

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 FIRST MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

Plaintiff, David A. Escamilla, in his capacity as Travis County Attorney, files this motion for summary judgment on its claim that the information at issue in the Attorney General Open Records Letter Ruling OR2016-21139 (the "Ruling") is not subject to disclosure under the Texas Public Information Act, TEX. GOV'T CODE §§552.001, *et seq.* (the "PIA"), and in support of this motion shows as follows:

I. INTRODUCTION

On July 12, 2016, Plaintiff received an open records request from Laura Bates, seeking documents pertaining to a criminal case brought against Chet Edward Cunningham. In her request, Ms. Bates specifically asked for a Deferred Prosecution Agreement made by the State and Mr. Cunningham, even though the Attorney General had previously determined that this Agreement was not subject to disclosure under the PIA. In Plaintiff's request for a ruling from the Attorney General, Plaintiff noted that Defendant had previously determined that the Deferred Prosecution Agreement was excepted from disclosure, and asserted that all the information sought by Ms. Bates was

excepted from disclosure by virtue of Texas Government Code §552.108(a)(1). The Attorney General determined that all of the information was excepted from disclosure except the Deferred Prosecution Agreement, thereby ruling contrary to Defendant's previous determination. By this suit, Plaintiff challenges Defendant's ruling that the Deferred Prosecution Agreement must be disclosed.

II. BASIS FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment on his claim that Defendant's Letter Ruling OR2016-10351 issued on May 6, 2016, constitutes a "previous determination" upon which Plaintiff can rely in withholding from the public the Deferred Prosecution Agreement. Tex. Gov't Code §552.301(a).

III. SUMMARY JUDGMENT EVIDENCE

In support of this motion, Plaintiff attaches the following summary judgment evidence:

- Exhibit 1: Motion to Dismiss
- Exhibit 2: Affidavit of Ann-Marie Sheely and documents attached thereto:
 - Exhibit A: April 11, 2016 open records request from Tara Coronado
 - Exhibit B: April 22, 2016 letter from Ann-Marie Sheely, Assistant County Attorney, to Justin Gordon, Assistant Attorney General
 - Exhibit C: Letter Ruling OR2016-10351 (May 6, 2016)
 - Exhibit D: May 11, 2016 open records request from Tara Coronado
 - Exhibit E: May 20, 2016 letter from Ann-Marie Sheely, Assistant County Attorney, to Tara Coronado
 - Exhibit F: June 1, 2016 open records request from Tara Coronado
 - Exhibit G: June 14, 2016 letter from Ann-Marie Sheely, Assistant County Attorney, to Tara Coronado
 - Exhibit H: July 12, 2016 open records request from Laura Bates

Exhibit I: July 15, 2016 letter from Ann-Marie Sheely, Assistant County Attorney, to Justin Gordon, Assistant Attorney General

Exhibit J: Letter Ruling OR2016-21139 (September 19, 2016)

Exhibit 3: Defendant's Response to Plaintiff's Requests for Disclosure, First Request for Admissions, and First Set of Interrogatories

Exhibit 4: Attorney General Open Records Decision No. 673

IV. STATEMENT OF UNDISPUTED FACTS

In May 2013, criminal cause number C-1-CR-13-180014 was filed, wherein Chet Edward Cunningham was accused of assaulting Tara Cunningham, who, at that time, was married to Mr. Cunningham. On April 6, 2016, this case was dismissed¹ after Mr. Cunningham and Plaintiff, acting as the State's attorney, entered into a Deferred Prosecution Agreement.

On April 11, 2016, Tara Cunningham, who also goes by the name Tara Coronado, requested under the PIA that Plaintiff provide her with "the full plea agreement" made in connection with cause number No. C-1-CR-13-180014.² The only document responsive to this request was the Deferred Prosecution Agreement.³ On April 22, 2016, Plaintiff, asked Defendant for a ruling that this agreement was excepted from disclosure by §552.108(a)(1) of the PIA.⁴ On May 6, 2016, Defendant, in OR2016-10351, noting that Plaintiff's request "does not present a novel or complex issue", ruled that the Deferred Prosecution Agreement is excepted from disclosure by §552.108(a)(1)⁵ Thus, the

¹ Motion to Dismiss, attached hereto as Exhibit 1.

² Exhibit A to the Affidavit of Ann-Marie Sheely, attached hereto as Exhibit 2. (Hereinafter referred to as the Sheely affidavit.) See also, paragraph 3 of the Sheely affidavit.

