

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

DAVID A. ESCAMILLA,	§	IN THE DISTRICT COURT
Travis County Attorney	§	
<i>Plaintiff</i>	§	
	§	
v.	§	OF TRAVIS COUNTY
	§	
KEN PAXTON	§	
State of Texas Attorney General	§	
<i>Defendant</i>	§	261 <sup>st</sup> JUDICIAL DISTRICT

**INTERVENOR/CROSS-PLAINTIFF TARA CORONADO'S PRETRIAL BRIEF**TO: THE HONORABLE LORA LIVINGSTON, JUDGE 261<sup>ST</sup> DISTRICT COURT**NOTE**

1. a. Intervenor/Cross-Plaintiff Tara Coronado offers this Brief in support of disclosure. This Brief is not being filed of record, pending a ruling by the Court as to what content in the Brief, if any, must be sealed or redacted in order not to reveal the content of the record in dispute in this case (the Cunningham Deferred Prosecution Agreement (DPA)). The County Attorney's blank DPA Form is not confidential or sealed. *See* attached Exhibit I-A. Therefore, counsel for Coronado has constructed this Brief to present generic facts and arguments as to disclosure of all of the content of the blank DPA Form, permitting the Court to determine what facts and argument in this Brief are relevant to the actual Cunningham DPA. Counsel for Coronado does not believe any portion of this Brief is required to be redacted pursuant to the Court's Order To Seal Court Records dated March 27, 2017, but submits this un-redacted version for the Court's review on this issue.

b. Therefore, no assumption should be made by any reader of this Brief that the contents of this Brief or of the blank DPA Form attached reveal what is, or is not, actually in the Cunningham DPA. This approach to briefing is being used with the intent to support Open Courts where, to the greatest extent possible, court records should be available to the public. And in the spirit of the Texas Public Information Act (TPIA), hopefully this Brief is constructed so that anyone reading this court record will be allowed to see the core issues at play in this important transparency and accountability lawsuit.

## **INTRODUCTION**

2. Giving context to the specific claims in this case is important. The Travis County Attorney seeks to cloak in secrecy not only the contract terms of his deals with criminal defendants, but he also does not voluntarily disclose any performance reports about the DPA program: when DPAs are used, what policies or procedures govern DPAs, who gets DPAs/who doesn't and why, and what results are achieved by using secret DPAs as opposed to the alternatives of public trials and open court records of judge-ordered Deferred *Adjudication*. This secrecy is at direct odds with the fundamental purpose of the TPIA:

Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, *it is the policy of this state that each person is entitled, unless otherwise*

*expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.* The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. *The people insist on remaining informed so that they may retain control over the instruments they have created.* The provisions of this chapter shall be liberally construed to implement this policy.

Tex. Gov't Code section 552.001(a) (emphasis added). Only transparency in government can lead to accountability, and secrecy in government is what leads to abuse of power and subpar performance. There is a noticeable irony, that it is the Travis County Attorney whose job it is to prosecute criminal violations of the TPIA and the Texas Open Meetings Act (TOMA) and advise Travis County officials on compliance with the TPIA and TOMA. Best practices of governmental transparency should be exhibited in all government offices, but most especially in the one whose job it is to enforce transparency by other government officials.

3. The very notion that a prosecutor can make a deal, a written contract, with a criminal defendant and keep that deal secret—even from the crime victims—seems bizarrely inconsistent with the principle of holding our public officials accountable. Many people believe that greater transparency in our criminal justice system is vital to earn the People's trust and respect for that system. It appears that the Travis County Attorney not only has secret Deferred Prosecution Agreements; he has a secret Deferred Prosecution Program generally.

a. Contrary to the County Attorney's strained assertion that DPAs are a way to hold criminal violators accountable, a DPA is a God-send *to a criminal defendant*, especially in a family violence assault case. The criminal case is immediately dismissed before the defendant does anything to comply with the terms of DPA. The County Attorney pledges to support expungement of the criminal records like the offense never happened. Secrecy of the DPA keeps the victim from knowing whether the defendant is complying with the DPA or not, thereby, reducing the odds that the County Attorney will find out if a defendant violates the conditions of the DPA. Since the records of family-member abuse will be expunged, the lucky defendant abuser will not be subject to sentencing enhancement under Tex. Code Crim. Proc. Section 42.013 and Tex. Pen. Code section 22.01(b)(2) if abusing a family member in the future. In addition, in a case where the abuser and victim may be involved in divorce and a child-custody battle, if the abuser is initially awarded superior custody, but is later convicted or placed on deferred *adjudication* for family violence assault, the custody decision can be reopened. *See* Tex. Fam. Code section 156.1045.<sup>1</sup> An abuser who gets deferred prosecution and child custody, does not

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<sup>1</sup> Tex. Fam. Code Sec. 156.1045. MODIFICATION OF ORDER ON CONVICTION FOR FAMILY VIOLENCE. (a) *The conviction or an order deferring adjudication of a person who is a possessory conservator or a sole or joint managing conservator for an offense involving family violence is a material and substantial change of circumstances* sufficient to justify a temporary order and modification of an existing court order or portion of a decree that provides for the appointment of a conservator or that sets the terms and conditions of conservatorship or for the possession of or access to a child to conform the order to the requirements of Section [153.004](#)(d).

(b) A person commits an offense if the person files a suit to modify an order or portion of a decree



have to worry about Section 156.1045. Secret, expunged Deferred Prosecution is a God-send for the defendant, but no one else. Is protecting the secrecy of this system really enhancing the “prosecution of crime”?

b. On the other hand, if such a deal in a criminal court case is made as a “deferred adjudication,” the terms of that deal are approved by the Judge and are an open court record which is readily available to the victim, with public disclosure of the defendant’s plea of no contest or guilty and of the terms for the probation. With deferred adjudication, the case is not dismissed until the defendant shows compliance with the terms of the deferred adjudication. If the criminal case went to trial in Travis County instead of getting a DPA, statistics from the Texas Office of Court Administration show that the odds of the defendant getting acquitted are very slim. Only 0.4% (less than ½ of 1 percent) of family assault cases in Travis County in the last 18 months resulted in acquittal; 12 acquittals out of about 3,580 disposed family violence cases.<sup>2</sup> It seems utterly incredible that a criminal defendant, offered a DPA, in lieu of a public trial with low odds of acquittal or public deferred adjudication, would turn down such a God-send gift *merely* because some part (or all) of the DPA might be disclosed.

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based on the grounds permitted under Subsection (a) and the person knows that the person against whom the motion is filed has not been convicted of an offense, or received deferred adjudication for an offense, involving family violence. An offense under this subsection is a Class B misdemeanor.

<sup>2</sup> Statistics available at <http://card.txcourts.gov/> for January 1, 2016 thru June 2017.

c. There are several aspects of the Travis County Attorney's DPA program that appear to favor the criminal defendant abuser and discount the impact on the abused victim. It appears that the County Attorney is overly concerned about protecting the criminal abuser from public embarrassment, despite the fact that open criminal court file records contain the incriminating evidence against the defendant. In addition to being denied a copy of the County Attorney's DPA with her abuser, having the criminal case against the abuser immediately dismissed, and then having the records expunged as if the abuse never occurred, there is another draconian effect of County Attorney's DPA tactic. As discussed above, the victim may also be blocked from re-opening a child custody case if the defendant is given deferred prosecution as opposed to deferred adjudication. Since this opportunity for a victim to reopen child custody orders does not apply to a DPA entered into after the custody order is set (even if the defendant admits the abuse), this is another example of how a DPA is a God-send to the abuser defendant and further victimization of the abused victim. When abuse victims see the County Attorney be so protective of, and secretly making deals with, the abuser, does that send the victim a message that Travis County wants to effectively prosecute family violence offenses? Or does that make victims believe they must live with the abuse in the future because the criminal justice system will not protect victims more than it protects the abuser?

d. As to the TPIA-intended accountability of the County Attorney's

office, how can the taxpaying public or victims know if a prosecutor is being fair and not discriminating based on the gender, ethnicity, wealth, status, or political affiliation of the criminal defendant (or his lawyer) if such deals can be kept secret? And with all due respect to the Travis County criminal justice system, one cannot ignore recent press reports that Black and Hispanic prisoners spend more time in Travis County jail than White prisoners for the same offenses. The Travis County Attorney does not even file his “deferred prosecution” contracts with the court or get court approval of the deals; he keeps the deals secret between himself and the criminal defendant. Even the crime victims cannot get a copy of the contracts involving their family-abuse perpetrators from the County Attorney without a ruling from the Attorney General or a Court order. Disclosure is the only remedy for such lack of accountability.

4. Aggravating the lack of accountability is the indication that disclosure of the DPAs may be the *only* way to get insight into the County Attorney’s DPA program. The County Attorney has no policies or procedures for entering in to a DPA.<sup>3</sup> Likewise, no published reports from the County Attorney have been found that would disclose how many DPAs the County Attorney has agreed to, by type of criminal charge, with demographic information about the criminal defendants or the

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<sup>3</sup> See Exhibit I-D attached. In response to Coronado’s Request for Production 1 for a copy of such policies and procedures, the County Attorney said, “None.”

identity of their attorneys, or about whether the DPAs resulted in compliance or refiling of charges, or the recidivism rate of criminal defendants who benefited from getting a DPA. Even a review of the County Attorney's online budget requests and "performance" measures reveals nothing about how these deals with criminal defendants are working or what, if any, benefit to the public is derived from their use. DPAs may increase the County Attorney's stats of disposed cases, but no publicly available evidence has been found that demonstrates that Justice or good law enforcement has improved as a result of the secret DPA program. If the DPAs themselves become subject to disclosure, it would give the public the base information they need to become "*informed so that they may retain control over the instruments they have created.*"

### **BURDEN OF PROOF**

5. Whether an exception to disclosure in the TPIA applies to a DPA is determined by giving a preference to disclosure and narrowly construing the exception. *See* Tex. Gov't Code section 552.001(b) ("This chapter shall be liberally construed in favor of granting a request for information."); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App.—Austin 2002) ("The TPIA was intended to provide the public with broad access to government documents....Texas Courts have consistently adhered to these requirements by narrowly construing the type of

information that may be withheld under the statute's exceptions.”).

6. The County Attorney has the burden to prove that an exception to mandatory disclosure is applicable to the DPA:

To withhold information, a governmental body must establish that the requested information is not subject to the Act, or, withholding the information is permitted by one of the TPIA's enumerated exceptions to disclosure. *See Thomas v. Cornyn*, 71 S.W.3d 473, 490 (Tex.App.-Austin 2002, no pet.) (holding government, not the requestor, must “produce evidence that an exception to disclosure applies”). Whether information is subject to the Act and whether an exception to disclosure applies are questions of law. *A & T Consultants v. Sharp*, 904 S.W.2d 668, 674 (Tex.1995).

*City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 323 (Tex. App.—Austin 2002).

