual and Cause No. C-I-CR-10-208750

Ms. Elizabeth Hanshaw Winn  
Assistant County Attorney  
County of Travis  
P.O. Box 1748  
Austin, Texas 78767

Dear Ms. Winn:

The Office of the Attorney General has received your request for a ruling and assigned your request ID# 524098.

After reviewing your arguments and the submitted information, we have determined your request does not present a novel or complex issue. Thus, we are addressing your claims in a memorandum opinion. You claim the submitted information may be withheld from the requestor pursuant to section 552.108(a)(2) of the Government Code. We have considered your arguments and the submitted information and have determined that in accordance with section 552.108(a)(2) you may withhold the submitted information.

For more information on the cited exception, please refer to the open government information on our website at [https:// www.oag.state.tx.us/open/memorulings.shtml](https://www.oag.state.tx.us/open/memorulings.shtml). You may also contact our Open Government Hotline at 1-877-OPENTEX.

Tex. Atty. Gen. Op. OR2014-05290 (Tex.A.G.), 2014 WL 1654911

EXHIBIT B



**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRANGER BLDG., 5<sup>TH</sup> FLOOR  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
AUSTIN, TEXAS 78767

(512) 854-9513  
FAX: (512) 854-4808



**TRANSACTIONS DIVISION**

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

MARY ETTA GERHART

TENLEY A. ALDREDGE

DANIEL BRADFORD

ELIZABETH H. WINN

JENNIFER KRABER

† Member of the College  
of the State Bar of Texas

June 3, 2014

**Hand Delivered**

Ms. Amanda Crawford, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Two Requests from **Samuel E. Bassett** on 5/27/2014<sup>1</sup>—Request for  
Ruling and Supplemental Brief

Dear Ms. Crawford:

On behalf of the Travis County Attorney's Office ("TCAO"), and under Government Code section 552.301, we request a ruling for the two open records requests submitted by requestor.

Cause No. C-1-CR-04-659923 (request for ruling only)

The Travis County Attorney's Office asserts that the requested information is excepted from disclosure under sections 552.101-552.153 of the Act, along with the exceptions incorporated therein. Accordingly, we are asking for a decision from your office with respect to the requested information. By copy of this letter, we are informing the requestor that we wish to withhold the requested information and that we are asking for a decision from your office.

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<sup>1</sup> The offices referenced above received the requestor's request on May 19, 2014. The Travis County Attorney's Office ("TCAO") contacted the requestor on May 27, 2014 in a good faith effort to seek a clarification in light of the confusing statutory reference in the request. We received the requestor's clarification on May 27, 2014. On receipt of the requestor's clarification, the receipt date of requestor's open records request was deemed to be May 27, 2014. *See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

A supplemental brief setting forth the applicability of the above-referenced exceptions and representative samples of the requested information will be submitted to your office within fifteen business days after receipt of the request.

Cause Nos. C-1-CR-09-203740, C-1-CR-10-205142, C-1-CR-11-203235 (request for ruling and supplemental brief)

Below is our supplemental brief setting forth the exceptions to disclosure.

By copy of this letter, we are informing the requestor that we wish to withhold some of the requested information, and that we are asking for a decision from your office. Some of the responsive information will be released to the requestor.

**Alternatively, the requested information is excepted from disclosure under section 552.108.**

Section 552.108 of the Government Code states in pertinent 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:

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

.....

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

- (c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's entire file is necessarily a request for work product because "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380 (quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding)).

In this instance, the requestor seeks "...any and all information contained in the file maintained by your office...for Deferred Prosecution Agreement for Cause No. C-1-CR-09-203740..." and in the second request "...any and all information contained in the file maintained by your office...for Deferred Prosecution Agreements for Cause Nos. C-1-CR-10-205142, C-1-CR-11-203235 ..." We believe that the request essentially encompasses requests for the County Attorney's Office's entire prosecution files. All of the requested information was created or assembled by prosecutors in anticipation of or in the course of preparing for criminal litigation; in addition, *Curry* provides that the release of the requested information would reveal the mental impressions or legal reasoning of prosecutors in the County Attorney's Office. Accordingly, we believe that the County Attorney's Office may withhold the requested information pursuant to subsections (a)(4) and (b)(3) of section 552.108 of the Government Code. To the extent that your office finds that *Curry* is not applicable, we assert in the alternative that all prosecutor notes are excepted from disclosure under subsections (a)(4) and (b)(3) because they were prepared by a prosecutor in anticipation of or in the course of preparing for criminal litigation and contain the prosecutor's mental impressions. We have sent representative samples for your review.

**The requested information is excepted from disclosure under section 552.108(a)(2).**

Government Code section 552.108(a)(2) states:

(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 . . .

(2) it is 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[.]

Here, the requested information relates to criminal investigations that resulted in deferred prosecution agreements, and the terms of the deferred prosecution agreements have been completed without the case concluding in a conviction or deferred adjudication.

Accordingly, we assert that this information may be withheld under Government Code section 552.108(a)(2). We have sent a representative samples for your review.

In conclusion, we ask that you rule on whether the enclosed information must be released to the requestor. If you have any questions, please contact me at (512) 854-4168, or by e-mail at [elizabeth.winn@co.travis.tx.us](mailto:elizabeth.winn@co.travis.tx.us).

Sincerely,

Elizabeth Hanshaw Winn  
Assistant County Attorney

Enclosures: request letter, representative sample of requested information.

c:

Samuel E. Bassett  
Minton, Burton, Bassett, & Collins, P.C.  
1100 Guadalupe Street  
Austin, TX 78701  
(via fax to 512-479-8315, without enclosures)

Tex. Atty. Gen. Op. OR2014-13728 (Tex.A.G.), 2014 WL 4688731

Office of the Attorney General

State of Texas  
Informal Letter Ruling No.

**OR2014**

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**13728**

August 7, 2014

\*1 Ms. Elizabeth Hanshaw Winn  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767-1748

Dear Ms. Winn:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 532049.

The Travis County Attorney's Office (the "county attorney's office") received four requests from the same requestor for all information related to specified deferred prosecution agreements. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A). You inform us the submitted information relates to criminal investigations that resulted in deferred prosecution agreements. You further state the terms of the deferred prosecution agreements have been completed without the cases concluding in conviction or deferred adjudication. Based upon these representations and our review, we find the submitted information relates to criminal investigations that have concluded in a final

EXHIBIT D

result other than a conviction or deferred adjudication. Accordingly, section 552.108(a)(2) is applicable to the submitted information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the county attorney's office may withhold the submitted information under section 552.108(a)(2) of the Government Code.<sup>2</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

\*2 Rahat Huq  
Assistant Attorney General  
Open Records Division

#### Footnotes

- 1 We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.
- 2 As our ruling is dispositive, we need not address your remaining argument against disclosure.

