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

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

INTERVENOR/CROSS-PLAINTIFF TARA CORONADO'S REPLY & OBJECTIONS TO THE TRAVIS COUNTY ATTORNEY'S RESPONSE TO CORONADO'S SPECIAL EXCEPTIONS & MOTION TO STRIKE

TO: THE HONORABLE LORA LIVINGSTON, JUDGE 261ST DISTRICT COURT:

Intervenor/Cross Plaintiff Tara Coronado asks the Court to grant her Special Exceptions and strike pleadings by the Plaintiff Travis County Attorney that are prohibited by Tex. Gov't Code (TPIA) section 552.326 and to sustain Coronado's objections to the County Attorney's Response contained herein. [1]

The Uncomplicated Issue

The plain words of TPIA section 552.326 prohibit a governmental body from even *raising* exceptions to disclosure in a trial like this that the governmental body did not raise in its request for a ruling from the Attorney General. *See* Tex. Gov't Code section 552.326(a)("... the only exceptions to required disclosure within Subchapter C that a governmental body *may raise in a suit filed under this chapter* are exceptions that the governmental body properly raised before the

[1] The County Attorney served his Response to the Court and the parties on June 26, 2017 but did not file it with the District Clerk, saying that it would not be filed until the day before the June 29th hearing in order to add an affidavit of a vacationing County Attorney employee (Sheely). This Reply and Objections is filed in regards to the version of the Response served on the Court and the parties, but we do not expect the filed version to be substantively different. This Reply is filed without waiting on the Response to be filed in order to give the Court and the County Attorney time to review it before the hearing.

attorney general in connection with its request for a decision....”). The Travis County Attorney has judicially admitted that the only exception to disclosure that he raised to the Attorney General about the Deferred Prosecution Agreement is section 552.108(a)(1) (“law enforcement exception,” interferes with investigation, detection, or prosecution of crime), and yet he raised prohibited exceptions to disclosure in its pleadings (section 552.108(a)(2) (closed investigation not resulting in conviction or deferred adjudication); section 552.103 (litigation exception); and 552.107 (attorney duty to client exception). *See* Travis County Attorney’s Response at unnumbered page 1 (admitting “these exceptions were not raised when a ruling was requested from the Attorney General.”).

There is no fact issue about whether the Travis County Attorney’s pleadings in this case violate section 552.326. Therefore, the County Attorney should be ordered to replead—with the amended pleading limited to only the disclosure exception of 552.108(a)(1)—or, in the interest of time, strike those portions of the Travis County Attorney’s pleadings that raise exceptions other than section 552.108(a)(1). (Note that under the Scheduling Order, the deadline to amend pleadings is this Friday, June 30, 2017.).

Objection to County Attorney’s Evidence & Affidavits

“The hearing on special exceptions is for argument only. No evidence may be presented.” Michol O’Connor, *O’Connor’s Texas Rules – Civil Trials* 289 (2017). Cross-Plaintiff Coronado objects to admission of all the exhibits to the County Attorney’s Response if offered as evidence at the hearing.

Cross-Plaintiff Coronado also objects, based on hearsay, to all references in the exhibits to what the Attorney General supposedly told, instructed, or suggested to the County Attorney as ways to improve his chances of getting a favorable ruling from the Attorney General for

withholding a Deferred Prosecution Agreement. Please note that none of records submitted are *from* the Attorney General, the source of the reliance-type argument the County Attorney purports would somehow give him a waiver from the pleading limitations of section 552.326. Specifically, Cross-Plaintiff Coronado objects, as hearsay, to Exhibit 8 in its entirety (Labadie Affidavit) and Exhibit 11 (Winn Affidavit).[2]

Even if the Court were to permit evidence to be introduced in this Special Exceptions hearing—over Cross-Plaintiff's general objection—Coronado also objects to the County Attorney's tactic of using affidavits in place of live witnesses who could be cross-examined. Use of affidavits under this procedural motion for special exceptions permits improper hearsay to be considered by the Court in rendering a decision.