The County Attorney must prove that the TPIA law enforcement exception, Section 552.108(a)(1) is applicable to the DPA. Coronado contends that it is not applicable because the criminal case is dismissed; there is no ongoing prosecution to be interfered with, and such an agreement is not the type of record the law enforcement exception exists to protect from disclosure. Any claim by the County Attorney that disclosure of the DPA might interfere in prosecution of a crime is necessarily based on unfounded conjecture and speculation, especially if disclosed after the criminal case is dismissed.

#### **NEW AG RULING OR2017-16049 SUPPORTS DISCLOSURE**

7. On April 27, 2017 Tara Coronado made another public information request to

the County Attorney for every DPA entered into since January 1, 2016 for family violence cases. On May 11, 2017, the County Attorney requested an Attorney General ruling to withhold those DPAs, pleading (a) the law enforcement exception (section 552.108(a)(1) and 552.108(a)(2)); the litigation exception (section 552.103); and attorney-client exception (section 552.107(1)). On July 18, 2017, the Attorney General ruled that the DPAs must be disclosed, at least in part. *See* attached Exhibit I-B, Tex. Att’y Gen. Op. OR2017-16049 (July 18, 2017). Relevant to this present case, the Attorney General held that the County Attorney could not withhold DPAs under section 552.108(a)(1). Without explanation or analysis, the Attorney General also held that the DPAs were not subject to disclosure under section 552.022(a)(18) (settlement agreements), but Coronado presses that pure question of law as grounds for disclosure.

### **A DPA IS A SETTLEMENT AGREEMENT THAT MUST BE DISCLOSED**

8. A DPA is a Settlement Agreement that must be disclosed under TPIA section 552.022(a)(18):

Sec. 552.022. CATEGORIES OF PUBLIC INFORMATION; EXAMPLES. (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information *are public information and not excepted from required disclosure unless made confidential* under this chapter or other law:  
.... (18) *a settlement agreement to which a governmental body is a party.*

(b) A court in this *state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a)* or to not produce the category of public information for inspection or duplication, unless the category of information is confidential under this chapter or other law.

9. “Settlement” is defined in Black’s Law Dictionary as “an agreement ending a dispute or lawsuit.” BLACK’S LAW DICTIONARY 1496 (9<sup>th</sup> ed. 2009). A “settlement” can exist regardless of whether a lawsuit has been filed or not. In this case, a DPA ends the criminal court case, and the case is dismissed. In other words, the criminal case is an adversarial dispute or lawsuit that is resolved/settled by the DPA. Even if the dismissal of the criminal case is “without prejudice,” as it is with Travis County’s DPAs (meaning the case can be refiled if the defendant does not comply with the Settlement) that does not mean there was not a Settlement Agreement that must be disclosed under section 552.022(a)(18). There is no substantive difference between the provision of a DPA permitting suit to be reinstated with a party waiving any statute of limitations than there is in a typical settlement with a “without prejudice” Nonsuit, that gives a party a remedy if the other party violates the settlement agreement.

10. The plain wording of section 552.022(a)(18) does not limit settlement agreements to just civil cases, or even limit its application to lawsuits or claims of any particular sort. The plain language demonstrates that when a governmental body

settles a dispute or claim, the public has a right to see that settlement agreement. Despite the Attorney General’s ruling in OR2017-16049 recently, Texas appellate courts have a record of giving the plain words of the TPIA meaning even if it means overruling years or decades of contrary interpretations by the Attorney General. *See e.g., Boeing Company v. Paxton*, 466 S.W.3d 831 (Tex. 2015) (holding that despite the long-standing position of the Attorney General, the language of TPIA section 552.104 does not limit its application solely to protecting *the governmental body’s* interest in competition for its contracts (552.104(a) says, “Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.”); *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016 no pet.)(holding that, despite the Attorney General’s long-standing ruling to the contrary, the plain language of TPIA section 552.137 to make confidential the “email address of a member of the public” does not apply to the personal email addresses of City Officials used in communicating about official city business.).

11. The following are some factors indicating that a DPA is a settlement agreement and that Section 552.022(a)(18) is applicable to the Travis County DPAs:

- a. The agreement relates to a court case, the cause number of which appears at the top of the agreement.
- b. The County Attorney is a party to the agreement. (Page 1: “The parties to this agreement are the State of Texas, which is represented by the Travis



County Attorney or his designated agent, and [name] the Defendant....”).

- c. The Defendant makes concessions and “in return” the criminal case is dismissed. (Page 1: “*In return*, the State of Texas agrees to conditionally dismiss the offense(s) charged.”).
- d. The term of the agreement is specified. (Page 2: “This agreement lasts for [ ] starting the day the Court has granted the State’s conditional dismissal motion.”).
- e. The agreement is to settle the prosecution of the defendant’s case. (Page 6: “If the Defendant complies with the specified terms and conditions for the duration of this agreement, the Travis County Attorney agrees not to prosecute the Defendant further for the offense(s).”).
- f. The Defendant not only agrees to plead guilty or no contest if the charges are refiled, but also agrees that the agreement can be admitted at a re-trial. (Page 6: “The Defendant agrees and stipulates that this agreement, including the written confession of guilt that it contains, is admissible against him or her in court.”).
- g. The agreement is signed by Defendant (and his/her attorney) and by an Assistant County Attorney for Travis County, Texas. (Page 7).

12. The County Attorney has already admitted that the DPA is not “confidential” and has not so asserted in his pleadings in this case. *See infra*, Paragraph 22, County Attorney’s Response to Interrogatory 10.

13. Even were the County Attorney to meet his burden to prove applicability of the law enforcement exception, section 552.108(a)(1), that would be irrelevant to disclosure of a Settlement Agreement. Information subject to section 552.022 cannot be withheld from disclosure based on such discretionary grounds for

withholding as section 552.108(a)(1). *See, e.g.* Tex. Atty. Gen. Op. OR2010-17679 at 2 (2010):

You seek to withhold the settlement agreement under sections 552.101 and 552.108 of the Government Code. Section 552.108, however, is a discretionary exception that protects a governmental body's interests and may be waived. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 586 (1991) (governmental body may waive section 552.108). *As such, section 552.108 does not make information confidential for the purposes of section 552.022. Consequently, the city may not withhold the submitted settlement agreement, which we have marked, under section 552.108 of the Government Code.*

14. If this Court finds that the DPA is a settlement agreement subject to mandatory disclosure under TPIA section 552.022(a)(18), there is no need to proceed further into the claims made by the County Attorney in this case. Being that the DPA is a settlement agreement, section 552.022(b) prohibits the Court from permitting the County Attorney to withhold the agreement, and section 552.108(a)(1) is irrelevant.

**BECAUSE THE COUNTY ATTORNEY DISCLOSES THE DPA TO THE DEFENDANTS, IT CANNOT BE WITHHELD FROM OTHERS**

15. There is no law the County Attorney would violate if he complied with the TPIA and disclosed the DPA in this case or any other. When the law enforcement exception of TPIA section 552.108 applies, it is a discretionary exception to mandatory disclosure. Even if section 552.108 applies, the County Attorney could

choose to disclose the DPA. And, the County Attorney admits that he has done so in other cases, and did so in disclosing the Cunningham DPA to defendant Mr. Cunningham. In the ruling at issue in this case, the Attorney General noted this fact as a reason why the County Attorney could not withhold the DPA under section 552.108(a)(1). Tex. Atty. Gen. Op. OR2016-21139 at 2 (2016) (“The defendant [Cunningham] 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 also* Tex. Att’y Gen. Op. OR2017-16049 at 2 (July 18, 2017).

16. The TPIA makes clear that if a governmental body exercises its discretion to release such information, then it must make that information available to “any person” and cannot discriminate against the position or occupation of the requestor. Tex. Gov’t Code section 552.007 (emphasis added) says:

**VOLUNTARY DISCLOSURE OF CERTAIN INFORMATION WHEN DISCLOSURE NOT REQUIRED.** (a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) *Public information made available under Subsection (a) must be*

*made available to any person.*

Likewise, the TPIA prohibits discrimination in to whom the governmental body releases such information. Tex. Gov't Code section 552.223 says:

UNIFORM TREATMENT OF REQUESTS FOR INFORMATION.  
The officer for public information or the officer's agent shall treat all requests for information uniformly without regard to the position or occupation of the requestor, the person on whose behalf the request is made, or the status of the individual as a member of the media.

17. Thus, because the County Attorney voluntarily released the DPA to defendant Ed Cunningham, he must release the DPA to the abuse victim and requestor Tara Coronado regardless of whether section 552.108(a)(1) would have been applicable.

**SECTION 552.108(a)(1) IS NOT APPLICABLE TO A DPA**

18. Section 552.108(a)(1) is not applicable to any DPA because the County Attorney dismisses the criminal case as a contractual stipulation of settlement.<sup>4</sup> Upon dismissal, there is no longer an ongoing criminal investigation or prosecution. During the time the DPA is in force, there is only the mere possibility that the criminal case could be refiled, but the DPA itself is not an internal investigatory record nor the type of record the law enforcement exception permits the County

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<sup>4</sup> TPIA Section 552.108(a)(1) says: "EXCEPTION: CERTAIN LAW ENFORCEMENT, CORRECTIONS, AND PROSECUTORIAL INFORMATION. (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

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

Attorney to conceal.

19. The cases cited by the County Attorney in his Pretrial Brief help demonstrate that a Deferred Prosecution Agreement is not the type of investigatory record within the scope of section 552.108's exception to disclosure.

a. In *Houston Chronicle*, the court recognized that a prosecutor might be able to withhold records from a criminal defendant. *Houston Chronicle v. City of Houston*, 531 S.W.2d 177, 186 (Tex. App.—Houston [14<sup>th</sup> Dist.], 1975, *writ ref'd n.r.e.*) (“The City and State have a legitimate interest in preserving secrecy of their records from the eyes of defendants and their counsel in criminal actions. The trial of a criminal case is an adversary proceeding.”). But the DPA is not that kind of record. The DPA is provided to the defendant.

b. In *City of Fort Worth*, the court described the types of records that should be concealed under section 552.108 so crime is not facilitated:

Thus, construing section 552.108 as a whole [...] evidences an intent by the Legislature to exempt from disclosure documents that facilitate a police department's ability to actively anticipate, plan for, and react to violations of the law....

*City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002).

...[I]t is clear that the law enforcement exception evidences an intent by the Legislature to permit government agencies to withhold internal documents that would enable citizens to circumvent policies, procedures, and techniques used by police departments in carrying out their missions....

*City of Fort Worth*, 86 S.W.3d at 329 (Tex. App.—Austin 2002).