³ Paragraph 3 of the Sheely affidavit.

⁴ Paragraph 3 of the Sheely affidavit and Exhibit B thereto.

⁵ Paragraph 3 of the Sheely affidavit and Exhibit C thereto.

agreement was not released to Ms. Coronado.

On May 11, 2016, Ms. Coronado again asked Plaintiff to provide her with “the plea agreement for C-1-CR-13-180014.”⁶ On May 20, 2016, Plaintiff, relying on Defendant’s previous determination in OR2016-10351, denied Ms. Coronado’s request without again asking for a ruling from Defendant.⁷

On June 1, 2016, Ms. Coronado, claiming that the Deferred Prosecution Agreement had been amended, made a third request for this agreement.⁸ On June 14, 2016, Plaintiff informed Ms. Coronado that the Deferred Prosecution Agreement had not been amended and once again denied her request to release the Deferred Prosecution Agreement, relying on Defendant’s previous determination in OR2016-10351.⁹

On July 12, 2016, Plaintiff received an open records request from Laura Bates,¹⁰ seeking Plaintiff’s entire file pertaining to Mr. Cunningham’s criminal case,¹¹ including the same Deferred Prosecution Agreement requested by Ms. Coronado in April, May, and June of 2016. Had Ms. Bates asked only for the Deferred Prosecution Agreement, as had Ms. Coronado, Plaintiff would have denied her request without resorting to the Attorney General based on Defendant’s previous determination in Letter Ruling

⁶ Paragraph 4 of the Sheely affidavit and Exhibit D thereto.

⁷ Paragraph 4 of the Sheely affidavit and Exhibit E thereto.

⁸ Paragraph 5 of the Sheely affidavit and Exhibit F thereto.

⁹ Paragraph 5 of the Sheely affidavit and Exhibit G thereto.

¹⁰ Although unknown to Plaintiff at the time the request was made, Ms. Bates made this request on behalf of Tara Coronado. See Application for Intervention filed in this matter by Ms. Coronado under the name of Tara Coronado Cunningham.

¹¹ Paragraph 6 of the Sheely affidavit and Exhibit H thereto.

OR2016-10351 that this agreement is excepted from disclosure.¹² However, because Laura Bates requested additional information, Plaintiff, on July 15, 2016, requested a ruling from Defendant that the information sought is excepted from disclosure by Section 552.108(a)(1), noting that Defendant had previously determined that the Deferred Prosecution Agreement was excepted from disclosure by Section 552.108(a)(1).¹³

On September 19, 2016, Defendant issued Letter Ruling OR2016-21139,¹⁴ permitting Plaintiff to withhold, pursuant to Section 552.108(a)(1), all of the information requested by Ms. Bates *except for the Deferred Prosecution Agreement* – the very information Defendant just four months before had determined was excepted from disclosure. In Letter Ruling OR2016-21139, Defendant stated that Plaintiff could not rely on Letter Ruling OR2016-10351 as a “previous determination” with respect to the Deferred Prosecution Agreement, claiming “the law, the facts, and circumstances” on which Letter Ruling OR2016-10351 was based had changed. However, as Plaintiff shows below, Letter Ruling OR2016-10351 is a “previous determination” that the Agreement is excepted from disclosure upon which Plaintiff can rely in order to withhold this information from public disclosure.

V. LETTER RULING OR2016-10351 CONSTITUTES A “PREVIOUS DETERMINATION” UNDER SECTION 552.301(A)

Section 55.011 of the PIA requires Defendant to “maintain uniformity in the application, operation, and interpretation” of the PIA. To fulfill this duty, Defendant is

¹² Paragraph 6 of the Sheely affidavit.

¹³ Paragraph 6 of the Sheely affidavit and Exhibit I thereto.

¹⁴ Exhibit J to the Sheely affidavit.

given the authority issue “comprehensive written decisions and opinions” concerning matters under the PIA. Tex. Gov’t Code § 552.011.

When a governmental entity receives a request for information it believes is excepted from disclosure under the PIA, and if there has not been a “previous determination” that the information need not be disclosed, the governmental entity must ask Defendant if one or more the PIA’s exceptions apply. Tex. Gov’t Code §552.301(a). See also ORD No. 673 (2001).