Tex. Atty. Gen. Op. OR2014-13728 (Tex.A.G.), 2014 WL 4688731

# EXHIBIT 12

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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

**DECLARATION OF ANN-MARIE SHEELY**

1. My name is Ann-Marie Sheely. I am an Assistant County Attorney, employed by the Travis County Attorney's Office, and have worked in this position from November, 1999 to present. I have been the Assistant County Attorney assigned to requests made under the Texas Public Information Act since February 17, 2015.

2. Attached as Exhibit A is a true and correct copy of my March 25, 2015 letter to the Attorney General's office seeking a ruling that a Deferred Prosecution Agreement being sought under the PIA was excepted from disclosure pursuant to §552.108(a)(2) since the term of the agreement had expired. Attached as Exhibit B is a true and correct copy of the Attorney General's ruling that the information could be withheld pursuant to §552.108(a)(2).

3. Attached as Exhibit C is a true and correct copy of my December 11, 2015 letter to the Attorney General's office seeking a ruling that a Deferred Prosecution Agreement being sought under the PIA was excepted from disclosure pursuant to §552.108(a)(1) since the term of the agreement had not expired. Attached as Exhibit D is



a true and correct copy of the Attorney General's ruling that the information could be withheld pursuant to §552.108(a)(1).

4. Attached as Exhibit E is a true and correct copy of my January 21, 2016 letter to the Attorney General's office seeking a ruling that a Deferred Prosecution Agreement being sought under the PIA was excepted from disclosure pursuant to §552.108(a)(1) since the term of the agreement had not expired. Attached as Exhibit F is a true and correct copy of the Attorney General's ruling that the information could be withheld pursuant to §552.108(a)(1).

5. Attached as Exhibit G is a true and correct copy of my January 21, 2016 letter to the Attorney General's office seeking a ruling that a Deferred Prosecution Agreement being sought under the PIA was excepted from disclosure pursuant to §552.108(a)(1) since the term of the agreement had not expired. Attached as Exhibit H is a true and correct copy of the Attorney General's ruling that the information could be withheld pursuant to §552.108(a)(1).

6. I am executing this declaration as part of my assigned duties and responsibilities as an Assistant Travis County Attorney. I declare under penalty of perjury that the foregoing is true and correct.

Executed in the \_\_\_\_\_ County, State of \_\_\_\_\_ on June \_\_\_\_\_, 2017.

---

Ann-Marie Sheely  
Assistant Travis County Attorney

**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRANGER BLDG., 5<sup>TH</sup> FLOOR  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
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(512) 854-9513  
FAX: (512) 854-4808



**TRANSACTIONS DIVISION**

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

TENLEY A. ALOREDGE

DANIEL BRADFORD

JENNIFER KRABER

ANN-MARIE SHEELY

† Member of the College  
of the State Bar of Texas

March 25, 2015

**Hand Delivered**

Mr. Justin Gordon, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request from **Stephanie Matherne** on **March 12, 2015**—Request for  
Ruling and Supplemental Brief

Dear Mr. Gordon:

The Travis County Attorney's Office and under Government Code section 552.301, we request a ruling for this open records request. Below is our supplemental brief setting forth the exceptions to disclosure.

By copy of this letter, we are informing the requestor that we wish to withhold the requested information and that we are asking for a decision from your office. We have included representative samples of the County Attorney's file for your review. In addition to the information enclosed for your review, there is a video that would also fall under the request but it is offsite. We have marked portions of the records that discuss the video and submit this is a representative sample of what is contained on the actual video.

**The requested information may be withheld under Government Code section 552.108(a)(2).**

Government Code section 552.108(a)(2) states:

(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 . . .

(2) it is 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[.]

Here, the requested information is for any and all information related to Cause No: C-1-CR-12-221078, and further specifies that she is seeking the deferred prosecution agreement, documentation of a plea deal, and the entire file. This request relates to a criminal prosecution that did not result in a conviction or deferred adjudication. The defendant in this matter entered a deferred prosecution agreement on September 10, 2013 and it was for the term of one year. The term of the agreement is complete and did not result in a conviction or deferred adjudication. Accordingly, we assert that this information may be withheld under Government Code section 552.108(a)(2).

**The responsive information is excepted from disclosure under section 552.108.**

Section 552.108 of the Government Code states in pertinent 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:

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

.....

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

- (c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

In *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994), the Texas Supreme Court held that a request for a county attorney's entire file is necessarily a request for work product because "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380 (quoting *National Union Fire Insurance Company v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993, orig. proceeding)).

In this instance, the request is for "the entire file and any information related to the case." We believe that the request essentially encompasses a request for the County Attorney's Office's entire prosecution file. All of the requested information was created or assembled by a prosecutor in anticipation of or in the course of preparing for criminal litigation; in addition, *Curry* provides that the release of the requested information would reveal the mental impressions or legal reasoning of prosecutors in the County Attorney's Office. Accordingly, we believe that the County Attorney's Office may withhold the requested information pursuant to subsections (a)(4) and (b)(3) of section 552.108 of the Government Code. To the extent that your office finds that *Curry* is not applicable, we assert in the alternative that all prosecutor notes are excepted from disclosure under subsections (a)(4) and (b)(3) because they were prepared by a prosecutor in anticipation of or in the course of preparing for criminal litigation and contain the prosecutor's mental impressions. We have sent a representative sample for your review, and marked those notations as "work product."

**Some of the requested information must be withheld under Government Code section 552.101 due to criminal history.**

Included in the file that was requested is a summary of criminal cases for the defendant. We believe this request implicates Government Code section 552.101, which excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Where an individual's criminal history information has been compiled by a government entity, the compiled information takes on a character that implicates the individual's right to privacy in a manner than the same information in an uncompiled state does not. See *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); see also Open Records Decision No. 616 at 2 (1993) (recognizing *Reporters Committee* as being incorporated into Government Code chapter 552). Part of the criminal file in this case contains criminal history of Mr. Armstrong that

was compiled for prosecution. We have marked these records with the notation "criminal history."

Additionally, some of the requested information also consists of criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") and the Texas Crime Information Center ("TCIC"). Such information is confidential under federal law and subchapter F of chapter 411 of the Government Code. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. 28 C.F.R. §20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Texas Department of Public Safety (the "DPS") is confidential. *See* Gov't Code §411.083(a); *see also id.* §§ 411.106(b), .082(2) (defining criminal history record information). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. *See id.* §411.084; *see also id.* §411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Thus, we believe that any responsive criminal history record information that was obtained from the NCIC and TCIC networks must be withheld from disclosure under section 552.101 of the Government Code. We have marked these records with the notation "criminal history."

In conclusion, we ask that you rule on whether the enclosed information and the video offsite must be released to the requestor. If you have any questions, please contact me at (512) 854-9176, or by e-mail at [ann-marie.sheely@traviscountytx.gov](mailto:ann-marie.sheely@traviscountytx.gov).

Sincerely,

Ann-Marie Sheely  
Assistant County Attorney

Enclosures: request letter, requested information.

c:

Stephanie Matherne  
Piper, Burnett, Turner, Bollier, Miller, PLLC  
6034 W. Courtyard Dr., Ste. 140  
Austin, TX 78730  
(via email to [smatherne@pbtbm.com](mailto:smatherne@pbtbm.com), without enclosures)

Tex. Atty. Gen. Op. OR2015-10333 (Tex.A.G.), 2015 WL 3798939

Office of the Attorney General

State of Texas

Informal Letter Ruling No.