An agreement with a criminal defendant to dismiss a pending criminal case is not the kind of record described in section 552.108(a)(1) or by these descriptions in the cited cases of why such criminal investigatory records should be concealed from the public. Counsel for Coronado cannot find any published case where a court has agreed that a settlement agreement with a criminal defendant can be withheld under section 552.108, and the County Attorney did not cite any such case in his Pretrial Brief.

c. The County Attorney has also ignored the fact that if disclosure were made of the content of a DPA, there would be a greater possibility of the County Attorney finding out about a defendant who violated the terms of the DPA. Wouldn't that *promote* prosecution of crime? If a DPA is an allegedly effective way of prosecuting a crime, would it be important to the County Attorney to enhance his likelihood of finding out about noncompliance with the DPA by letting people who might witness the defendant's conduct during deferred prosecution know when they observe a violation of the terms of the DPA by the defendant? Or does nondisclosure of these DPAs allows these cases to conveniently become out-of-sight, out-of-mind regardless of the defendant's actual compliance with the terms of the DPA?

**WAIVER BY THE COUNTY ATTORNEY**  
**& ISSUES RESOLVED IN DISCOVERY**

20. Coronado contends that no part of the DPA can be withheld from disclosure, and we contend that the County Attorney must prove that each and every part of the DPA can be withheld under section 552.108(a)(1). Even if the County Attorney proved that a particular portion of a DPA could be redacted before disclosure under section 552.108(a)(1), that is not enough to prove that the entire DPA can be withheld from disclosure. And the County Attorney, in public statements and in uncontested disclosures in discovery, has waived any claim to withhold certain portions of the DPA.<sup>5</sup>

21. a. With regard to disclosure of his blank DPA Form, the County Attorney admitted:

REQUEST FOR ADMISSION 13:           You have not kept confidential the blank form Your office uses for deferred prosecution agreements.

RESPONSE:       Plaintiff admits that forms have been provided to attorneys in conjunction with finalizing a Deferred Prosecution Agreement but denies that forms have been provided to the general public.

REQUEST FOR ADMISSION 14:           The form Your office has used for one or more deferred prosecution agreements is available for public viewing, including via a link at

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<sup>5</sup> On July 11, 2017, Coronado served the County Attorney and Attorney General with notice of her intent to use unfiled discovery and provided a copy of that discovery with that notice. The County Attorney did not file any objection to these exhibits nor request any protective order. The deadline in the Scheduling Order to make such objections to exhibits was July 17, 2017.

<http://www.pacefirm.com/faq/deferred.html>.

RESPONSE: Plaintiff admits that some attorneys, without Plaintiff's consent, have posted this form on the internet.

REQUEST FOR ADMISSION 15: You have provided a copy of the blank form Your office uses for deferred prosecution agreements to one or more persons outside Your office.

RESPONSE: Plaintiff admits that forms have been provided to attorneys in conjunction with finalizing a Deferred Prosecution Agreement but denies that forms have been provided to the general public.<sup>6</sup>

b. The County Attorney admits that the U.S. Department of Justice not only publicly discloses its deferred prosecution agreements, it posts them on the DOJ website. One must wonder why the Travis County Attorney claims disclosure of DPAs will interfere in prosecution of crime while the U.S. Justice Department seems to have no such qualms against disclosure of its DPAs. This evidence further weakens the County Attorney's claim that mere disclosure of DPAs interferes with prosecution of crime.

REQUEST FOR ADMISSION 16: The United States Department of Justice publicly discloses deferred prosecution agreements on its website, including at <https://search.justice.gov/search?query=deferred+prosecution&op=Search&affiliate=justice>

RESPONSE: Plaintiff admits that a person can view deferred

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<sup>6</sup> This is not a true statement, because the County Attorney's Office has provided at least one reporter a copy of a blank DPA Form in the last week in response to a TPIA public information request. The County Attorney also produced a copy of the blank DPA Form, without contest or request for nondisclosure, in response to Coronado's Request for Production 3.



prosecution agreements made in cases involving the United States of America on the website noted above.

c. Further undermining the County Attorney's claims of adverse effect on prosecution of crime, the County Attorney has publicly disclosed DPAs in the past.

In Coronado's Request for Admission 9, the County Attorney admitted:

You [the County Attorney] have disclosed deferred prosecution agreements, either in part or in their entirety, (other than the Cunningham DPA) to persons who were not parties (or their attorneys) to the deferred prosecution agreement.

So, unless the County Attorney can firmly prove that his prior disclosure of other DPAs *has* interfered with prosecution of crimes this admission helps to undermine the County Attorney's claim that mere disclosure of a DPA interferes in prosecution of crime.

22. The County Attorney has responded to Interrogatories in this case saying that he does not contend that disclosure of the DPA would interfere in the detection or investigation of crime, nor does the County Attorney contend the DPA is "confidential" as that term is defined by the TPIA:

INTERROGATORY NO. 5: Do You contend that there are provisions in the Cunningham DPA that, if disclosed, would interfere with the detection of crime? If so, explain how disclosure of the Cunningham DPA would interfere with the detection of crime?

RESPONSE: No.

INTERROGATORY NO. 6: Do You contend that there are provisions in the Cunningham DPA that, if disclosed, would interfere

with the investigation of crime? If so, explain how disclosure of the Cunningham DPA would interfere with the investigation of crime?

RESPONSE: No.

INTERROGATORY NO. 10: Do You contend that the Cunningham DPA is “confidential” as that term is used in the Texas Public Information Act (including Tex. Gov’t Code section 552.352) as opposed to contending that the DPA is just not subject to mandatory disclosure? If so, explain the basis for your contention that the Cunningham DPA is “confidential.”

RESPONSE: No.

23. a. The County Attorney has waived nondisclosure of at least part of the Cunningham DPA because he has admitted that he disclosed material terms of the Cunningham DPA to Coronado (apparently prior to the County Attorney’s request for an Attorney General ruling or this lawsuit, where the County Attorney claims no part of the DPA is subject to mandatory disclosure). Instead of just admitting RFA 18, the County Attorney chose to disclose terms of the Cunningham DPA in his response.

REQUEST FOR ADMISSION 18: You have divulged to Plaintiff Tara Coronado material terms of the Cunningham DPA.

RESPONSE: Plaintiff admits that Ms. Coronado was informed by the Travis County Attorney's Office of the following terms of the Deferred Prosecution Agreement, which are important and pertain to her safety:

2 years Def. Pros. + CES/Recs (Domestic Violence + 16 hrs. of parenting classes/ counseling)

Have no contact through any means with Ms. Coronado and do not go within 200 yards of the following locations: the residence or place of employment of Ms. Coronado unless pursuant to child custody order or related to the safety and welfare of the children.

Plaintiff denies that Ms. Coronado was informed by the Travis County Attorney's Office of any other terms of the Deferred Prosecution Agreement.

b. How can the County Attorney prove that the mere disclosure of the Cunningham DPA will interfere in the prosecution of crime, when he offered to disclose material terms? *See* Exhibit I-C Email 3/10/17 (“... we offer to settle this matter by releasing to Ms. Coronado pages 4 and 5 of the Deferred Prosecution Agreement, the pages that contain the specific terms and conditions applicable to Mr. Cunningham, and inform her of the length of the Agreement, which is contained on Page 2.”).

**THE COUNTY ATTORNEY CANNOT PROVE THAT *EVERY SECTION***  
**OF THE DPA CAN BE WITHHELD**

24. For purposes of illustrating the issue of *partial* disclosure of a DPA, this Brief segregates the DPA Form into 15 “sections” and challenges the fact that the County Attorney has not pled or briefed explanations for why each and every applicable section can be withheld under TPIA section 552.108(a)(1). The Blank DPA Form used in this Brief is the one produced, without objection, by the County Attorney in

discovery and is marked on each page by the County Attorney,<sup>7</sup> as follows:

Produced in response to Request for Production No. 3 made in No. D-1-GN-16-004769; *David A. Escamilla, Travis County Attorney v. Ken Paxton, State of Texas Attorney General*

25. Some of the information on the DPA Form is information that is in the criminal court record, even of dismissed cases. TPIA section 552.022(a)(17) makes public “information that is also contained in a public court record.” And, as explained *supra* in Paragraph 13, such information made public under section 552.022 cannot be withheld under a discretionary exception to disclosure such as section 552.108(a)(1). For example, the style of the criminal court case is contained in a public court record, as well as a notation in the Order of Dismissal that the dismissal was a result of a deferred prosecution agreement. *See* Exhibit I-E attached.

#### **DPA Form Section 1 – Style of the Criminal Case & Title of the Agreement**

26. The County Attorney has the burden to prove what possible basis there could be to withhold from disclosure the following “Section 1” of a DPA, merely the style of the criminal case and title of agreement “Deferred Prosecution Agreement.” The County Attorney has admitted in open court records and elsewhere that he entered into a DPA with the defendants. What legal or factual basis is there for refusing to disclose Section 1? Section 1 should be publicly disclosed.

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<sup>7</sup> *See* Exhibit I-A attached.

DPA FORM – SECTION 1 (Page 1)

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CAUSE NO. C - 1 - CR - \_\_\_\_\_



THE STATE OF TEXAS

§

IN THE COUNTY

v.

§

COURT-AT-LAW # \_\_\_\_\_

§

TRAVIS COUNTY, TEXAS

DEFERRED PROSECUTION AGREEMENT

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**DPA Form Sections 2 and 11 – Language Evincing a “Settlement Agreement”**

27. Sections 2 and 11 of the DPA Form is specific language evincing a settlement agreement, a mutually agreed resolution of the criminal court case brought by the County Attorney. Under TPIA section 552.022(a)(18), these sections (and the entire agreement) is subject to disclosure. This language shows the basic terms of the settlement, the *quid pro quo*, for dismissal of the criminal court case and should be disclosed. The County Attorney has the burden to demonstrate why these sections should be withheld from disclosure.

[NEXT PAGE]

## DPA FORM – SECTION 2 (Page 1)

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### DEFERRED PROSECUTION AGREEMENT

The parties to this agreement are the State of Texas, which is represented by the Travis County Attorney or his designated agent, and \_\_\_\_\_, the Defendant, whose date of birth is \_\_\_\_\_. **The Defendant agrees to waive certain rights and to comply with specified terms and conditions. The Defendant also confesses guilt of the offense(s) charged and stipulates to the admissibility of incriminating evidence.** In return, the State of Texas agrees to conditionally dismiss the offense(s) charged.

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## DPA FORM – SECTION 11 (Page 6)

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If the Defendant complies with all the specified terms and conditions for the duration of this agreement, the Travis County Attorney agrees not to prosecute the Defendant further for the offense(s).

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### **DPA Form Section 3 – Defendant’s Waiver of Rights**

28. Section 3 is merely a waiver of rights, part of what the defendant provides as a *quid pro quo* as part of the settlement. There is no legal basis for withholding the defendant’s waiver of rights from public disclosure. Even in court proceedings, such waivers are not kept secret from the public. Section 3 should be publicly disclosed.

[NEXT PAGE]

### DPA FORM – SECTION 3 (Page 1-2)

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#### *Defendant's waiver of rights*

I understand that I have the following rights:

- I have the right to a speedy trial.
- I have the right to a trial by jury.
- I have the right to confront and cross-examine the witnesses against me.
- I have the right to secure the appearance at trial of witnesses in my favor.