Because of the absence of a statutory definition of “previous determination,” and so that governmental entities “can identify what constitutes a previous determination in order to ascertain whether the Act requires the governmental body to request a decision from [the Attorney General],” the Attorney General devised four criteria that must be met before a ruling will constitute a “previous determination” enabling the governmental entity to withhold information without requesting another ruling. Open Records Decision¹⁵ No. 673 (2001). Thus, OR2016-10351 constitutes a previous determination that the Deferred Prosecution Agreement is excepted from disclosure if:

1. the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
2. the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;

¹⁵ According to the Attorney General, Open Records Decisions are formal opinions that address novel or problematic legal questions, which are signed by the Attorney General, as contrasted to Letter Rulings, which are informal rulings based on established law and practice, signed by assistant attorneys general. See <https://texasattorneygeneral.gov/og/open-records-decisions-ords> and https://texasattorneygeneral.gov/open/index_orl.php.

3. the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and
4. the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.

ORD 673 at pp. 6-7.

There is no dispute that the first three criteria were met as both Ms. Coronado and Ms. Bates requested the same Deferred Prosecution Agreement from Plaintiff,¹⁶ and Defendant ruled in Letter Ruling OR2016-10351 that this agreement is excepted from disclosure under section 552.108(a)(1).¹⁷ Indeed, in Letter Ruling OR2016-21139, Defendant did not assert that these three criteria were not met. Instead, Defendant claimed that the fourth criterion was not met, baldly asserting that "the law, facts, and circumstances on which [Letter Ruling OR2016-10351] was based have changed."¹⁸

However, Defendant now admits that the law on which Letter Ruling OR2016-10351 was based has not changed since its issuance,¹⁹ and does not contend that the facts or circumstances on which Letter Ruling OR2016-10351 was based have changed.²⁰ Since the law, the facts, and the circumstances upon which Letter Ruling OR2016-10351 was based have not changed, Letter Ruling OR2016-10351 constitutes a previous determination by Defendant upon which Plaintiff can rely to withhold from disclosure the Deferred Prosecution Agreement. Thus, in issuing Letter Ruling OR2016-21139,

¹⁶ Paragraphs 2 and 6 of the Sheely affidavit.

¹⁷ Defendant's admissions in response to Requests for Admissions Nos. 1, 5, 6, 10, 12, and 13, attached as Exhibit 3.

¹⁸ Letter Ruling OR2016-21139 at p. 2 (Exhibit J to the Sheely affidavit).

¹⁹ Defendant's admission in response to Plaintiff's RFA No. 14, attached as Exhibit 3.

²⁰ Defendant's answers to Plaintiff's interrogatories 2 and 3, attached as Exhibit 3. Incredibly, Defendant states that he does not possess personal knowledge of the facts and circumstances surrounding the Deferred Prosecution Agreement – which raises the question of how he could have determined that those facts and circumstances had changed.

Defendant failed to fulfill his statutory duty to maintain uniformity in the application, operation, and interpretation of the PIA.

VI. CONCLUSION AND PRAYER

Therefore, Plaintiff respectfully requests that the Court grant summary judgment in his favor and against Defendant, declare that Letter Ruling OR2016-10351 is a “previous determination” upon which Plaintiff can rely in withhold the Deferred Prosecution Agreement from public disclosure, and render judgment that the Deferred Prosecution Agreement is excepted from disclosure pursuant to section 551.108(a)(1), in accordance with the Attorney General previous determination in Letter Ruling OR2016-10351. Plaintiff prays for all further relief to which he may be entitled.

Respectfully submitted,

DAVID ESCAMILLA
TRAVIS COUNTY ATTORNEY

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

ATTORNEY FOR PLAINTIFF

NOTICE OF HEARING

Plaintiff’s First Motion for Summary Judgment will be heard on March 30, 2017 at 9:00 a.m.

CERTIFICATE OF SERVICE

I hereby certify by my signature above that on March 7, 2017, the foregoing was emailed, in accordance with Rules 21 and 21a of the Texas Rules of Civil Procedure, to:

Matthew Entsminger, Assistant Attorney General
email: matthew.entsminger@oag.texas.gov
Attorney for Ken Paxton, Defendant

Bill Aleshire
email: Bill@AleshireLaw.com
Attorney for The Austin Bulldog and Tara Coronado Cunningham

EXHIBIT 1

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 refilled;
- ☐ 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

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



Dana DeBeauvoir, County Clerk

By Deputy: Charles R. Yon 5/3/16

[Signature]
Judge of the County Court At Law

No. 4 of Travis County, Texas

2179-176

EXHIBIT 2

DAVID A. ESCAMILLA,
TRAVIS COUNTY ATTORNEY

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261ST JUDICIAL DISTRICT COURT

V.