**OR2015**

-

**10333**

May 28, 2015

\*1 Ms. Ann-Marie Sheely  
Assistant County Attorney  
Transactions Division  
County of Travis  
P.O. Box 1748  
Austin, Texas 78767

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 565291.

The Travis County Attorney's Office (the "county attorney's office") received a request for all information related to a specified case. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id* § 552.301(e)(1)(A). You inform us the submitted information relates to a criminal case that resulted in a deferred prosecution agreement. You further state the terms of the deferred prosecution agreement have been completed without the case concluding in conviction or deferred adjudication. Based upon these representations and our review, we find the submitted information relates to a criminal investigation that has concluded in a final

EXHIBIT B

result other than a conviction or deferred adjudication. Accordingly, section 552.108(a)(2) is applicable to the submitted information.

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the county attorney's office may withhold the submitted information under section 552.108(a)(2) of the Government Code.<sup>2</sup>

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

\*2 Paige Lay  
Assistant Attorney General  
Open Records Division

#### Footnotes

- 1 We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.
- 2 As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Tex. Atty. Gen. Op. OR2015-10333 (Tex.A.G.), 2015 WL 3798939

**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRANGER BLDG., 5<sup>TH</sup> FLOOR  
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FAX: (512) 854-4808



**TRANSACTIONS DIVISION**

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

TENLEY A. ALDREDGE

DANIEL BRADFORD

JENNIFER KRABER

ANN-MARIE SHEELY

† Member of the College  
of the State Bar of Texas

December 11, 2015

Hand Delivered

Mr. Justin Gordon, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request from **Molly Knowles** received on **11/25/2015**<sup>1</sup>—Request for Ruling and Supplemental Brief

Dear Mr. Gordon:

On behalf of the Travis County Attorney's Office ("TCAO"), and under Government Code section 552.301, we request a ruling for this open records request. Our office received this request on November 25, 2015<sup>2</sup>. Below is our supplemental brief setting forth the exceptions to disclosure. Here, Requestor seeks the initial police report and call for service, as well as the complaint filed for case number C-1-CR-10-216075. The TCAO does not possess any responsive information regarding the call for service involved with the case number provided by Requestor. The remaining portion of this request is addressed below.

Based on the reasons set forth in this brief, we are objecting to the release of the requested information. By copy of this letter, we are informing the requestor that we are withholding the requested information and that we are asking for a decision from your office. We have attached representative samples of the responsive information for your review. Basic offense information will be released.

**The requested information may be withheld under Government Code section 552.108(a)(1).**

Government Code section 552.108 states in relevant part:

<sup>1</sup> Requestor submitted her original request on November 24, 2015. On November 25, 2015, TCAO asked requestor for clarification of her request, which the TCAO received on November 25, 2015.

<sup>2</sup> Please note that TCAO was closed for business on November 26 and 27, 2015 in observation of the Thanksgiving holiday



(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:

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

In this instance, Requestor seeks information related to C-1-CR-10-216075, an assault case which resulted in the defendant agreeing to a deferred prosecution disposition of the case. Following the case's disposition, the defendant failed to comply with the terms of the deferred prosecution agreement, and the case, including the initial reports and complaints associated with the original offense, has been refiled as case number C-1-CR-14-405876. Consequently, the information Requestor seeks involving case number C-1-CR-10-216075 is now part of and currently the subject of pending prosecution by the TCAO in case number C-1-CR-14-405876. The TCAO objects to the release of this information because doing so would interfere with its prosecution of the crime underlying the responsive information. Accordingly, we assert that this information may be withheld under Government Code section 552.108(a)(1).

In conclusion, we ask that you rule on whether the enclosed information must be released to the requestor. If you have any questions, please contact me at (512) 854-9176, or by e-mail at [ann-marie.sheely@traviscountytx.gov](mailto:ann-marie.sheely@traviscountytx.gov).

Sincerely,

A handwritten signature in black ink that reads "Ann-Marie Sheely". The signature is written in a cursive, flowing style.

Ann-Marie Sheely  
Assistant County Attorney

c:

Molly Knowles

(Via email to: [molly55mk@gmail.com](mailto:molly55mk@gmail.com), without enclosures)

Tex. Atty. Gen. Op. OR2016-02695 (Tex.A.G.), 2016 WL 729925

Office of the Attorney General

State of Texas  
Informal Letter Ruling No.  
**OR2016**

-  
**02695**

February 4, 2016

**\*1** Re: Request for copies of the initial police report, call for service, and complaint filed in relation to case #C-1-CR-10-216075

Ms. Ann-Marie Sheely  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767-1748

Dear Ms. Sheely:

The Office of the Attorney General has received your request for a ruling and assigned your request ID# 599074.

After reviewing your arguments and the submitted information, we have determined your request does not present a novel or complex issue. Thus, we are addressing your claims in a memorandum opinion. You claim the submitted information may be withheld from the requestor pursuant to section 552.108(a)(1) of the Government Code. We have considered your arguments and the submitted information and have determined that in accordance with section 552.108(a)(1) you may withhold the submitted information. However, you must release the basic information pursuant to section 552.108(c) of the Government Code.

For more information on the cited exception, please refer to the open government information on our website at <https://www.oag.state.tx.us/open/memorulings.shtml>. You may also contact our Open Government Hotline at 1-877-OPENTEX.

Tex. Atty. Gen. Op. OR2016-02695 (Tex.A.G.), 2016 WL 729925

EXHIBIT D

**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRANGER BLDG., 5<sup>TH</sup> FLOOR  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
AUSTIN, TEXAS 78767

(512) 854-9513  
FAX: (512) 854-4808



**TRANSACTIONS DIVISION**

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

TENLEY A. ALDREDGE

DANIEL BRADFORD

JENNIFER KRABER

ANN-MARIE SHEELY

† Member of the College  
of the State Bar of Texas

January 21, 2016

Hand Delivered

Mr. Justin Gordon, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request from **Andy Pierrotti** received on **1/11/2016**—Request for Ruling and  
Supplemental Brief

Dear Mr. Gordon:

On behalf of the Travis County Attorney's Office ("TCAO"), and under Government Code section 552.301, we request a ruling for this open records request. Our office received this request on January 11, 2016<sup>1</sup>. Below is our supplemental brief setting forth the exceptions to disclosure. Here, Requestor seeks the surveillance footage and photographs/pictures related to case number C-1-CR-13-500948.

Based on the reasons set forth in this brief, we are objecting to the release of the requested information. By copy of this letter, we are informing the requestor that we are withholding the requested information and that we are asking for a decision from your office. We have attached representative samples of the responsive information for your review.