\_\_\_\_\_ I knowingly and voluntarily waive these rights.

I have also been advised of and fully understand that

- I have the right to remain silent and not make any statement at all. Any statement I make may be used against me at my trial.
- Any statement I make may be used against me in court.
- I have the right to have a lawyer present to advise me prior to and during any questioning.
- If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning.
- I have the right to terminate this interview at any time.

\_\_\_\_\_ I knowingly and voluntarily waive these rights, as well.

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
State Bar Number

---

### **DPA Form Section 4 – Defendant's Confession to the Charges**

29. The County Attorney may argue that if a confession was publicly disclosed, defendants would not agree to sign a DPA, and thus, the County Attorney might argue that disclosure of this part of a DPA would interfere in the prosecution of crime within the meaning of section 552.108(a)(1). But if that conjecture was true, why then, does the County Attorney succeed in getting criminal defendants to agree to

Deferred *Adjudication*, where the defendant pleads guilty and a public court record discloses that plea as well as all of the terms of the deferral? Such an argument against disclosure is spurious. Advocates for victims of family violence also contend that an important part of successful prosecution in such cases, and in breaking the cycle of violence, is when the defendant abuse admits to others that he committed the abuse. These advocates contend that without such an open admission, the abuser's behavior may not change, and odds of repeating that behavior increases. Section 4 should be publicly disclosed.

[NEXT PAGE]



## DPA FORM – SECTION 4 (Page 2)

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### *Defendant's Confession to the Charges*

The State's information alleges that I committed the offense(s) of \_\_\_\_\_  
\_\_\_\_\_ on [date] \_\_\_\_\_, in Travis County,  
Texas. The State's information may be found in the Court Clerk's file, and it is  
incorporated by reference into this agreement as though fully set out.

I am the person named as the defendant in the State's information. I understand  
the allegations against me. I hereby voluntarily confess that they are true.

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
State Bar Number

---

### **DPA Form Section 5 – Duration of the Agreement**

30. The County Attorney must explain why disclosure of the duration of the agreement would interfere in the prosecution of crime under 552.108(a)(1). Also, recall that the County Attorney admitted (*see* Paragraph 23 *supra*, Request for Admission 18; Exhibit I-C Email) that he offered to disclose the duration of the term of the DPA (in addition to other information) to Coronado if she would withdraw from this lawsuit. Apparently, the County Attorney does not really believe disclosure of this information would interfere in prosecution of crime or he would not have offered to disclose it. This also the kind of information routinely available in deferred adjudication cases as part of public court record. Section 5 of the DPA should be publicly disclosed.

## DPA FORM – SECTION 5 (Page 2)

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### *When the Agreement Begins, and How Long it Lasts*

This agreement begins when all of the following have occurred:

- the Defendant has initialed the waivers on pages 1 and 2;
- the Defendant and the Defendant's attorney have signed page 2;
- the Defendant, the Defendant's attorney and the attorney for the State of Texas have signed page 7 of the agreement; *and*
- the Court has granted the State's conditional dismissal motion.

This agreement lasts for \_\_\_\_\_, starting the day the Court has granted the State's conditional dismissal motion.

---

## **DPA Form Section 6 – Specific Terms & Conditions**

31. Section 6 of a DPA Form is merely administrative in nature, giving direction to the defendant about where to send proof of compliance and general direction. There is no good reason this section of the DPA should be withheld from disclosure. The County Attorney has the burden to prove otherwise. Section 6 should be publicly disclosed.

[NEXT PAGE]

## DPA FORM – SECTION 6 (Page 3)

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### *Defendant's Agreement to Specific Terms and Conditions.*

By initialing the line beside each relevant term or condition, the Defendant shows that he or she understands that compliance with this particular term or condition is required. *If the Defendant has already complied with the condition when the parties enter into this agreement, the parties must attach documents showing that compliance.*

The Defendant must timely provide proof of completion of all terms and conditions, by either U.S. postage-prepaid mail, fax transmission, email, or hand-delivery to:

#### *Street Address*

Travis County Attorney's Office  
Ned Granger Admin. Bldg.  
314 West 11th, 3rd Floor  
Austin, TX 78701

#### *Mailing Address*

Travis County Attorney's Office  
Attn: Deferred Prosecution  
(List cause number from page 1)  
Post Office Box 1748  
Austin, TX 78767-1748

#### *Best way to communicate is by email:*

**tcaodfpr@traviscountytx.gov** (email)

(512)854-9415 - telephone

(512)854-3377 – fax number

(512)854-4282 – alternative fax number

(List the cause number from page 1)

**Keep a copy, for your own records, of any document(s) sent to the Travis County Attorney's Office. Make sure that the agreement's cause number is on all paperwork. (The cause number is on page 1 of this agreement.)**

Proof is timely provided if it is mailed, fax transmitted, emailed, or hand-delivered within the specified duration of this agreement.

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### **DPA Form Section 7 – Statement of No Additional Offenses**

32. Section 7 of the DPA Form merely obtains an agreement that the defendant will not commit other criminal offenses while the agreement is in effect. The disclosure of this information would not interfere in the prosecution of crime, and cannot be withheld under section 552.108(a)(1). The County Attorney has the burden to demonstrate how it would. Section 7 should be publicly disclosed.

#### **DPA FORM – SECTION 7 (Page 3)**

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**Mandatory:** While this agreement is in effect, the Defendant shall not commit any other offense(s) above that of a Class C moving traffic violation. For purposes of this agreement, an offense is "committed" if the Travis County Attorney believes that probable cause to arrest the Defendant for that offense develops at any time during or after an arrest.

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### **DPA Form Section 8 – Counseling/Course Requirement**

33. Section 8 of the DPA Form lists possible counseling and courses the defendant will be required to take under the DPA. The County Attorney must explain why disclosure of this section would interfere in the prosecution of crime under section 552.108(a)(1). And keep in mind that the County Attorney admitted (*see* Paragraph 23 *supra*, Request for Admission 18; Exhibit I-C Email) that he offered to disclose the required counseling (in addition to other information) to Coronado if she would withdraw from this lawsuit. Apparently, the County Attorney does not really believe disclosure of this information would interfere in prosecution of crime or he would not have offered to disclose it.

[NEXT PAGE]

**Counseling Requirements**

- \_\_\_ Obtain a **Domestic Violence Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.
- \_\_\_ Obtain a **Non-Intimate Partner Violence Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.
- \_\_\_ Obtain an **Alcohol/Substance Abuse Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.

**Complete the following course(s):**

- |   |                                     |
|---|-------------------------------------|
| ___ Assault (8hrs Misd. I)<br><i>(Only for Non-Intimate Partner violence)</i>               | TCCES contact number (512) 854-9540 |
| ___ Multiple Offender/Felony (20hrs Misd.II)  | TCCES contact number (512) 854-9540 |
| ___ Theft/Shoplifting (8hrs. Misd.I)  | TCCES contact number (512) 854-9540 |
| ___ Austin Stress Clinic Level 1 (8hrs)<br><i>(Only for Non-Intimate Partner violence)</i>  | ASC contact number (512) 326-1717   |
| ___ Austin Stress Clinic Level 2 (20hrs)<br><i>(Only for Non-Intimate Partner violence)</i> | ASC contact number (512) 326-1717   |
| ___ Any Baby Can Parenting Class  | ABC contact number (512) 454-3743   |

**NOTES:**

- *A Defendant who resides outside Travis County, Texas must be evaluated in Travis County before doing counseling equivalents in the state or county of residence.*
- *Evaluations MUST be completed within Two (2) months of starting the deferred prosecution agreement.*
- *On-line courses are NOT acceptable.*
- *If the Defendant has already complied with the condition, the parties must attach documents showing that compliance.*

### **DPA Form Section 9 –The No-Contact Provision**

34. Of all the provisions of a DPA that a victim ought to have access to, it is this one: the “stay away” provision. The County Attorney must prove that disclosure of the stay-away provision of a DPA as well as the other requirements of Section 9 would interfere in the prosecution of crime under section 552.108(a)(1). And keep in mind that the County Attorney admitted (*see* Paragraph 23 *supra*, Request for Admission 18; Exhibit I-C Email) that he offered to disclose the stay-away provision (in addition to other information) to Coronado if she would withdraw from this lawsuit. Apparently, the County Attorney does not really believe disclosure of this information would interfere in prosecution of crime or he would not have offered to disclose it. Section 9 should be publicly disclosed.

[NEXT PAGE]



DPA FORM – SECTION 9 (Page 5)

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\_\_\_\_ Have no contact through any means with \_\_\_\_\_  
and do not go within 200 yards of the following location: \_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_ Provide proof of a valid Texas driver's license and automotive liability-insurance coverage by the term date of this agreement.

\_\_\_\_ Provide proof of completing a certified Texas Alcohol & Beverage Commission Seller/Server, training course. **TABC contact number (512) 451-0231.**

\_\_\_\_ Forfeit the weapon. *The ORIGINAL "Forfeiture of Weapon's Agreement" must be attached to this agreement.*

\_\_\_\_ Provide proof of \$\_\_\_\_\_ restitution paid to \_\_\_\_\_.  
Payable only through the Travis County Attorney's Hot Check Division. (A restitution sheet is required.)

\_\_\_\_ Provide proof of the Defendant's pleading to the Class C offense of \_\_\_\_\_,  
and paying a \$\_\_\_\_\_ fine and court costs.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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### **DPA Form Section 10 – Alcohol Monitoring Requirement**

35. How would disclosure of a DPA requirement prohibiting the defendant from consuming alcohol during the term of the DPA interfere in the prosecution of crime? It is the County Attorney's burden to so prove. Section 10 should be publicly disclosed.

DPA FORM – SECTION 10 (Page 5)

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#### **Alcohol Monitoring Requirement**

*\*Any indication of the consumption of alcohol is a violation of this agreement.*

\_\_\_\_ Provide proof of installing and maintaining the following alcohol monitoring device(s) for a period of \_\_\_\_\_.

\_\_\_\_ IID      \_\_\_\_ SoberLink      \_\_\_\_ SCRAM      \_\_\_\_ IN-HOM

\* *The ORIGINAL "Alcohol Monitoring Device Agreement" must be attached to this agreement.*

---

### **DPA Form Section 12 – Consequences of Defendant’s Noncompliance**

36. Section 12 of the DPA Form says that if the defendant violates the DPA, the County Attorney is no longer subject to the agreement. Again this is similar to most Settlement Agreements that permit enforcement of the agreement or refiling of the litigation. Section 12 is further evidence that a DPA is subject to disclosure under section 552.022(a)(18). In addition, the County Attorney must prove that disclosure of this Section 12 would interfere in the prosecution of crime. Section 12 should be publicly disclosed.