KEN PAXTON,
STATE OF TEXAS ATTORNEY GENERAL

TRAVIS COUNTY, TEXAS

AFFIDAVIT OF ANN-MARIE SHEELY

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the undersigned authority, personally appeared Ann-Marie Sheely, known to me to be the person whose name is subscribed to this affidavit, and, being first duly sworn, deposed as follows:

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

2. "I am an Assistant County Attorney, employed by the Travis County Attorney's Office, and have worked in this position from November, 1999 to present. I have been the Assistant County Attorney assigned to requests made under the Texas Public Information Act since February 17, 2015. I am familiar with the open records requests made by Tara Coronado and Laura Bates for the release of the Deferred Prosecution Agreement made in connection with cause No. C-1-CR-13-180014; styled *The State of Texas v. Chet Edward Cunningham*.

3. "On April 11, 2016, I received from Tara Coronado an open records request for "the full plea agreement" made in connection with cause number No. C-1-CR-13-180014, a true and correct copy of which is attached hereto as Exhibit A. The only document responsive to this request was a Deferred Prosecution Agreement. On April 22, 2016, I asked the Office of the Texas Attorney General ("OAG") for a ruling that this agreement was excepted from disclosure by §552.108(a)(1) of the Public Information Act. Attached hereto as Exhibit B is a true and correct copy of my April 22, 2016 letter to the OAG. Attached hereto as Exhibit C is a true and correct copy of Letter Ruling OR2016-10351, the OAG's ruling concerning the Deferred Prosecution Agreement.

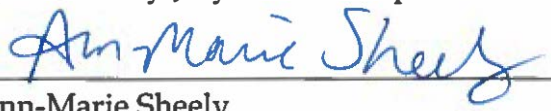
4. "On May 11, 2016, I received from Tara Coronado a second open records request for "the plea agreement for C-1-CR-13-180014," a true and correct copy of which is attached hereto as Exhibit D. As with the first request, the only document responsive to this request was the Deferred Prosecution Agreement. On May 20, 2016, I informed Ms. Coronado, based on Open Records Decision 673, that her second request was denied since she had previously requested the same information from the Travis County Attorney's Office, that the OAG had ruled in OR2016-10351 that the Deferred Prosecution Agreement was excepted from disclosure, and that the same circumstances applied. Attached hereto as Exhibit E is a true and correct copy of my May 20, 2016, letter to Ms. Coronado.

5. "On June 1, 2016, Tara Coronado, claiming that the Deferred Prosecution Agreement had been amended, asked for it a third time. A true and correct copy of this request is attached as Exhibit F. On June 14, 2016, I informed Ms. Coronado that the

Deferred Prosecution Agreement had not been amended and once again denied her request to release the Deferred Prosecution Agreement, relying on the OAG's prior determination in OR2016-10351. A true and correct copy of my June 14, 2016 letter to Ms. Coronado is attached as Exhibit G.

6. "On July 12, 2016, I received an open records request from Laura Bates, a true and correct copy of which is attached hereto as Exhibit H. Ms. Bates requested the entire file of the Travis County Attorney's Office pertaining to Mr. Cunningham's criminal case, including the same Deferred Prosecution Agreement requested by Tara Coronado in April, May, and June of 2016. Had Ms. Bates asked only for the Deferred Prosecution Agreement, her request would have been denied based on Defendant's prior determination in Letter Ruling OR2016-10351 that this agreement could be withheld from disclosure, just as were Ms. Coronado's second and third requests for this agreement. However, because Laura Bates requested additional information, I, on July 15, 2016, requested a ruling from the OAG that all the information sought by Ms. Bates is excepted from disclosure by Section 552.108(a)(1), noting that the Deferred Prosecution Agreement had already been excepted from disclosure by the OAG in Letter Ruling OR2016-10351. Attached as Exhibit I is a true and correct copy of my July 15, 2016 letter to the OAG.

7. "Attached as Exhibit J is a true and correct copy of Letter Ruling OR2016-21139, the ruling made by the OAG is response to my July 15, 2016 request for a ruling.