**The requested information may be withheld under Government Code section 552.108(a)(1).**

Government Code section 552.108 states 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:

---

<sup>1</sup> Please note that TCAO was closed for business on January 18, 2016 in observance of the Martin Luther King holiday

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

In this instance, Requestor seeks information related to C-1-CR-13-500948, an assault case which resulted in the defendant agreeing to a deferred prosecution disposition of the case. The subject entered into a deferred prosecution agreement in March 2015. The deferred prosecution period has not concluded, and therefore is still an active, pending case. If at the end of the deferred prosecution period the subject fails to comply with the terms of the agreement, the case will be refiled. The TCAO therefore objects to the release of the information requested because doing so would interfere with any prosecution of the crime underlying the responsive information. Accordingly, we assert that this information may be withheld under Government Code section 552.108(a)(1).

In conclusion, we ask that you rule on whether the enclosed information must be released to the requestor. If you have any questions, please contact me at (512) 854-9176, or by e-mail at [ann-marie.sheely@traviscountytx.gov](mailto:ann-marie.sheely@traviscountytx.gov).

Sincerely,

A handwritten signature in black ink that reads "Ann-Marie Sheely". The signature is written in a cursive, flowing style.

Ann-Marie Sheely  
Assistant County Attorney

c:

Andy Pierrotti  
KVUE News  
3201 Steck Ave.  
Austin, TX 78757  
(via email to [apierrotti@kvue.com](mailto:apierrotti@kvue.com), without enclosures)

Tex. Atty. Gen. Op. OR2016-06950 (Tex.A.G.), 2016 WL 1597925

Office of the Attorney General

State of Texas  
Informal Letter Ruling No.

**OR2016**

-

**06950**

March 29, 2016

\*1 Ms. Ann-Marie Sheely  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767-1748

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 603338.

The Travis County Attorney's Office (the "county attorney's office") received a request for surveillance footage and photographs related to a specified incident. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime ... if ... release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the submitted information relates to a case where the suspect has been granted a deferred prosecution that is pending. You inform us the case will be refiled if the suspect fails to comply with the terms of the agreement by the end of the deferred prosecution period. Based upon your representation the prosecution is pending and our review of the submitted information, we conclude release of the information will

EXHIBIT F

interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, we find the county attorney's office may withhold the submitted information under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

\*2 Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

#### Footnotes

- 1 We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Tex. Atty. Gen. Op. OR2016-06950 (Tex.A.G.), 2016 WL 1597925

**DAVID A. ESCAMILLA**  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRAINGER BLDG., 5<sup>TH</sup> FLOOR  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
AUSTIN, TEXAS 78767

(512) 854-9313  
FAX: (512) 854-4808



**TRANSACTIONS DIVISION**

JOHN C. HILLIE, JR., DIRECTOR †

BARBARA J. WILSON

TERILEY A. ALDREDGE

DANIEL BRADFORD

JENNIFER KRABER

ATTN. MARIE SHEELY

† Member of the College  
of the State Bar of Texas

March 10, 2016

**Hand Delivered**

Mr. Justin Gordon, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request from Alyse D. Brown on 03/02/2016—Request for Ruling and  
Supplemental Brief

Dear Mr. Gordon:

On behalf of the Travis County Attorney's Office ("TCAO") and under Government Code section 552.301, we request a ruling for this open records request. Below is our supplemental brief setting forth the exceptions to disclosure. Requestor seeks 1) a copy of the "deal made between Tal Belvin and the State of Texas" in case number C-1-CR-13-152059, including the terms as well as, 2) a copy of the ruling on a hearing concerning case number C-1-CR-14-150082, also involving Mr. Belvin. The information responsive to the first request is the deferred prosecution agreement between defendant Tal Belvin and the State of Texas in case number C-1-CR-13-152059.

Based on the reasons set forth in this brief, we are objecting to the release of the requested information. By copy of this letter, we are informing the requestor that we wish to withhold the requested information and that we are asking for a decision from your office. We have attached copies of the responsive information to this request for your review.

**The requested information may be withheld under Government Code section 552.108(a)(1).**

Government Code section 552.108 states 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[.]

In this instance, Requestor first seeks information related to the terms of an agreement related to case C-1-CR-13-152059, an assault case in which the subject entered into a deferred prosecution agreement with the State. The subject entered into the deferred prosecution agreement on October 28, 2015. The 12 month term of the deferred prosecution period has not concluded, and therefore, it is still an active, pending case. If at the end of the deferred prosecution period the subject fails to comply with the terms of the agreement, the case will be refiled. The TCAO therefore objects to the release of the information requested because doing so would interfere with any prosecution of the crime underlying the responsive information. Accordingly, we assert that this information may be withheld under Government Code section 552.108(a)(1).

**The remaining requested information related to C-1-CR-14-150082 may be withheld under Government Code section 552.108(a)(2).**

Government Code section 552.108(a)(2) states:

(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 . . .

(2) it is 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[.]

Here, Requestor also seeks a copy of the ruling dismissing case C-1-CR-14-150082, a drug possession case. The TCAO does not have a copy of a ruling on the dismissal, but only information related to referrals. Because this case has been dismissed, the request relates to a criminal prosecution that did not result in a conviction or deferred adjudication. The defendant in this matter was required to complete a class as a condition to dismissal. The defendant has successfully completed the required class, and the case has been dismissed without resulting in a conviction or deferred adjudication. Accordingly, we assert that the information held by the TCAO regarding subject's referral may be withheld under Government Code section 552.108(a)(2).

In conclusion, we ask that you rule on whether the enclosed information and the video offsite must be released to the requestor. If you have any questions, please contact me at (512) 854-9176, or by e-mail at [ann-marie.sheely@traviscountytx.gov](mailto:ann-marie.sheely@traviscountytx.gov).

Sincerely,



*Ann-Marie Sheely*

Ann-Marie Sheely  
Assistant County Attorney

Enclosures: request letter, requested information.

c:

Alyse D. Brown  
12107 Dessau Rd. # 432  
Austin, TX 78754  
(via email to: abrownu08@yahoo.com, without enclosures)



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 12, 2016

Ms. Ann-Marie Sheely  
Assistant County Attorney  
Travis County Attorney's Office  
P.O. Box 1748  
Austin, Texas 78767

OR2016-10900

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 610176.

The Travis County Attorney's Office (the "county attorney's office") received a request for information related to the disposition of two specified criminal cases. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the information you have marked relates to a criminal case which is subject to a deferred prosecution agreement. You state the term of the deferred prosecution agreement has not concluded and, if at the end of the deferred prosecution agreement term the subject fails to comply with the terms of the agreement, the criminal case will be re-filed. Therefore, you claim this information relates to a pending criminal case. Based on this representation and our review, we find release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536

EXHIBIT H

S.W.2d 559 (Tex. 1976). Thus, we find the county attorney's office may withhold the information you have marked under section 552.108(a)(1).

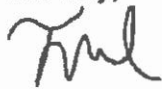
Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. *See* Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal prosecution that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(c)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information you have marked relates to a concluded criminal investigation that did not result in a conviction or a deferred adjudication. Based on your representation and our review, we find the county attorney's office may withhold the information you have marked under section 552.108(a)(2).