[NEXT PAGE]

## DPA FORM – SECTION 12 (Page 6)

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### *Consequences of Defendant's Non-Compliance with or Violation of the Agreement's Terms and Conditions*

If the Defendant fails to comply with or violates any of the specified terms and conditions of this agreement, then the Travis County Attorney is no longer subject to the agreement and may refile the charges and prosecute the case to the full extent of the law.

The Defendant hereby agrees to the following if the Travis County Attorney refiles the charges:

- The Defendant agrees to plead guilty or no contest to the refiled charges, as shown by the Defendant's signing the attached plea form.
  - The Defendant agrees and stipulates that this agreement, including the written confession of guilt that it contains, is admissible against him or her in court.
  - The Defendant agrees and stipulates that affidavits, written statements of witnesses and other documentary evidence--including but not limited to the police offense report--are admissible against the Defendant at trial.
  - The Defendant waives any statute-of-limitations objection to the refiled charges.
  - The Travis County Attorney's burden of showing the Defendant's non-compliance with this agreement is by a preponderance of the evidence.
  - If the parties agree to continue the deferred prosecution agreement after the County Attorney refiles the charges, then the agreement is extended for the same period as the original agreement, without the need to draft and sign a new document. For example, if the initial agreement was to last six months, then the extended agreement will last yet another six months from the date of the second dismissal.
-

### **DPA Form Section 13 – Signature & Disclosure of Attorney Name**

37. Section 13 of the DPA Form discloses the name of the attorney and that the defendant asserts that the attorney properly represented him/her. The County Attorney must prove that disclosure of this information would interfere in the prosecution of crime under section 552.108(a)(1). Section 13 should be publicly disclosed.

#### **DPA FORM – SECTION 13 (Page 6 – 7)**

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I, the Defendant, have fully discussed this case and the evidence with my attorney. I am satisfied that he or she has properly represented me. **I have received a copy of this Deferred Prosecution Agreement.** I waive any further time to prepare for trial to which my attorney or I may be entitled.

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
State Bar Number

Date: \_\_\_\_\_

\_\_\_\_\_  
Assistant County Attorney  
Travis County, Texas

\_\_\_\_\_  
State Bar Number

### **DPA Form Section 14 – Defendant’s Plea of Guilty or No Contest**

38. While the County Attorney may claim that any disclosure of the defendant’s admission of guilt or plea somehow interferes in the prosecution of crime under section 552.108(a)(1), there is no reason to believe such a spurious claim. When criminal defendants sign up for deferred *adjudication*, they plead guilty or no contest—on the record. The County Attorney has no evidence that mere disclosure of these open court records in deferred adjudication cases interferes in prosecution of crime if those defendants fail to comply with the terms of the deferral and are retried. Section 14 should be publicly disclosed.

#### **DPA FORM – SECTION 14 (Page 7)**

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##### **Defendant’s Plea of Guilty or No Contest**

I have consulted with my attorney, who has advised me of the consequences of pleading guilty or no contest. I understand these consequences. I plead guilty/no contest to the offense(s) of \_\_\_\_\_.  
My plea is given freely and voluntarily.

\_\_\_\_\_  
Defendant’s signature

\_\_\_\_\_  
Printed name

\_\_\_\_\_  
Date

---

### **DPA Form Section 15 – Alcohol Monitoring Device Agreement**

39. Section 15 of the DPA Form is an agreement by the defendant to obtain and maintain an alcohol monitoring device. How would disclosure that the defendant made such an agreement interfere in the prosecution of crime under section 552.108(a)(1)? It is the burden of the County Attorney in this case to show how and why. Section 15 should be publicly disclosed.

[NEXT PAGE]



**Alcohol Monitoring Device Agreement  
Travis County Attorney's Office  
Deferred Prosecution Program**



I, \_\_\_\_\_ agree to obtain and maintain the below indicated alcohol monitoring device for a period of \_\_\_\_\_, as part of my agreed upon Deferred Prosecution Agreement Program of the Travis County Attorney's Office.

*\*Any indication of the consumption of alcohol is a violation of this agreement.*

\_\_\_\_ IID    \_\_\_\_ SoberLink    \_\_\_\_ SCRAM    \_\_\_\_ IN-HOM

- I will notify the Travis County Attorney's Office **within ten(10) working days** from the date of the conditional dismissal, with the name of my chosen vendor, through the communication methods listed on page 3 of the Deferred Prosecution Agreement.
- I will inform my chosen vendor that the Travis County Attorney's Office's is the monitoring agency for my case. Making sure that the monthly monitoring reports are:

Emailed:        **TCAODFPR@traviscountytexas.gov**

or

Fax no.:        (512) 854-3377 Attn: Deferred Prosecution (C-1-CR-\_\_\_\_\_)

- I will direct any questions about my financial burden and device responsibility directly to my chosen vendor.

I understand that **only** the Travis County Attorney's Office will be allowed to give removal authorization for any device being monitored under the Deferred Prosecution Agreement. Judges **do not** have the authorization to remove any device monitored under the Agreement. Any removal of a device other than through the Travis County Attorney's authorization will be considered a violation and subject to the refiling of the original charges for continuing prosecution of the case.

I understand that if I failure to adhere to any of the Deferred Prosecution Agreement's conditions concerning the alcohol monitoring devices, it can result in subsequent time added to the monitoring period, added time to the deferred prosecution agreement, and/or refiling of the original charges and continued prosecution of the case.

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Date

**THE COUNTY ATTORNEY’S “PREVIOUS DETERMINATION”  
ARGUMENT IS AN IRRELEVANT DISTRACTION THAT HAS  
NOTHING TO DO WITH THE MERITS**

40. Due to his frustration with the Attorney General for ruling in favor of disclosure of the Cunningham DPA, the County Attorney has spent a lot of time in court and in his brief arguing about whether a previous determination was made by the Attorney General. It is irrelevant to the merits of this case. It is also irrelevant whether the County Attorney *could have* relied on a previous determination and denied disclosure of the DPA to the requestor, Ms. Coronado, *instead of* asking the Attorney General for *another* ruling on disclosure of the DPA *as he did*. This Court can take into consideration any ruling or opinion by the Attorney General the Court so desires, but whether there was a previous or new determination by the Attorney General is irrelevant to whether the information is actually subject to disclosure.

41. The source of the “previous determination” argument is from TPIA section 552.301(a) which says:

Sec. 552.301. REQUEST FOR ATTORNEY GENERAL DECISION.  
(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.  
(emphasis added)

All this statutory provision does is to indicate that a governmental body *must* ask for



a ruling by the Attorney General *unless* there has been a previous determination. Now, the County Attorney seems to want to retroactively assert (only after receiving the adverse ruling in favor of disclosure), that there was a “previous determination.” All that means is that the County Attorney was not required to seek another ruling; he could have *relied* on—but did not—the previous determination *and not even ask the Attorney General for another ruling* and withhold the DPA. But that’s not what happened.

42. a. The record clearly shows that the County Attorney, in a request for ruling dated July 15, 2016, asked the Attorney General *again* for a ruling as to whether he could withhold the Cunningham DPA, while just letting the Attorney General know (in an obscure footnote) that the DPA had been the subject of OR2016-10351 (May 6, 2016), a previous determination. The County Attorney seems to obfuscate the issue of whether the July 15<sup>th</sup> request for ruling included the Cunningham DPA or just the additional records Coronado requested in the broader public information request. But were that true, the County Attorney would not have resubmitted the Cunningham DPA itself for the Attorney General to review again ... but he did. *See* TPIA section 552.301(e)(1)(D) & (E), requiring the governmental body in its ruling request to submit a copy of the specific information at issue in the request and label it to indicate “which exceptions apply to which parts of the copy.”

b. Pursuant to the County Attorney’s request for *another* ruling on the

DPA, the Attorney General issued OR2016-21139 (September 19, 2016) in favor of disclosure, the ruling the County Attorney refused to follow and, instead, filed this lawsuit. The County Attorney asked for another ruling; he got one and now regrets asking for one. The legal answer to the County Attorney's consternation is, "Too bad."

43. As the County Attorney has correctly pointed out, Tex. Att'y Gen. ORD-673 (2001) lays out the factors for determining whether a "previous determination" has been made when the exact same record is requested again. *See* Tex. Att'y Gen. ORD-673 at 6-7 (2001). Factor No. 4 is "the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling." *Id.* In a footnote, it points out that "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." *Id.* at FN 6.

44. a. In his original ruling request on the Cunningham DPA dated April 22, 2016, the County Attorney did not disclose to the Attorney General *that the criminal case against Mr. Cunningham had been dismissed* as a result of the deferred prosecution agreement. The County Attorney slyly avoided disclosing that central fact to the Attorney General and just said that the term of the Cunningham DPA had not expired, therefore, he misleadingly claimed, "...it is still an active, pending case."

b. In his July 15, 2016 ruling request, the County Attorney used similar language that is either confusing—compared to the facts—or is clearly misleading. In the footnote in that July letter referencing the previous determination, the County Attorney said,

“The same circumstances and status apply to the present case, *as this matter is still an active, pending case.*”

If that were true, then pursuant to ORD-673, the County Attorney was under no duty under TPIA section 552.301(a) to even *request* another Attorney General ruling nor to resubmit the Cunningham DPA to the Attorney General to review for a ruling. But he did. In fact, if the *Attorney General* believed that a previous determination had already been made (with no change of law, facts, or circumstances) the Attorney General could have said so instead of issuing the subsequent ruling OR2016—21139 (September 19, 2016).

45. But while the July ruling request was pending, *Ms. Coronado* supplied the Attorney General’s Office with a copy of the Order of Dismissal in the Cunningham criminal case No. C-1-CR-13-180014, dated April 6, 2016—which occurred before the County Attorney requested the first Attorney General ruling on April 22<sup>nd</sup>. *See* Exhibit I-D attached. That dismissal order was mentioned in the Attorney General ruling as a factor favoring disclosure of the DPA and the inapplicability of section 552.108(a)(1). It may be that the fact or circumstances had not actually changes, but

the facts and circumstances *of which the Attorney General was made aware* certainly had materially changed, resulting in the ruling being challenged by the County Attorney in this lawsuit.

46. It is clear from the record, that the County Attorney did not rely on a previous determination to withhold the DPA when he received the July 12, 2016 Coronado request (through her attorney Laura Bates) and decline to request another ruling about the DPA itself. *Instead*, the County Attorney rolled the dice again, but got snake-eyes this time, and no longer has an Attorney General ruling on which it has, or can, rely since OR2016—21139 superseded the prior ruling based on the County Attorney’s incomplete and misleading information about dismissal of the Cunningham criminal case. This Court is free to ignore or consider the prior ruling to the extent the Attorney General’s rulings are helpful to the Court, but whether there was a “prior determination” is irrelevant to the ultimate decision on disclosure of the DPA to be made in this case by the Court.

