

NO. D-1-GN-16-004769

DAVID A. ESCAMILLA,
TRAVIS COUNTY ATTORNEY§
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261ST JUDICIAL DISTRICT COURT

V.

KEN PAXTON,
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

PLAINTIFF'S SECOND MOTION TO SEAL COURT RECORDS

TO THE HONORABLE COURT:

Plaintiff, David A. Escamilla, in his capacity as Travis County Attorney, asks the Court to sign an order under Texas Rule of Civil Procedure 76a sealing that portion of the trial transcript recording testimony and argument concerning the contents of the Deferred Prosecution Agreement signed on April 1, 2016. Plaintiff also asks the Court to order the courtroom closed during that portion of the trial where evidence is presented or arguments are made concerning the contents of the Deferred Prosecution Agreement signed on April 1, 2016.

INTRODUCTION

This suit is brought pursuant to Tex. Gov't Code § 552.324, to challenge a letter ruling of the Attorney General (OR2016-21139) and to seek a judgment that a Deferred Prosecution Agreement made in connection with No. C-1-CR-13-180014, styled *State of Texas v. Chet Edward Cunningham* is not subject to disclosure under the Texas Public Information Act, TEX. GOV'T CODE §§552.001, *et seq.* (the "PIA").

Plaintiff posted notice of this motion on July 14, 2017 on the bulletin board located in the foyer of the Heman Marion Sweatt Travis County Courthouse, 1000 Guadalupe St., Austin, Texas, which is the place where notices for meetings of the Travis County Commissioners Court are required to be posted. A verified copy of this notice is attached to this motion as Exhibit 1.

PERMANENT SEALING ORDER

Under Texas Rule of Civil Procedure 76a, court records are presumed to be open to the general public. Tex. R. Civ. P. 76a(1). The presumption of openness can be overcome, however, if the party seeking to seal the records establishes that (1) it has a specific, serious, and substantial interest in sealing the records that clearly outweighs the presumption of openness and any probable adverse effect on the general public health or safety and (2) no less restrictive means than sealing will adequately and effectively protect that interest. Tex. R. Civ. P. 76a(1). In determining whether court records should be sealed, the court should balance the public's interest in open court proceedings against a party's personal or proprietary interest in privacy. *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 526 (Tex. 1998).

Plaintiff has a specific, serious, and substantial interest in preventing disclosure of the court records listed above because they will contain information that, if disclosed at this time, will have a substantial likelihood of materially prejudicing an adjudicatory proceeding and might lead to a denial of due process. Specifically, the transcript will reveal the very information Plaintiff contends is excepted from public disclosure under the Texas Public Information Act.

This interest clearly outweighs the presumption of openness and any probable adverse effect the sealing would have on the general public health or safety. There are no less restrictive means than sealing the records that will adequately and effectively protect this interest.

MOTION TO CLOSE COURTROOM

Plaintiff also asks the Court to close the courtroom to the public when evidence of the content of the Deferred Prosecution Agreement is presented to the Court and when counsel make arguments to the Court that refer to or quote the contents of this Agreement, which Plaintiff contends is excepted from public disclosure.

Although the public's right to attend civil proceedings is recognized under Texas law and grounded in the First Amendment, this right is not absolute. A trial court may close its courtroom to protect the dissemination of certain sensitive information to the public. In this case, which centers on Plaintiff's claim that a Deferred Prosecution Agreement is not public information, the courtroom should be closed to the public during the phase of the trial when the witnesses and attorneys refer to, quote from, and explain the very provisions of this agreement that Plaintiff contends are excepted from disclosure under the Public Information Act.

CONCLUSION

For these reasons, Plaintiff, David A. Escamilla, in his capacity as Travis County Attorney, asks the Court to do the following:

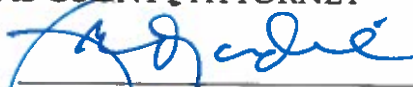
1. After the hearing, seal the records described above permanently.

2. Order that the courtroom be closed to the public during that portion of the trial where evidence is presented or arguments are made that disclose the content of the Deferred Prosecution Agreement that Plaintiff contends is excepted from public disclosure
3. To the extent that the Court denies Plaintiff's request to seal and close the courtroom, Plaintiff asks the Court to stay the order until it is considered on appeal.
4. Grant other relief as the Court may find in the interest of justice.

Respectfully submitted,

DAVID ESCAMILLA
TRAVIS COUNTY ATTORNEY

By:



Tim Labadie

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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify by my signature above that, in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure, on July 14, 2017, a copy of the foregoing was emailed to:

Bill Aleshire

Email: Bill@AleshireLaw.com

Attorney for Tara Coronado Cunningham, Intervenor

Matthew Entsminger

Assistant Attorney General

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

Attorney for Ken Paxton, Texas Attorney General, Defendant