In summary, the county attorney's office may withhold the information you marked under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/bw

Ref: ID# 610176

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

# EXHIBIT 13

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**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 6, 2016

Ms. Ann-Marie Sheely  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2016-10351

Re: Request for the full plea agreement from State of Texas v. named individual; TCAO case #C-ICR-13-180014.

Dear Ms. Sheely:

The Office of the Attorney General has received your request for a ruling and assigned your request ID# 615952.

After reviewing your arguments and the submitted information, we have determined your request does not present a novel or complex issue. Thus, we are addressing your claims in a memorandum opinion. You claim the submitted information may be withheld from the requestor pursuant to section 552.108(a)(1) of the Government Code. We have considered your arguments and the submitted information and have determined that in accordance with section 552.108(a)(1) you may withhold the submitted information.

For more information on the cited exception, please refer to the open government information on our website at <https://www.oag.state.tx.us/opcn/memorulings.shtml>. You may also contact our Open Government Hotline at 1-877-OPEN TEX.

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

# EXHIBIT 14

**Ramiro Gonzalez**

---

**From:** Tara Coronado <tcoronado@4implus.com>  
**Sent:** Monday, April 11, 2016 1:42 PM  
**To:** TCA Open Records  
**Subject:** (EXTERNAL) Request for the full plea agreement

CAUSE NO. C-1- CR- 13-180014

THE STATE OF TEXAS

VS.

Chet Cunningham

§  
§  
§  
§  
§

IN THE COUNTY COURT AT LAW

NUMBER 4

TRAVIS COUNTY, TEXAS

**PLEA OF GUILTY. NO CONTEST. ADMONISHMENTS. VOLUNTARY STATEMENTS.**  
**WAIVERS, STIPULATION & JUDICIAL CONFESSION**  
(Defendant Should Initial Appropriate Blanks)

Tara Coronado  
Manager, Administration, Austin  
Implus LLC

Office: (512) 300-2804 ext 1326  
[www.implus.com](http://www.implus.com)

 **IMPLUS** 5507 Industrial Oaks Blvd. Suite 100 Austin, TX 78735

# EXHIBIT 15



## TCA Open Records

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**From:** Laura Bates <lbates@safeaustin.org>  
**Sent:** Tuesday, July 12, 2016 1:34 PM  
**To:** TCA Open Records  
**Subject:** (EXTERNAL) Open records request

To the Officer for Public Information handling Open Records Requests for Travis County;

Under the Texas Public Information Act, §6252-17a et seq., the Legal Services department of SAFE Alliance is requesting an opportunity to inspect or obtain copies of public records that pertain to cause number C-1-CR-13-180014, styled "The State of Texas v. Chet Edward Cunningham," including, but not limited to, all investigative reports, statements, witness statements, court documents, filings, memorandums, 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.

If there are any fees for searching or copying these records, please inform me if the cost will exceed \$40. However, I would also like to request a waiver of all fees in that SAFE Alliance is a 501(c)(3) nonprofit organization representing and working with survivors of domestic violence. We also welcome all documents to be delivered in electronic format to eliminate or defray costs. This information is not being sought for commercial purposes.

The Texas Public Information Act requires that you "promptly produce" the requested records unless, within 10 days, you have sought an Attorney General's Opinion. If you expect a significant delay in responding to this request, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

Thank you for considering my request.

Sincerely,

Laura Bates

# EXHIBIT 16

DAVID A. ESCAMILLA  
COUNTY ATTORNEY

STEPHEN H. CAPELLE  
FIRST ASSISTANT

JAMES W. COLLINS  
EXECUTIVE ASSISTANT

314 W. 11<sup>TH</sup> STREET  
GRANGER BLDG., 3<sup>RD</sup> FLOOR  
AUSTIN, TEXAS 78701

P. O. BOX 1748  
AUSTIN, TEXAS 78707

(512) 834-9513  
FAX: (512) 834-4808



July 15, 2016



FILE COPY

TRANSACTIONS DIVISION

JOHN C. HILLE, JR., DIRECTOR

BARBARA J. WILSON

TENLEY A. ALDREDGE

JENNIFER KRABER

ANN-MARIE SHEELY

Member of the College  
of the State Bar of Texas

OPEN RECORDS DIVISION

Hand Delivered

Mr. Justin Gordon, Division Chief  
Office of the Attorney General of Texas—Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request from Laura Bates received on 07/12/2016 —Request for Ruling and  
Supplemental Brief

Dear Mr. Gordon:

The Travis County Attorney's Office ("TCAO") received an open records request from Laura Bates on July 12, 2016. Pursuant to Government Code section 552.301, we request a ruling for this open records request. Requestor seeks all public records relating to the matter of *The State of Texas v. Chet Cunningham*, TCAO case No. C-ICR-13-180014, including, but not limited to, all investigative reports, statements, witness statements, court documents, filings, memorandums, 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. Below is our supplemental brief setting forth the exceptions to disclosure.<sup>1</sup>

By copy of this letter, we are informing the requestor that we wish to withhold the information requested and that we are asking for a decision from your office.

**The requested information may be withheld under Government Code section 552.108(a)(1).**

Government Code section 552.108 states in relevant part:

<sup>1</sup> Please note that the Texas Attorney General's Open Records Division has previously ruled that the deferred prosecution agreement for the same case being requested here, fell under a disclosure exception to the Texas Public Information Act, specifically section 552.108(a)(1). See Open Letter Ruling #2016-10351 (AG ID #612742). The same circumstances and status apply to the present case, as this matter is still an active, pending case.

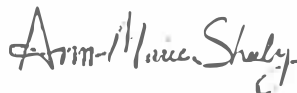
(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

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

In this instance, Requestor seeks information related to case C-1-CR-13-180014, an assault-family violence case in which the subject entered into a deferred prosecution agreement with the State. The subject entered into the deferred prosecution agreement on April 1, 2016. The term of the deferred prosecution period has not concluded, and therefore, it is still an active, pending case. If at the end of the deferred prosecution period the subject fails to comply with the terms of the agreement, the case will be refiled. The requestor asks for multiple records in the case file. However, TCAO therefore objects to the release of all of the information requested and related to this pending case because doing so would interfere with any prosecution of the crime underlying the responsive information. Accordingly, we assert that all of this information may be withheld under Government Code section 552.108(a)(1). We have submitted representative samples of the information requested, and assert that all may be withheld under section 552.108 Government Code.

In conclusion, we ask that you rule on whether the enclosed information must be released to the requestor. If you have any questions, please contact me at (512) 854-9176 or by e-mail at [ann-marie.sheely@traviscountytexas.gov](mailto:ann-marie.sheely@traviscountytexas.gov).