### **CONCLUSION AND PRAYER**

For these reasons, Intervenor/Cross-Plaintiff Coronado asks the Court to deny the claims by the County Attorney, find that the DPA at issue in this case is a settlement agreement subject to disclosure under Tex. Gov’t Code section 552.022(a)(18); that the County Attorney must disclose the DPA under section 552.007(b); that the law-enforcement exception of section 552.108(a)(1) is not

applicable to the DPA under the facts and circumstances; or, in the alternative, that only parts of the DPA may be withheld from disclosure. Coronado asks that the Court further find that she has prevailed in this case and grant award of reasonable and necessary attorney fees she has incurred in pursuing her claims in this lawsuit pursuant to Tex. Gov't Code section 552.323.

Respectfully submitted,



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Telephone: (512) 320-9155  
Cell: (512) 750-5854  
Facsimile: (512) 320-9156  
[Bill@AleshireLaw.com](mailto:Bill@AleshireLaw.com)  
**ATTORNEY FOR CROSS-PLAINTIFF**

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been served on the parties' attorneys by hand-delivery on this 21<sup>st</sup> day of July, 2017.

### ATTORNEYS FOR PLAINTIFF/CROSS-DEFENDANT

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512 843-9316 (fax)  
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## **APPENDIX**

### **EXHIBITS**

- I-A** Blank DPA Form produced by the County Attorney
- I-B** Tex. Att’y Gen. Op. OR2017-16049 (July 18, 2017)
- I-C** County Attorney’s Discovery Responses included in Intervenor’s Brief
- I-D** Email 3/10/17 Offering to Disclose portions of Cunningham DPA
- I-F** Order Dismissing *State v. Cunningham*, Cause No. C-1-CR-13-180014

## **APPENDIX**

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- I-A** Blank DPA Form produced by the County Attorney
- I-B** Tex. Att’y Gen. Op. OR2017-16049 (July 18, 2017)
- I-C** County Attorney’s Discovery Responses included in Intervenor’s Brief
- I-D** Email 3/10/17 Offering to Disclose portions of Cunningham DPA
- I-F** Order Dismissing *State v. Cunningham*, Cause No. C-1-CR-13-180014





CAUSE NO. C - 1 - CR - \_\_\_\_\_

THE STATE OF TEXAS

§

IN THE COUNTY

v.

§

COURT-AT-LAW # \_\_\_\_\_

§

TRAVIS COUNTY, TEXAS

### DEFERRED PROSECUTION AGREEMENT

The parties to this agreement are the State of Texas, which is represented by the Travis County Attorney or his designated agent, and \_\_\_\_\_, the Defendant, whose date of birth is \_\_\_\_\_.

**The Defendant agrees to waive certain rights and to comply with specified terms and conditions. The Defendant also confesses guilt of the offense(s) charged and stipulates to the admissibility of incriminating evidence.** In return, the State of Texas agrees to conditionally dismiss the offense(s) charged.

#### *Defendant's waiver of rights*

I understand that I have the following rights:

- I have the right to a speedy trial.
- I have the right to a trial by jury.
- I have the right to confront and cross-examine the witnesses against me.
- I have the right to secure the appearance at trial of witnesses in my favor.

\_\_\_\_\_ I knowingly and voluntarily waive these rights.

I have also been advised of and fully understand that

- I have the right to remain silent and not make any statement at all. Any statement I make may be used against me at my trial.
- Any statement I make may be used against me in court.
- I have the right to have a lawyer present to advise me prior to and during any questioning.
- If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning.
- I have the right to terminate this interview at any time.



\_\_\_\_\_ I knowingly and voluntarily waive these rights, as well.

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
State Bar Number

*Defendant's Confession to the Charges*

The State's information alleges that I committed the offense(s) of \_\_\_\_\_  
\_\_\_\_\_ on [date] \_\_\_\_\_, in Travis County,  
Texas. The State's information may be found in the Court Clerk's file, and it is  
incorporated by reference into this agreement as though fully set out.

I am the person named as the defendant in the State's information. I understand  
the allegations against me. I hereby voluntarily confess that they are true.

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
State Bar Number

*When the Agreement Begins, and How Long it Lasts*

This agreement begins when all of the following have occurred:

- the Defendant has initialed the waivers on pages 1 and 2;
- the Defendant and the Defendant's attorney have signed page 2;
- the Defendant, the Defendant's attorney and the attorney for the State of Texas  
have signed page 7 of the agreement; and
- the Court has granted the State's conditional dismissal motion.

This agreement lasts for \_\_\_\_\_, starting the day the Court has  
granted the State's conditional dismissal motion.

***Defendant's Agreement to Specific Terms and Conditions.***

By initialing the line beside each relevant term or condition, the Defendant shows that he or she understands that compliance with this particular term or condition is required. ***If the Defendant has already complied with the condition when the parties enter into this agreement, the parties must attach documents showing that compliance.***

The Defendant must timely provide proof of completion of all terms and conditions, by either U.S. postage-prepaid mail, fax transmission, email, or hand-delivery to:

*Street Address*  
Travis County Attorney's Office  
Ned Granger Admin. Bldg.  
314 West 11th, 3rd Floor  
Austin, TX 78701

*Mailing Address*  
Travis County Attorney's Office  
Attn: Deferred Prosecution  
(List cause number from page 1)  
Post Office Box 1748  
Austin, TX 78767-1748

***Best way to communicate is by email:***

***tcaodfpr@traviscountytx.gov*** (email)

(512)854-9415 - telephone

(512)854-3377 – fax number

(512)854-4282 – alternative fax number

(List the cause number from page 1)

**Keep a copy, for your own records, of any document(s) sent to the Travis County Attorney's Office. Make sure that the agreement's cause number is on all paperwork. (The cause number is on page 1 of this agreement.)**

Proof is timely provided if it is mailed, fax transmitted, emailed, or hand-delivered within the specified duration of this agreement.

**Mandatory:** While this agreement is in effect, the Defendant shall not commit any other offense(s) above that of a Class C moving traffic violation. For purposes of this agreement, an offense is "committed" if the Travis County Attorney believes that probable cause to arrest the Defendant for that offense develops at any time during or after an arrest.



### **Counseling Requirements**

- \_\_\_ Obtain a **Domestic Violence Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.
- \_\_\_ Obtain a **Non-Intimate Partner Violence Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.
- \_\_\_ Obtain an **Alcohol/Substance Abuse Assessment** through the Travis County Counseling & Education Services (TCCES), and **COMPLETE ALL RECOMMENDED COURSES**. TCCES contact number (512) 854-9540.

### **Complete the following course(s):**

- \_\_\_ Assault (8hrs Misd. I) TCCES contact number (512) 854-9540  
(*Only for Non-Intimate Partner violence*)
- \_\_\_ Multiple Offender/Felony (20hrs Misd.II) TCCES contact number (512) 854-9540
- \_\_\_ Theft/Shoplifting (8hrs. Misd.I) TCCES contact number (512) 854-9540
- \_\_\_ Austin Stress Clinic Level 1 (8hrs) ASC contact number (512) 326-1717  
(*Only for Non-Intimate Partner violence*)
- \_\_\_ Austin Stress Clinic Level 2 (20hrs) ASC contact number (512) 326-1717  
(*Only for Non-Intimate Partner violence*)
- \_\_\_ Any Baby Can Parenting Class ABC contact number (512) 454-3743

#### **NOTES:**

- *A Defendant who resides outside Travis County, Texas must be evaluated in Travis County before doing counseling equivalents in the state or county of residence.*
- *Evaluations MUST be completed within Two (2) months of starting the deferred prosecution agreement.*
- *On-line courses are NOT acceptable.*
- *If the Defendant has already complied with the condition, the parties must attach documents showing that compliance.*

\_\_\_\_ Have no contact through any means with \_\_\_\_\_  
and do not go within 200 yards of the following location: \_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_ Provide proof of a valid Texas driver's license and automotive liability-insurance  
coverage by the term date of this agreement.

\_\_\_\_ Provide proof of completing a certified Texas Alcohol & Beverage Commission  
Seller/Server, training course. TABC contact number (512) 451-0231.

\_\_\_\_ Forfeit the weapon. *The ORIGINAL "Forfeiture of Weapon's Agreement" must be  
attached to this agreement.*

\_\_\_\_ Provide proof of \$\_\_\_\_\_ restitution paid to \_\_\_\_\_.  
Payable only through the Travis County Attorney's Hot Check Division. (A restitution  
sheet is required.)

\_\_\_\_ Provide proof of the Defendant's pleading to the Class C offense of  
\_\_\_\_\_, and paying a \$\_\_\_\_\_ fine and court costs.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### Alcohol Monitoring Requirement

*\*Any indication of the consumption of alcohol is a violation of this agreement.*

\_\_\_\_ Provide proof of installing and maintaining the following alcohol monitoring  
device(s) for a period of \_\_\_\_\_.

\_\_\_\_ IID    \_\_\_\_ SoberLink    \_\_\_\_ SCRAM    \_\_\_\_ IN-HOM

\* *The ORIGINAL "Alcohol Monitoring Device Agreement" must be attached to  
this agreement.*

If the Defendant complies with all the specified terms and conditions for the duration of this agreement, the Travis County Attorney agrees not to prosecute the Defendant further for the offense(s).

*Consequences of Defendant's Non-Compliance with or Violation of  
the Agreement's Terms and Conditions*

If the Defendant fails to comply with or violates any of the specified terms and conditions of this agreement, then the Travis County Attorney is no longer subject to the agreement and may refile the charges and prosecute the case to the full extent of the law.

The Defendant hereby agrees to the following if the Travis County Attorney refiles the charges:

- The Defendant agrees to plead guilty or no contest to the refiled charges, as shown by the Defendant's signing the attached plea form.
- The Defendant agrees and stipulates that this agreement, including the written confession of guilt that it contains, is admissible against him or her in court.
- The Defendant agrees and stipulates that affidavits, written statements of witnesses and other documentary evidence--including but not limited to the police offense report--are admissible against the Defendant at trial.
- The Defendant waives any statute-of-limitations objection to the refiled charges.
- The Travis County Attorney's burden of showing the Defendant's non-compliance with this agreement is by a preponderance of the evidence.
- If the parties agree to continue the deferred prosecution agreement after the County Attorney refiles the charges, then the agreement is extended for the same period as the original agreement, without the need to draft and sign a new document. For example, if the initial agreement was to last six months, then the extended agreement will last yet another six months from the date of the second dismissal.

I, the Defendant, have fully discussed this case and the evidence with my attorney. I am satisfied that he or she has properly represented me. **I have received a copy of this Deferred Prosecution Agreement.** I waive any further time to prepare for trial to which my attorney or I may be entitled.



\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
State Bar Number

Date: \_\_\_\_\_

\_\_\_\_\_  
Assistant County Attorney  
Travis County, Texas

\_\_\_\_\_  
State Bar Number

### **Defendant's Plea of Guilty or No Contest**

I have consulted with my attorney, who has advised me of the consequences of pleading guilty or no contest. I understand these consequences. I plead guilty/no contest to the offense(s) of \_\_\_\_\_.  
My plea is given freely and voluntarily.