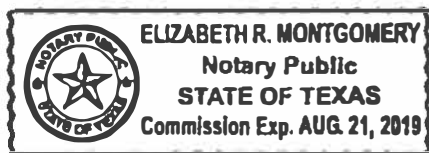

Ann-Marie Sheely
Assistant Travis County Attorney

THE STATE OF TEXAS

COUNTY OF TRAVIS

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

SWORN TO AND SUBSCRIBED before me on the 1st day of March, 2017.



Elizabeth R. Montgomery
Notary Public, State of Texas
My commission expires: 2019

Ramiro Gonzalez

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

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

THE STATE OF TEXAS

VS.

Chet Cunningham

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IN THE COUNTY COURT AT LAW

NUMBER 4

TRAVIS COUNTY, TEXAS

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

Tara Coronado
Manager, Administration, Austin
Implus LLC

Office: (512) 300-2804 ext 1326
www.implus.com

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

EXHIBIT A

DAVID A. ESCAMILLA
COUNTY ATTORNEY

STEPHEN H. CAPELLE
FIRST ASSISTANT

JAMES W. COLLINS
EXECUTIVE ASSISTANT

314 W. 11TH STREET
GRANGER BLDG., 5TH FLOOR
AUSTIN, TEXAS 78701

P. O. BOX 1748
AUSTIN, TEXAS 78767

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



COPY

RECEIVED
TRANSACTIONS DIVISION
JOHN C. HILL, JR., DIRECTOR †
BARBARA J. WILSON
OPEN RECORDS DIVISION
DANIEL BRADFORD
JENNIFER KRABER
ANN-MARIE SHEELY
† Member of the College
of the State Bar of Texas

April 22, 2016

Hand Delivered

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

Re: Request from **Tara Coronado** received on **04/11/2016** —Request for Ruling and Supplemental Brief

Dear Mr. Gordon:

The Travis County Attorney's Office ("TCAO") received an open records request from Tara Coronado on April 11, 2016. Pursuant to Government Code section 552.301, we request a ruling for this open records request. Requestor seeks the full plea agreement relating to the matter of *The State of Texas v. Chet Cunningham*, TCAO case No. C-1CR-13-180014. Below is our supplemental brief setting forth the exceptions to disclosure.

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

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

Government Code section 552.108 states in relevant part:

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

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

In this instance, Requestor seeks information related to the terms of an agreement related to case C-1-CR-13-180014, an assault-family violence case in which the subject entered into a deferred prosecution agreement with the State. The subject entered into the deferred prosecution agreement on April 1, 2016. The term of the deferred prosecution period has not concluded, and therefore, it is still an active, pending case. If at the end of

the deferred prosecution period the subject fails to comply with the terms of the agreement, the case will be refiled. The TCAO therefore objects to the release of the information related to this pending case because doing so would interfere with any prosecution of the crime underlying the responsive information. Accordingly, we assert that this information may be withheld under Government Code section 552.108(a)(1).

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

Sincerely,

A handwritten signature in cursive script that reads "Ann-Marie Sheely".

Ann-Marie Sheely
Assistant County Attorney

c: Tara Coronado
(via email to: tcoronado@4implus.com, without enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 6, 2016

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

OR2016-10351

Re: Request for the full plea agreement from State of Texas v. named individual; TCAO case #C-1CR-13-180014.

Dear Ms. Sheely:

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

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

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

Enc: Submitted documents

c: Requestor
(w/o enclosures)

EXHIBIT C

Ramiro Gonzalez

5-11-16 / 5-25-16

From: Tara Coronado <tcoronado@4implus.com>
Sent: Wednesday, May 11, 2016 4:32 PM
To: Ann-Marie Sheely
Cc: Ramiro Gonzalez
Subject: RE: (EXTERNAL) Response to request for Information- Coronado (TCSO)

Please accept this email as new request for the plea agreement for C1CR13-180014 under the Victim Right's Act. Thank you.

tara

Victim Rights

A victim of crime is defined by Chapter 56 of the Code of Criminal Procedure, as (1) someone who is the victim of sexual assault, kidnapping, or aggravated robbery or who has suffered bodily injury or death because of the criminal conduct of another, (2) the close relative (spouse, parent, adult brother or sister, or child) of a deceased victim or (3) the guardian of a victim. The law also applies to victims of juvenile crime, including victims who suffer property loss.