Response to County Attorney's "T'ain't Fair" Argument

The County Attorney argues that the Court should ignore section 552.326 as it applies to his pleadings because it "would work a result both inequitable and unjust since [the County Attorney] followed the procedure for excepting Deferred Prosecution Agreements from disclosure devised by the Attorney General in 2013." It is irrelevant what the discussion may or may not have occurred between the Attorney General and the County Attorney over the years about how best for the County Attorney to win—after failing several times—a favorable ruling to withhold a Deferred Prosecution Agreement. Regardless of their content or purpose, those purported discussions cannot constitute an exemption for the Travis County Attorney from the pleading

[2] Cross-Plaintiff Coronado objects, to the extent that Exhibit 12 purports to be a business records affidavit of Ann-Marie Sheely, that the affidavit does not comply with the requirements of the form or service requirements for a business records affidavit under TRE 902(10)(A) or (B). The objection to these records is made because evidence should not be heard at this hearing on Special Exceptions. Coronado also objects because these records were not included in the County Attorney's response to Coronado's discovery requests asking for disclosure of all records the County Attorney intended to present at trial in support of his claims or defenses.

limitations of section 552.326. And, besides, the County Attorney has not proffered a single piece of evidence to demonstrate that the County Attorney was ever *prohibited* from raising an exception to disclosure he wanted to in his requests for Attorney General open records rulings.

In this counsel's practice, and probably in the experience of this Court, there are, too often, individual citizens who fight for far more serious issues to them (such as their occupation licenses, tax appraisals protests, gender/racial discrimination, and even criminal proceedings, etc.) but find some law or some procedure that precludes or limits their options to get justice in our courts. No matter how unfair it may seem to them, if these individuals did not take some earlier step or meet some deadline, the courts will likely not be able to just "be fair" to them. Sadly, when the laws apply that way, the Courts are *not* free to just ignore the plain language of the applicable laws or procedures ... even if it ain't fair. The County Attorney has no special status or right to be exempt for the plain language of a law—of which section 552.326 gave him clear prior notice—that he should make every claim for exception to disclosure to the Attorney General that he might want to make in a subsequent court challenge to the Attorney General's ruling.

Coronado also disagrees that enforcement of section 552.326 works any inequity or unjustness on the County Attorney that the County Attorney's *own choice* (to limit disclosure exception arguments he made to the Attorney General) did not cause. Notice also that while the County Attorney violated section 552.326 by pleading exceptions under section 552.103 (litigation exception) and section 552.107 (attorney duty to client), nowhere in the objected-to evidence in the Response does the County Attorney purport that the Attorney General's Office told him not to make those separate and distinct arguments, in the ruling process, for nondisclosure.

The only issue raised by the County Attorney's one-sided correspondence in his Exhibits is whether a Deferred Prosecution Agreement should be withheld under section 552.108(a)(1) or

section 552.108(a)(2). Those two sections depend on inconsistent factual situations: Section 552.108(a)(1) applies to an *ongoing* investigation and section 552.108(a)(2) applies to records of a *completed* investigation. Those two sections are clearly mutually exclusive; it would make no more sense to plead them both in a ruling process before the Attorney General than it does for the County Attorney to try to plead them both in this lawsuit.

Even if the Court were to accept the County Attorney's made-up "reliance" waiver of section 552.326 and permit their expanded pleading, that is no justification for letting the County Attorney claim the exception under section 552.108(a)(2) because the Deferred Prosecution Agreement in this case has not concluded (according to the Response). The Response says the supposed "deal" that the County Attorney allegedly had with the Attorney General since 2013 was that the County Attorney "would assert only §552.108(a)(1) when the term of the DPA had not concluded, and the TCAO would assert only §552.108(a)(2) when the term of the DPA had concluded." The County Attorney is asking this Court to permit an exception to the section 552.326 pleading limitation to plead a claim, under section 552.108(a)(2), that, according to the County Attorney, it deliberately did not, and would not, claim to the Attorney General *because the DPA in this case is <u>not</u> concluded.*

One can understand the desperation of the County Attorney in trying to not be limited to pleading section 552.108(a)(1), because the County Attorney dismissed the criminal case against Mr. Cunningham when he agreed to settle the matter with a Deferred Prosecution Agreement. The County Attorney wants to be able to argue that, since the "investigation" ended without a conviction or deferred adjudication, section 552.108(a)(2) might be grounds for withholding. But the Deferred Prosecution Agreement in this case is not an "investigation" record at all, but a plain settlement agreement which must be disclosed pursuant to TPIA section 552.022(18). Section

552.022(18) preempts *all* the exceptions the County Attorney has raised, whether they were raised before the Attorney General, or in its pleadings in violation of section 552.326.

PRAYER

For these reasons, Cross-Plaintiff Coronado asks the Court to decline the County Attorney's invitation to ignore the pleading limitations of Tex. Gov't Code section 552.326 and to either require the County Attorney to amend his petition to comply with section 552.326 or to strike the additional prohibited claims for exceptions-to-disclosure that the County Attorney has raised in violation of section 552.326.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been served on Defendants by e-served on this 27th day of June, 2017.

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