\_\_\_\_\_  
Defendant's signature

\_\_\_\_\_  
Printed name

\_\_\_\_\_  
Date



**Alcohol Monitoring Device Agreement  
Travis County Attorney's Office  
Deferred Prosecution Program**



I, \_\_\_\_\_ agree to obtain and maintain the below indicated alcohol monitoring device for a period of \_\_\_\_\_, as part of my agreed upon Deferred Prosecution Agreement Program of the Travis County Attorney's Office.

*\*Any indication of the consumption of alcohol is a violation of this agreement.*

\_\_\_\_\_ IID      \_\_\_\_\_ SoberLink      \_\_\_\_\_ SCRAM      \_\_\_\_\_ IN-HOM

- I will notify the Travis County Attorney's Office **within ten(10) working days** from the date of the conditional dismissal, with the name of my chosen vendor, through the communication methods listed on page 3 of the Deferred Prosecution Agreement.
- I will inform my chosen vendor that the Travis County Attorney's Office's is the monitoring agency for my case. Making sure that the monthly monitoring reports are:

Emailed:      **TCAODFPR@traviscountytexas.gov**

or

Fax no.:      (512) 854-3377 Attn: Deferred Prosecution (C-1-CR-\_\_\_\_\_)

- I will direct any questions about my financial burden and device responsibility directly to my chosen vendor.

I understand that **only** the Travis County Attorney's Office will be allowed to give removal authorization for any device being monitored under the Deferred Prosecution Agreement. Judges **do not** have the authorization to remove any device monitored under the Agreement. Any removal of a device other than through the Travis County Attorney's authorization will be considered a violation and subject to the refiling of the original charges for continuing prosecution of the case.

I understand that if I failure to adhere to any of the Deferred Prosecution Agreement's conditions concerning the alcohol monitoring devices, it can result in subsequent time added to the monitoring period, added time to the deferred prosecution agreement, and/or refiling of the original charges and continued prosecution of the case.

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for Defendant

\_\_\_\_\_  
Date





**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 18, 2017

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

OR2017-16049

Dear Ms. Sheely:

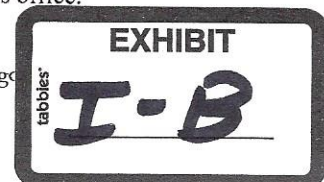
You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 666635.

The Travis County Attorney's Office (the "county attorney's office") received a request for specified deferred prosecution agreements.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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<sup>1</sup>We note the county attorney's office received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding 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 request is clarified or narrowed). We also note the requestor limited the request to exclude the social security numbers and dates of birth of certain individuals.

<sup>2</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 that those records contain substantially different types of information than that submitted to this office.



Initially, the requestor claims the submitted information is subject to section 552.022(a)(18) of the Government Code. Section 552.022(a)(18) provides for required public disclosure of “a settlement agreement to which a governmental body is a party[.]” unless the information is expressly made confidential under the Act or other law. *Id.* § 552.022(a)(18). Upon review, we find none of the submitted information is subject to section 552.022(a)(18). Accordingly, we consider the arguments of the county attorney’s office against disclosure of the submitted information:

Section 552.108(a)(2) of the Government Code excepts from disclosure “information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication.” *See id.* § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the submitted information relates to concluded criminal investigations that did not result in convictions or a deferred adjudications. Based on your representation and our review, we find the county attorney’s office may withhold the information we marked under section 552.108(a)(2) of the Government Code. However, we find you have failed to demonstrate the remaining information relates to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication. Accordingly, the county attorney’s office may not withhold the remaining information under section 552.108(a)(2) of the Government Code.

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[.]” *Id.* § 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). You inform us the remaining deferred prosecution agreements (the “agreements”) pertain to criminal cases that have been dismissed subject to the terms of the agreements. However, you state the terms of the agreements have not concluded and, if at the end of the agreement terms the subjects fail to comply with the terms of the agreements, the criminal case will be re-filed. Therefore, you claim the agreements pertain to pending criminal cases. 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 defendants signed the remaining agreements, acknowledging their receipt of the agreements. Thus, because copies of the agreements have previously been released to the defendants, we find you have not shown release of the agreements will interfere with the detection, investigation, or prosecution of crime; thus, the remaining agreements may not be



withheld under section 552.108(a)(1) of the Government Code. *See* Gov't Code § 552.108(a)(1).

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

*Id.* § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Although you assert section 552.103 for the remaining information, we find the remaining information either is not related to the litigation at issue or has been seen by the opposing parties in the litigation at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we conclude none of the remaining information may be withheld under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7

(2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert the remaining information is protected under section 552.107(1) of the Government Code. However, we find you have failed to establish the information at issue constitutes privileged attorney-client communications for the purposes of section 552.107(1). Accordingly, the county attorney’s office may not withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the county attorney’s office may withhold the information we marked under 552.108(a)(2) of the Government Code. The county attorney’s office must release the remaining information.

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,

A handwritten signature in black ink, reading "Ashley Crutchfield". The signature is fluid and cursive, with the first name "Ashley" and last name "Crutchfield" clearly distinguishable.

Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/bw

Ref: ID# 666635

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

**From:** Bill Aleshire <bill@aleshirelaw.com>  
**Sent:** Friday, March 10, 2017 8:48 PM  
**To:** Tim Labadie  
**Cc:** Entsminger, Matthew; David Escamilla  
**Subject:** RE: Escamilla v Paxton

Tim,

I discussed your email from this morning (below) with Tara. We are glad to see that the County Attorney admits that there may be, at least, parts of the DPA that are not subject to the Law Enforcement Exception and could be disclosed to her, as the Requestor. If the County Attorney is changing his position about withholding the entire document, he is certainly free to disclose whatever portion he agrees should have been disclosed. However, Tara does not believe that she should have to drop her TPIA lawsuit in order to see those parts of the DPA that you offered to disclose.

This case is proceeding because she believes—as do I—that deals between prosecutors and criminal defendants should not be secret, and particularly not secret from victims of family violence. There is not enough difference between the Deferred Adjudication process and the Deferred Prosecution process to justify such secrecy. Some prosecutors won't even do a DPA in family violence cases. Surely the Travis County Attorney has it within his power to require defendants in family violence cases to agree that the County Attorney will make the DPA available to the victim in response to a request.

Of course, if the County Attorney nonsuited this lawsuit against the Attorney General and followed and relied on the AG's ruling to disclose the DPA, this lawsuit would be moot and "resolved without further litigation and expense."

### ***Bill Aleshire***

AleshireLAW PC  
 700 Lavaca, Suite 1400  
 Austin, Texas 78701  
 512 320-9155 phone  
 512 750-5854 cell  
 512 320-9156 fax  
[Bill@AleshireLaw.com](mailto:Bill@AleshireLaw.com)

**From:** Tim Labadie [<mailto:Tim.Labadie@traviscountytexas.gov>]  
**Sent:** Friday, March 10, 2017 8:31 AM  
**To:** Bill Aleshire ([bill@aleshirelaw.com](mailto:bill@aleshirelaw.com)) <[bill@aleshirelaw.com](mailto:bill@aleshirelaw.com)>  
**Subject:** Escamilla v Paxton

Bill,

In reviewing Ms. Coronado's pro se pleadings, she seems most interested in seeing the provisions in the Deferred Prosecution Agreement that afford her protection. So that we might resolve this matter without further litigation and expense, we offer to settle this matter by releasing to Ms. Coronado pages 4 and 5 of the Deferred Prosecution Agreement, the pages that contain the specific terms and conditions applicable to Mr. Cunningham, and inform her of the length of the Agreement, which is contained on page 2.



I look forward to your response.

Tim

[NOTE: Edited to Include Only Responses Used in Coronado Pretrial Brief]

NO.D-1GN-16-004769

DAVIDA A. ESCAMILLA,  
TRAVIS COUNTY ATTORNEY

§  
§  
§  
§  
§  
§  
§  
§

261ST JUDICIAL DISTRICT COURT

V.

KEN PAXTON,  
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

PLAINTIFF'S RESPONSES TO TARA CORONADO'S REQUEST FOR  
ADMISSIONS, INTERROGATORIES, AND REQUEST FOR PRODUCTION

REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION: The Confidentiality PDA is an agreement between the Plaintiff and the Defendant, which was signed by the Plaintiff's Attorney and the Defendant's Attorney.

ANSWER TO ADMISSION:

REQUEST FOR ADMISSION: The Confidentiality PDA states that the Plaintiff and the Defendant have agreed to keep the contents of the PDA confidential in Travis County Court.

ANSWER TO ADMISSION:

REQUEST FOR ADMISSION: In consideration of the Confidentiality PDA, the Plaintiff and the Defendant have agreed to keep the contents of the PDA confidential in Travis County Court.

ANSWER TO ADMISSION:

REQUEST FOR ADMISSION: The Confidentiality PDA states that the Plaintiff and the Defendant have agreed to keep the contents of the PDA confidential in Travis County Court.

REQUEST FOR ADMISSION: The Confidentiality PDA states that the Plaintiff and the Defendant have agreed to keep the contents of the PDA confidential in Travis County Court.





REQUEST FOR ADMISSION 5: You denied in writing a copy of the Cunningham DPA to Plaintiff Tara Coronado.

RESPONSE: Plaintiff admits they do not have not given Tara Coronado a copy of the Deferred Prosecution Agreement.

REQUEST FOR ADMISSION 6: On July 12, 2016 Laura Bates requested a copy of the Cunningham DPA.

RESPONSE: Admit.

REQUEST FOR ADMISSION 7: In making the request for the Cunningham DPA, Laura Bates was acting as an attorney for Plaintiff Tara Coronado.

RESPONSE:  
Plaintiff denies that Laura Bates at the time of the request authorized Plaintiff that she was making the request on behalf of Plaintiff. Plaintiff admits that Laura Bates, in an affidavit filed in this matter, stated that she made the request on behalf of Mrs. Coronado.

REQUEST FOR ADMISSION 8: Plaintiff denied to Plaintiff Tara Coronado with the Cunningham DPA and requested a copy from the Texas Attorney General pursuant to the Texas Code Section 55.001 to withhold the Cunningham DPA among other records from Laura Bates.

RESPONSE:  
Plaintiff admits that he and his attorneys did not disclose the Cunningham DPA to Plaintiff Tara Coronado and did not disclose the Cunningham DPA to Plaintiff Tara Coronado's attorney, Laura Bates, as requested.  
Plaintiff admits that he and his attorneys did not disclose the Cunningham DPA to Plaintiff Tara Coronado and did not disclose the Cunningham DPA to Plaintiff Tara Coronado's attorney, Laura Bates, as requested.  
Plaintiff denies that he and his attorneys did not disclose the Cunningham DPA to Plaintiff Tara Coronado and did not disclose the Cunningham DPA to Plaintiff Tara Coronado's attorney, Laura Bates, as requested.