The State of Texas intends that victims of crime receive the following safeguards, assurances and considerations:

more information:

VINE 24-hour-information on jail status and court events:
1-877-894-8463

Code of Criminal Procedure, Chapter 56 Texas Constitution, Article I Section 30

- Receive adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;
- have their safety considered by the magistrate when setting bail;
- receive information, on request, of relevant court proceedings, including appellate proceedings, of cancellations and rescheduling prior to the event, and appellate court decisions after the decisions are entered but before they are made public;
- be informed, when requested, by a peace officer about the defendant's right to bail and criminal investigation procedures, and from the prosecutor's office about general procedures in the criminal justice system, including plea agreements, restitution, appeals and parole;
- provide pertinent information concerning the impact of the crime to the probation department prior to sentencing;
- information about the Texas Crime Victims' Compensation Fund and payment for a medical examination for a victim of sexual assault, and, on request, referral to social service agencies that provide additional assistance;

- information, on request, about parole procedures; notification of parole proceedings and of the inmate's release; and the opportunity to participate in the parole process by submitting written information to the Board of Pardons and Paroles for inclusion in the defendant's file for consideration by the Board prior to parole;
- a separate or secure waiting area at all public court proceedings;
- prompt return of any property that is no longer needed as evidence;
- have the prosecutor notify, upon request, an employer that the need for the victim's testimony may involve the victim's absence from work;
- on request, counseling and testing regarding AIDS and HIV infection and testing for victims of sexual assault
- request victim-offender mediation coordinated by the Victim Services Division of the Texas Department of Criminal Justice;
- be informed of the use and purpose of a victim impact statement, to complete a victim impact statement and to have the statement considered before sentencing and acceptance of a plea bargain and before an inmate is released on parole.

A victim, guardian of a victim, or close relative of a deceased victim may be present at all public court proceedings, with the consent of the presiding judge;

A judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a service enumerated herein.

Victims should also know that they can have a victim advocate accompany them during the sexual assault exam if an advocate is available at the time of the examination.

Please call your crime victim services contacts in law enforcement and the prosecutor's office for more information about victim services in your community.

Tara Coronado
Manager, Administration, Austin
 Implus LLC

Office:(512) 300-2804 ext 1326
www.implus.com



DAVID A. ESCAMILLA
COUNTY ATTORNEY

STEPHEN H. CAPELLE
FIRST ASSISTANT

JAMES W. COLLINS
EXECUTIVE ASSISTANT

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TRANSACTIONS DIVISION

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

TENLEY A. ALDREDGE

DANIEL BRADFORD

JENNIFER KRABER

ANN-MARIE SHEELY

† Member of the College
of the State Bar of Texas

May 20, 2016

Via Email to tcoronado@4implus.com

Tara Coronado

Implus LLC

5307 Industrial Oaks Blvd., Suite 100

Austin, TX 78735

Re: Public Information Request to the Travis County Attorney's Office received on 5/11/16 for information related to TCAO Case Number C-1-CR-13-180014 — Previous Determination

Dear Ms. Coronado:

I write in response to a request for information received by the Travis County Attorney's Office ("TCAO") on May 11, 2016 seeking the full plea agreement in relation to TCAO case number C-1-CR-13-180014. The information you have requested is the subject of a deferred prosecution by the TCAO and is excepted from disclosure for that reason. In OR ruling # 2016-10351, attached here, the Texas Attorney General's Open Records Division ruled that the same plea agreement you seek (which is titled Deferred Prosecution Agreement) fell under a disclosure exception to the Texas Public Information Act. You have asked for the same information, from the same governmental body and the same circumstances apply.

In Open Records Decision 673 (2001), the Attorney General determined that in order for a previous determination to be met, the following requirements must be met:

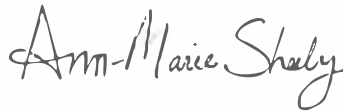
1. the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
2. the governmental body which received the request for the records or information is the same governmental body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

If all four prongs of this previous determination test apply, a governmental body is not required to ask for a ruling from Attorney General if it wants to withhold the requested information.

Here, the same exact records are requested (you refer to the records as a plea agreement in case number C-1-CR-13-180014, which our office calls a deferred prosecution agreement), made to the same governmental body (TCAO). OR ruling # 2016-10351 determined that the same requested records were excepted from disclosure under Section 552.108(a)(1) Government Code, and the circumstances have not changed since the prior ruling- the case involving the deferred prosecution is still pending, and the TCAO continues to object to the release of the information. Because you have asked for the same information, from the same governmental body and the same circumstances apply, we must deny your request.