Sincerely,



Ann-Marie Sheely  
Assistant County Attorney

c: Laura Bates  
The SAFE alliance  
P.O. Box 19454  
Austin, TX 78760  
(via email to: [lbates@safeaustin.org](mailto:lbates@safeaustin.org), without enclosures)

# EXHIBIT 17



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 19, 2016

Ms. Ann-Marie Sheely  
Assistant County Attorney  
Travis County Attorney's Office  
P.O. Box 1748  
Austin, Texas 78767

OR2016-21139

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 626940.

The Travis County Attorney's Office (the "county attorney's office") received a request for all information pertaining to a specified prosecution, including all information pertaining to the Deferred Prosecution Agreement (the "agreement") in that case. You claim the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the representative sample of information.<sup>1</sup> We have also received and considered comments from an interested party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state the agreement was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-10351 (2016). In that ruling, we determined the county attorney's office may withhold the agreement under

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

section 552.108(a)(1) of the Government Code. However, we note the law, facts, and circumstances on which the previous ruling was based have changed. Accordingly, the county attorney's office may not rely on Open Records Letter No. 2016-10351 as a previous determination in regard to the agreement. *See* Open Records Decision No. 673 at 7-8 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Thus, we will consider your arguments against disclosure of the agreement as well as the remaining submitted information.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The interested party asserts the criminal case at issue has been dismissed and provides the related motion to dismiss, signed on April 6, 2016, indicating the case was dismissed due to the agreement. You acknowledge the submitted information relates to a criminal case which is subject to the agreement, which was entered into on April 1, 2016. However, you state the term of the agreement has not concluded and, if at the end of the agreement term the subject fails to comply with the terms of the agreement, the criminal case will be re-filed. Therefore, you claim the submitted information pertains to a pending criminal case. Generally, the release of information pertaining to an open case is presumed to interfere with the criminal investigation. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). We note, however, the information at issue includes the agreement. The defendant signed the agreement, acknowledging his receipt of the agreement. Thus, because a copy of the agreement has previously been released to the defendant, we find you have not shown release of the agreement will interfere with the detection, investigation, or prosecution of crime; thus, the agreement may not be withheld under section 552.108(a)(1). *See* Gov't Code § 552.108(a)(1). However, we agree release of the remaining information would interfere with the detection, investigation, or prosecution of crime. Thus, we find section 552.108(a)(1) is applicable to the remaining information at issue.

However, we note that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). We note basic information does not include dates of birth. *See* ORD 127

at 3-4. Thus, with the exception of the basic information, the county attorney's office may withhold the remaining submitted information under section 552.108(a)(1) of the Government Code.

We note portions of the agreement are subject to section 552.101 of the Government Code.<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at \*3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.<sup>3</sup> *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at \*3. Thus, the county attorney's office must withhold the public citizen's date of birth under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the county attorney's office must release the submitted agreement; however, in releasing this document, the county attorney's office must withhold the date of birth of a member of the public under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the basic information, the county attorney's office may withhold the remaining information under section 552.108(a)(1) of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>2</sup>This office will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).



This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sidney M. Pounds  
Assistant Attorney General  
Open Records Division

SMP/bhf

Ref: ID# 626940

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

# EXHIBIT 18

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**OPEN RECORDS DECISION NO. 673  
(ORQ-55)**

March 19, 2001

**RE:** Which attorney general decisions are "previous determinations" and which are not? When can a court decision function as a previous determination? When does a previous determination expire or become invalid? To which documents does a previous determination apply? To which governmental bodies does a previous determination apply? What is the result if a governmental body does not seek an attorney general ruling because it believes that it has a previous determination, but; in fact, the governmental body does not have a previous determination?

**AUTHORITY**

Section 552.011 of the Government Code states that "the attorney general shall maintain uniformity in the application, operation, and interpretation" of the Public Information Act (the "Act"). Pursuant to this legislative mandate, section 552.011 grants the attorney general the authority to "prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on" the Act. Gov't Code § 552.011. Under that authority, we consider what constitutes a "previous determination" as that term is used in section 552.301(a) of the Government Code and related issues.

**BACKGROUND**

Section 552.301 of the Government Code states in pertinent part:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C *must ask for a decision from the attorney general* about whether the information is within that exception *if there has not been a previous determination about whether the information falls within one of the exceptions.*

Gov't Code § 552.301(a) (emphasis added). The above language first sets forth a general requirement that a governmental body ask this office whether requested information is excepted from required disclosure whenever a governmental body seeks to withhold information responsive to a request. The language then sets forth a single exception to this general requirement: where there exists a "previous determination," a governmental body is not required to ask this office for a decision and may instead withhold the information in accordance with the previous determination. Thus, a governmental body must be able to

identify what constitutes a previous determination in order to ascertain whether the Act requires the governmental body to request a decision from this office.

The term "previous determination" is not defined in the Act. In addressing particular open records disputes, some court decisions have opined that a particular attorney general decision constituted a previous determination in regard to the request at issue in the case.<sup>1</sup> However, we are aware of no court decision that sets forth any criteria for determining what constitutes a previous determination, nor are we aware of any court decision that defines the term. In addition, no published decision of any court or of this office has held or suggested that a governmental body has the authority to determine, on its own, whether a decision of this office constitutes a previous determination. To the contrary, in a case deciding whether this office was required to issue a particular decision under the Act, the Texas Supreme Court declared that the Act "does not require a previous determination on the specific piece of information [at issue in a given request]; it allows the Attorney General to explicitly refuse to render a decision *if he decides that a previous determination has been made* regarding the category of information to which the request belongs." *Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (emphasis added). The court further directed the attorney general to perform his duties under the Act, by either rendering a decision or determining that a prior decision constitutes a previous determination as to the information at issue. Thus, the Texas Supreme Court has expressly acknowledged this office's authority to decide what constitutes a previous determination under section 552.301(a) of the Act.

Open records decisions of this office have used the term "previous determination" or "previously determined" in various and inconsistent ways.<sup>2</sup> Our varied use of these terms

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<sup>1</sup>See, e.g., *Hart v. Gossum*, 995 S.W.2d 958 (Tex. App. - Fort Worth 1999, no pet.) (concluding that Open Records Decision No. 574 (1990) constituted a previous determination that attorney communications of legal advice and opinion are excepted from disclosure); *Rainbow Group, Ltd. v. Texas Employment Comm'n*, 897 S.W.2d 946, 950 (Tex. App.-Austin 1995, writ denied) (concluding that Open Records Decision No. 599 (1992), Open Records Letter Ruling No. 92-201 (1992), and Open Records Letter Ruling No. 92-097 (1992) comprised previous determinations that information from employer reports held by the Texas Employment Commission was confidential under predecessor provision to section 301.081 of the Labor Code).