REQUEST FOR ADMISSION 9: You have disclosed deferred prosecution agreements, either in part or in their entirety, (other than the Cunningham DPA) to persons who were not parties (or their attorneys) to the deferred prosecution agreement.

RESPONSE: Admit

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

REQUEST FOR ADMISSION 13: You have not kept confidential the blank form Your office uses for deferred prosecution agreements.

RESPONSE: Plaintiff admits that forms have been provided to attorneys in conjunction with finalizing a Deferred Prosecution Agreement but denies that forms have been provided to the general public.

REQUEST FOR ADMISSION 14: The form Your office has used for one or more deferred prosecution agreements is available for public viewing, including via a link at <http://www.pacefirm.com/faq/deferred.html>.

RESPONSE: Plaintiff admits that some attorneys, without Plaintiff's consent, have posted this form on the internet.



REQUEST FOR ADMISSION 15: You have provided a copy of the blank form Your office uses for deferred prosecution agreements to one or more persons outside Your office.

RESPONSE: Plaintiff admits that forms have been provided to attorneys in conjunction with finalizing a Deferred Prosecution Agreement but denies that forms have been provided to the general public.

REQUEST FOR ADMISSION 16: The United States Department of Justice publicly discloses deferred prosecution agreements on its website, including at <https://search.justice.gov/search?query=deferred+prosecution&op=Search&affiliate=justice>

RESPONSE: Plaintiff admits that a person can view deferred prosecution agreements made in cases involving the United States of America on the website noted above.

[REDACTED]

[REDACTED]

REQUEST FOR ADMISSION 18: You have divulged to Plaintiff Tara Coronado material terms of the Cunningham DPA.

RESPONSE: Plaintiff admits that Ms. Coronado was informed by the Travis County Attorney's Office of the following terms of the Deferred Prosecution Agreement, which are important and pertain to her safety:

2 years Def. Pros. + CES/ Recs (Domestic Violence + 16 hrs. of parenting classes/counseling)

Have no contact through any means with Ms. Coronado and do not go within 200 yards of the following locations: the residence or place of employment of Ms. Coronado unless pursuant to child custody order or related to the safety and welfare of the children.

Plaintiff denies that Ms. Coronado was informed by the Travis County Attorney's Office of any other terms of the Deferred Prosecution Agreement.

[REDACTED]

[REDACTED]

### INTERROGATORIES

[REDACTED]

[REDACTED]

INTERROGATORY NO. 2: Identify the records that contain Your policy and procedure for entering in to a deferred prosecution agreement including any policies regarding disclosure of such deferred prosecution agreements.

RESPONSE: None.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

INTERROGATORY NO. 5: Do You contend that there are provisions in the Cunningham DPA that, if disclosed, would interfere with the detection of crime? If so, explain how disclosure of the Cunningham DPA would interfere with the detection of crime?

RESPONSE: No.

INTERROGATORY NO. 6: Do You contend that there are provisions in the Cunningham DPA that, if disclosed, would interfere with the investigation of crime? If so, explain how disclosure of the Cunningham DPA would interfere with the investigation of crime?

RESPONSE: No.

[REDACTED]

[REDACTED]

INTERROGATORY NO. 8: Do You contend that the disclosure of a blank form of the deferred prosecution agreement used by Your office (with no identifying information of any defendant) would interfere with the detection, investigation, or prosecution of crime? If so, explain the factual basis for your contention.

RESPONSE: No, because the form is not completed (terms and conditions can be added and deleted) and is not applicable to anyone in particular.



INTERROGATORY NO. 9: If You did not admit Request for Admission No. 12, explain the basis for Your contention that the Cunningham DPA is part of the records of Your "investigation" of a crime.

RESPONSE: The Deferred Prosecution Agreement resulted after our investigation of Mr. Comrade's allegation that Mr. Cunningham assaulted him.

INTERROGATORY NO. 10: Do You contend that the Cunningham DPA is "confidential" as that term is used in the Texas Public Information Act (including Tex. Gov't Code section 552.352) as opposed to contending that the OPA is just not subject to mandatory disclosure? *U* so, explain the basis for your contention that the Cunningham DPA is "confidential."

RESPONSE: No.

INTERROGATORY NO. 11: If You contend that there is a substantive difference between "deferred adjudication" and "deferred prosecution," explain the ways in which You contend they differ.

RESPONSE: Objection: not relevant to the issue is this case (i.e. whether the Deferred Prosecution Agreement is excepted from disclosure) and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to this objection, deferred adjudication is a special form of judge-ordered community supervision (commonly known as "probation"), authorized by statute, that permits a defendant to accept responsibility for a crime without an actual conviction being placed on the record. Only a judge can grant deferred adjudication, so the prosecutor and defendant must agree to waive a jury trial. The defendant is monitored just as if he were on a regular probation. Successful completion of the term of deferred adjudication results in no finding of guilt. Failure to comply opens the defendant to the full range of punishment and the judge can enter a judgement of guilt and sentence the defendant to whatever he/she feels appropriate because the defendant had previously entered a plea or guilty or no contest.

A deferred prosecution is an extra-judicial agreement between the defendant and the prosecutor. There is no plea and no finding of guilt. The criminal charge is either not filed or the charge is dismissed upon the execution of the agreement. The parties agree that the prosecution of the charge will be "deferred" for an agreed term, during which the defendant agrees to complete specified conditions. If the defendant successfully completes all agreed conditions before the term of the agreement expires, the case remains dismissed and no further action is taken. If the defendant fails to successfully complete the conditions of the agreement, the charge will be re-filed and prosecuted.

INTERROGATORY NO. 12: During a phone call on or about March 24, 2016, what information did Your Assistant County Attorney Neha Naik give Plaintiff Tara Coronado concerning the terms that Chet Edward Cunningham would have to comply with in a deferred prosecution agreement and what would occur in an criminal court case in Travis County Cause No. CLKR-D-8004, if a deferred prosecution agreement was entered into?

RESPONSE: Ms. Naik does not recall having a phone conversation with Tara Coronado on March 24, 2016, but she does recall meeting with her on March 29, 2016, at which time Ms. Naik explained to Ms. Coronado that Mr. Cunningham would have to undergo counseling, take parenting classes, could not have contact with Ms. Coronado, and could not go within 200 yards of her residence or place of employment unless pursuant to a child custody order or related to the safety and welfare of the children. Ms. Naik also told Ms. Coronado that after the Deferred Prosecution Agreement was finalized, the criminal case against Mr. Cunningham would be dismissed.

#### REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION 1: Produce a copy of Your policies and procedures for entering in to a deferred prosecution agreement that were in effect on April 1, 2016.

RESPONSE: None

REQUEST FOR PRODUCTION 2: Produce a copy of any correspondence (email, letter, or paper) that You have had in the last 5 years with other District Attorneys or County Attorneys in Texas regarding need of deferred prosecution agreements or the terms thereof.

RESPONSE: Objection not relevant, not reasonably calculated to lead to the discovery of admissible evidence.

REQUEST FOR PRODUCTION 3: Produce a copy of a blank form Your office uses for a deferred prosecution agreement.

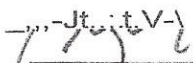
RESPONSE: Being produced.

REQUEST FOR PRODUCTION 4: Produce a copy of any correspondence (email or paper) that You had with Chet Edward Cunningham or his attorney regarding a deferred prosecution agreement. This Request does not include a request for a copy of Cunningham DPA.

RESPONSE: Being produced.

Respectfully submitted,

DAVID FSCAMILLA  
TRAVIS COUNTY ATTORNEY

BY: 

\_\_\_\_\_  
Tim Labadie  
State Bar No. 11784853  
Assistant Travis County Attorney  
P. O. Box 1748  
Austin, Texas 78767  
(512) 854-9415  
(512) 854-9316 (fax)  
tim.labadie@traviscountytexas.gov

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify by my signature above that on May 17, 2017, the foregoing was emailed and sent by certified mail, return receipt requested, in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure, to:

Bill Aleshire, AleshireLAW, P.C., 700 Lavaca, Suite 1400, Austin, Texas 78701  
Email: Bill@AleshireLaw.com

Matthew Entsminger, Assistant Attorney General, P. O. Box 12548, Capitol Station,  
Austin, Texas 78711-2548. Email: matthew.entsminger@oag.texas.gov.



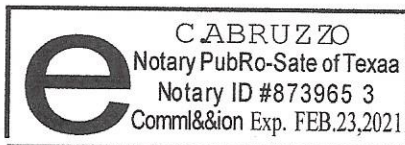
VERIFICATION

STATE OF TEXAS           §  
                                     §  
COUNTY OF TRAVIS       §

BEFORE ME, the undersigned authority, on this day personally appeared David A. Escamilla, Travis County Attorney, known to me to be the person whose name is subscribed below, and upon first being duly sworn, on his oath deposed and stated that he has read the above and foregoing Plaintiff's Responses to Tara Coronado's Interrogatories, and that each and every statement contained therein is within his knowledge and is true and correct.

*D.A. Escamilla*  
David A. Escamilla

SUBSCRIBED      AND      SWORN      TO      BEFORE      ME      on      May  
17, 2017, to certify which witness my hand and official seal.



*C. Abruzzo*  
Notary Public in and for the  
State of Texas

Cause No. C1CR13-180014

THE STATE OF TEXAS

C-1-CR-13-180014

IN THE COUNTY COURT

VS.

AT LAW NO. 4 OF

Chet Edward Cunningham

TRAVIS COUNTY, TEXAS

**MOTION TO DISMISS**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas by and through her Attorney, and respectfully requests the Court to dismiss the above entitled and numbered criminal action in which the defendant is charged with the offense of Assault - family violence, for the reason:

- ☐ The evidence is insufficient;
- ☐ The defendant was convicted in another case;
- ☐ The complaining witness has requested dismissal;
- ☐ The case has been refiled;
- ☐ The defendant is unapprehended;
- ☐ The defendant is deceased;
- ☐ The defendant has been granted immunity in light of his testimony;
- ☐ Restitution made;
- ☒ Other: Def. Pros. Agreement

and for cause would show the Court the following:

FILED FOR RECORD  
2016 APR - 6 PM 1:35  
DANA DEBEAUVOR  
COUNTY CLERK  
TRAVIS COUNTY, TEXAS

WHEREFORE, it is prayed that the above entitled and numbered cause be dismissed.

Respectfully submitted

[Signature]  
Assistant County Attorney  
4/6/16 Date Signed

**ORDER**

The foregoing motion having been presented to me on this the 6 day of April, A.D. 2016 and the same having been considered, it is, therefore, ORDERED, ADJUDGED and DECREED that said above entitled and numbered cause be and the same is hereby dismissed.

I, Dana DeBeauvoir, County 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 4-19-17



Dana DeBeauvoir, County Clerk

By Deputy Caitlin Bell

Judge of the County Court At Law

No. 4 of Travis County, Texas