<sup>2</sup>The term "previous determination" has sometimes been employed to indicate the absence of a prior decision with regard to a particular exception. See, e.g., Open Records Decision No. 537 at 1 (1990). The term has also been employed to refer to prior decisions of this office that concluded particular information is *not* excepted from required disclosure. See, e.g., Open Records Decision Nos. 206 at 1 (1978), 197 at 2 (1978). Similarly, the term "previously determined" has sometimes been employed to refer to categories of information that this office, or a court, has declared *not* excepted from required disclosure. See, e.g., Open Records Decision Nos. 633 at 2 (1995), 562 at 9 (1990). The term "previously determined" has also been employed to refer to categories of information that a prior decision held to be excepted from disclosure. See, e.g., Open Records Decision No. 550 at 3 (1990). In addition, the term "previously determined" has been employed to indicate that a prior decision from this office held that a particular governmental body may claim a particular exception. See, e.g., Open Records Decision No. 211 at 3 (1978).

has contributed to confusion and divergent views over the meaning of the term “previous determination” as it is used in section 552.301(a). Indeed, the comments submitted to this office in connection with this decision confirm that there exist among various governmental bodies and interested parties, each relying on different authority or even interpreting the same authority in different ways, conflicting and varied viewpoints of what constitutes a previous determination under section 552.301(a). Thus, under the existing authority which employs the term “previous determination,” including prior decisions from this office, a governmental body acting in good faith may conclude that it is not required to seek a decision from this office, although this office may disagree with the governmental body that a particular decision functions as a previous determination. Because section 552.011 requires that this office “maintain uniformity in the application, operation, and interpretation” of the Act, and because the Texas Supreme Court has expressly acknowledged this office’s authority to decide what constitutes a previous determination, this office is compelled to provide clear guidance to governmental bodies as to the meaning of the term “previous determination” as it is used in section 552.301(a).

### DISCUSSION

At the outset, we note that, because a “previous determination” under section 552.301(a) is not defined in the Act, the meaning of the term must be derived by reading it in the context of the Act as a whole. *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex.1998); *Taylor v. Fireman’s & Policemen’s Civil Service Comm’n*, 616 S.W.2d 187, 190 (Tex. 1981). Mindful of the Act’s purpose and the legislative mandate that the provisions of the Act be construed liberally in favor of granting a request for information,<sup>3</sup> the legislature has adopted, in subchapter G of the Act, detailed provisions pertaining exclusively to the *procedural* process a governmental body must follow if it seeks to withhold information from the public. See Gov’t Code §§ 552.301, .302, .303, .305, .306. These *procedural* requirements are separate from the *substantive* provisions in the Act that lay out the particular exceptions a governmental body may assert.<sup>4</sup> To validly invoke an exception to disclosure a governmental body must comply with both the substance and the procedure, which means both identifying an exception that arguably applies (substance) and also seeking a ruling from the attorney general regarding whether that exception actually applies (procedure).

The general rule that a governmental body must ask for an attorney general decision is reinforced by specific provisions in subchapters G and H. These provisions establish the consequences of a governmental body’s failure to seek a decision from the attorney general as provided by section 552.301 and generally limit the exceptions a governmental body may

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<sup>3</sup>See Gov’t Code § 552.001.

<sup>4</sup>The Act’s exceptions to required disclosure, sections 552.101 through 552.132 of the Government Code, are found in subchapter C of the Act.

raise in a suit filed under the Act to only those exceptions that were “properly raised” before the attorney general in the procedural rulings process.<sup>3</sup> See Gov’t Code §§ 552.302, .326. Indeed, the importance of the rulings process is specifically reinforced by the legislature’s express authorization for this office to file suit against a governmental body that refuses to request a ruling from this office. See Gov’t Code § 552.321. Thus, other provisions of the Act contemplate that the section 552.301(a) requirement that a governmental body seek a decision from this office is a legislative mandate that generally applies anytime a governmental body wishes to withhold requested information from the public. The structure of the statute makes clear that a “previous determination” in section 552.301(a) is an exception to the provision’s general rule that a governmental body must obtain an attorney general ruling.

Some of the comments submitted to this office argue in favor of a broad reading of the term “previous determination” in section 552.301(a), thus creating a broad exception to the above-referenced general mandate. The essential assertion is that the term encompasses any decision from this office or of a court that concludes, based on a given standard of interpretation, that a category of information is excepted from disclosure under a particular exception in the Act. Under this reading, if a governmental body holds information that appears to be encompassed within a description of information discussed in an open records or court decision, and if the decision concludes the information discussed is excepted from disclosure, the decision would constitute a previous determination and the governmental body could therefore decide to withhold its information without seeking a decision from this office.

We do not believe such a broad reading of the term “previous determination” is tenable. There is a significant difference between announcing a general standard in an open records decision as to the applicability of an exception in the Act to the particular records before this office in that decision, and applying that standard to other documents or records that are responsive to a given request. For example, in Open Records Decision No. 435 (1986), we addressed the issue of whether three memoranda held by a school district could be withheld under the predecessor provision to section 552.111 of the Government Code without the necessity of seeking a decision from this office. We stated that “although prior decisions have discussed the *standard* to be applied in section [552.111] cases . . . the applicability of this standard to the content of these three memoranda has never been resolved.” Open Records Decision No. 435 at 2 (1986) (emphasis in original). We further stated:

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<sup>3</sup>By way of illustration, even if litigation involving the governmental body is pending, section 552.326 of the Government Code prohibits a governmental body from raising, among other exceptions, section 552.103 of the Government Code in a suit filed against the governmental body under the Act if the governmental body did not properly raise section 552.103 in connection with its request for a decision from this office. See Gov’t Code §§ 552.103, .326.

To allow a governmental body conclusively to determine how standards developed for open records decisions apply to particular documents would enable it to function in two inconsistent legal roles - those of advocate and judge. In its role as advocate, the entity could assert the applicability of a standard; then, in its role as judge, the entity could decide the validity of its claim. Its conclusion, moreover, would not be subject to review by this office, because unless a governmental body seeks our decision we will very likely never hear of the matter. This is so even though the Act clearly contemplates that the attorney general shall independently and objectively review determinations by governmental bodies that particular exceptions apply to requested information.

In fact, this situation has occurred several times. We have received many letters from the public seeking our assistance in obtaining information denied them by governmental bodies on the basis of standards discussed in prior decisions. After obtaining the relevant details, we have often discovered that the governmental body incorrectly applied these standards. Had the requestor never brought the matter to our attention, we would never have been able to perform the independent-review function contemplated by the [Act]. The requestor's only recourse would have been to seek a writ of mandamus under section [552.321 of the Act].

*Id.*; see also Open Records Decision No. 511 at 3 (1988). As a practical matter, an average member of the general public who requests information from a governmental body does not have the resources to file suit every time a governmental body unilaterally withholds information without seeking a ruling from this office. Moreover, a governmental body does not have the discretion to unilaterally decide whether it can withhold information that is subject to the Act. *City of Lubbock v. Cornyn*, 993 S.W.2d 461, 465 (Tex. App. - Austin 1999, no pet.). Such a broad reading of the term "previous determination" under section 552.301(a) would subvert the primary purpose of the Act, *i.e.*, to make information available to the public, and would be contrary to the legislative mandate that the Act's provisions be liberally construed by this office in a way that favors granting a request for information. Gov't Code § 552.001.

Had the legislature intended the "previous determination" exception in section 552.301(a) to be read broadly, the practical effect would be that this office, charged with interpreting the Act, would now be called upon to issue open records decisions only on novel issues or questions of first impression. The practical effect of such a broad reading of the term "previous determination," thus, would virtually rescind section 552.301(a)'s express general requirement that a decision be sought from this office. Only in the rarest of circumstances, *e.g.* a question of first impression, would a governmental body then be required to do so. We find no indication that the legislature intended the Act's procedural rulings process to operate

in this manner. Indeed, the language of section 552.301(a) and the structure of the Act strongly suggest that seeking a decision from this office is not anomalous, but is instead a general procedural requirement in the ordinary operation of the Act.

This is not to say, however, that the general standards announced in open records decisions and court cases do not serve an important and useful purpose in the Act's rulings process. This office's numerous open records decisions that interpret and adopt standards for particular exceptions under the Act provide guidance to a governmental body, and allow it to make its own informed initial determination as to whether particular information that is responsive to a request may be excepted from required disclosure. However, these decisions do not substitute for the detailed rulings procedures that the legislature has adopted in the Act. For all of the above reasons, we hold that the term "previous determination" under section 552.301(a) of the Act must be construed narrowly. Because this office has used the term in various and inconsistent ways, we next set forth the specific criteria that must be met in order for a previous determination under section 552.301(a) to exist.

### **PREVIOUS DETERMINATIONS**

We believe there are only two instances in which a previous determination under section 552.301(a) exists. The first and by far the most common instance of a previous determination pertains to specific information that is again requested from a governmental body where this office has previously issued a decision that evaluates the public availability of the precise information or records at issue. This first instance of a previous determination does not apply to records that are substantially similar to records previously submitted to this office for review, nor does it apply to information that may fall within the same category as any given records on which this office has previously ruled. The first type of previous determination requires that all of the following criteria be met:

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.<sup>6</sup>

Absent all four of the above criteria, and unless the second type of previous determination applies, a governmental body must ask for a decision from this office, if it wishes to withhold from the public information that is requested under the Act.

The second type of previous determination requires that all of the following criteria be met:

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;<sup>7</sup>
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and<sup>8</sup>

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<sup>6</sup>A governmental body must make an initial finding that it in good faith reasonably believes the requested information is excepted from disclosure. Open Records Decision No. 665 at 3 (2000). A governmental body should request a decision from this office if it is unclear to the governmental body whether there has been a change in the law, facts, or circumstances on which the prior decision was based.

<sup>7</sup>Previous determinations of the second type can apply to all governmental bodies if the decision so provides. *See, e.g.*, Open Records Decision No. 670 (2001) (concluding that all governmental bodies subject to the Act may withhold information that is subject to section 552.117(2) of the Government Code without the necessity of seeking a decision from this office). The second type of previous determination can also apply to all governmental bodies of a certain type. *See, e.g.*, Open Records Decision No. 634 (1995) (applying to any governmental body that meets the definition of an "educational agency or institution" as defined in the federal Family Educational Rights and Privacy Act, *see* 20 U.S.C. § 1232g(a)(3)). On the other hand, if the decision is addressed to a particular governmental body and does not explicitly provide that it also applies to other governmental bodies or to all governmental bodies of a certain type, then only the particular governmental body to which the decision is addressed may rely on the decision as a previous determination. *See, e.g.*, Open Records Decision No. 662 (1999) (constituting the second type of previous determination but only with respect to information held by the Texas Department of Health).

<sup>8</sup>Thus, in addition to the law remaining unchanged, the facts and circumstances must also have remained unchanged to the extent necessary for all of the requisite elements to be met. As with the first type of previous determination, a governmental body seeking to withhold requested information must make an initial finding that it in good faith reasonably believes the information is excepted from disclosure. With respect to

5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Absent all five of the above criteria, and unless the first type of previous determination applies, a governmental body must ask for a decision from this office if it wishes to withhold from the public information that is requested under the Act.

This office has issued a limited number of decisions that constitute the second type of previous determination. For example, in Open Records Decision No. 634, this office concluded:

*[A]n educational agency or institution may withhold from public disclosure information that is protected by [the Family Educational Rights and Privacy Act (FERPA)] and excepted from required public disclosure by section 552.101 as 'information considered to be confidential by law,' without the necessity of requesting an attorney general decision as to that exception.*

Open Records Decision No. 634 at 10 (1995) (emphasis added). This decision constitutes a previous determination for requested records or information if: the requested information falls within the specific, clearly delineated category of information that is protected by FERPA (criterion "1"), and the governmental body from which the information is requested is an educational agency or institution as that term is defined in FERPA<sup>9</sup>(criterion "2"). This is because the decision concludes that the information is excepted from disclosure under section 552.101 of the Government Code (criterion "3"), the law, facts, and circumstances on which the conclusions of Open Records Decision No. 634 were based equally apply to the present request (criterion "4"), and the decision explicitly authorizes an educational agency or institution to withhold the information without the necessity of again seeking a decision from this office (criterion "5"). However, if, for example, the governmental body from which the information is requested is a police department rather than an educational agency or institution as that term is defined in FERPA, then Open Records Decision No. 634 cannot be relied upon by the police department as a previous determination, because neither criterion "2" nor criterion "4" is met. Likewise, there are numerous prior decisions of this office that may meet all of the above-stated criteria except the fifth. These prior decisions provide guidance to a governmental body of whether particular information *may be* excepted

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previous determinations of the second type, a governmental body should request a decision from this office if it is unclear to the governmental body whether all of the elements on which the previous decision's conclusion was based have been met with respect to the requested records or information.

<sup>9</sup>See 20 U.S.C. § 1232g(a)(3) (defining "educational agency or institution" under FERPA).

from disclosure, but none of these decisions constitutes previous determinations under section 552.301(a) of the Act of the second type. These prior decisions, therefore, are previous determinations only to the extent they meet all four of the above-stated criteria for the first type of previous determination.

If a governmental body receives repeated requests for a specific, clearly delineated category of information, the governmental body is encouraged to ask this office for a previous determination of the second type, authorizing the governmental body to withhold the information in response to future requests without the necessity of seeking a ruling from this office.

**SUMMARY**

The term "previous determination" under section 552.301(a) of the Government Code means only one of two types of attorney general decisions. So long as the law, the facts, and the circumstances on which the ruling was based have not changed, the first type of previous determination exists where requested information is precisely the same information as was addressed in a prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that the information is or is not excepted from disclosure. The second type is an attorney general decision which may be relied upon so long as the elements of law, fact, and circumstances are met to support the previous decision's conclusion, the decision concludes that a specific, clearly delineated category of information is or is not excepted from disclosure, and the decision explicitly provides that the governmental body or type of governmental body from which the information is requested, in response to future requests, is not required to seek a decision from the attorney general in order to withhold the information.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Cornyn", written over a horizontal line.

JOHN CORNYN  
Attorney General of Texas

ANDY TAYLOR  
First Assistant Attorney General

CLARK KENT ERVIN  
Deputy Attorney General - General Counsel

KATHERINE MINTER CARY  
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