If you have any questions, please contact me at (512) 854-9176, or by e-mail at ann-marie.sheely@traviscountytexas.gov.

Sincerely,

A handwritten signature in cursive script that reads "Ann-Marie Sheely".

Ann-Marie Sheely
Assistant County Attorney

Ann-Marie Sheely

From: Tara Coronado <tcoronado@4implus.com>
Sent: Wednesday, June 01, 2016 8:18 AM
To: Ann-Marie Sheely
Subject: (EXTERNAL) Data regarding the Deferred Prosecution Agreement Judge Denton signed 4.6.16 - Request for the amended version
Attachments: Email timeline.pdf

Ms. Sheely,

It appears the terms of the plea have changed. In light of this fact, this is a new open records request for the full terms of the amended plea.

Here is the timeline of my correspondence with prosecutor about the agreement – the attachment has the corresponding emails:

4/8 – first description of terms (stay away/no contact)
4/11 – expanded description - 200 yards away from me
4/22 – I send proof of an email violation – defendant's behavior changes immediately – I no longer get emails from him
4/28 – I send information about video footage of a violation of the 200 yards away from me order
5/4 – the terms of the plea have changed from 200 yards away from me to 200 yards away from my house/place of employment

Please let me know if you need any additional information. Thank you so much.

tara
512-241-9294

Tara Coronado
Manager, Administration, Austin
Implus LLC

Office:(512) 300-2804 ext 1326
Fax: (512) 899-2047
www.implus.com

 **IMPLUS** 5307 Industrial Oaks Blvd. Suite 100 Austin, TX 78735



EXHIBIT F

Ann-Marie Sheely

From: Ann-Marie Sheely
Sent: Tuesday, June 14, 2016 12:13 PM
To: 'Tara Coronado'
Cc: Ramiro Gonzalez
Subject: Response to Request from Tara Coronado re: Data regarding the Deferred Prosecution Agreement Judge Denton signed 4.6.16 - Request for the amended version- Previous Determination.

Ms. Coronado,

I write in response to your request for information on June 1, 2016, copied below. You ask for a copy of an amended plea/amended version of the deferred prosecution agreement. You have made previous requests for a copy of the plea agreement in cause C-1-CR-13-180014. We have responded that the responsive information was a deferred prosecution agreement, and have received a ruling from the Attorney General's office that allowed our office to withhold this deferred prosecution agreement. You now ask for an amended version of this agreement. Please be advised that no changes have been made to the deferred prosecution agreement in cause C-1-CR-13-180014.

To the extent you again seek the deferred prosecution agreement in cause C-1-CR-13-180014, this information was allowed to be withheld in Open Letter Ruling# 2016-10351 (which we have previously provided to you). In that ruling, the Texas Attorney General's Open Records Division ruled that the same plea agreement you seek (which is titled deferred prosecution agreement) fell under a disclosure exception to the Texas Public Information Act. You are again asking for the same information, from the same governmental body and the same circumstances apply.

In Open Records Decision 673 (2001), the Attorney General determined that in order for a previous determination to be met, the following requirements must be met:

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

If all four prongs of this previous determination test apply, a governmental body is not required to ask for a ruling from Attorney General if it wants to withhold the requested information. Here, the same exact records are requested (deferred prosecution agreement in case number C-1-CR-13-180014), made to the same governmental body (TCAO), OR ruling # 2016-10351 determined that the same requested records were excepted from disclosure under Section 552.108(a)(1) Government Code, and the circumstances have not changed since the prior ruling- the case involving the deferred prosecution is still pending, and the TCAO continues to object to the release of the information. There have been no changes made to the deferred prosecution agreement in this cause. Because you have asked for the same information, from the same governmental body and the same circumstances apply, we must deny your request.

Ann-Marie Sheely
Assistant Travis County Attorney
Travis County Attorney's Office
314 West 11th Street
P.O. Box 1748
Austin, TX 78767
(512) 854-9176
Fax: (512) 854-4808
Email: ann-marie.sheely@traviscountytexas.gov

TCA Open Records

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

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

Under the Texas Public Information Act, §6252-17a et seq., the Legal Services department of SAFE Alliance is requesting an opportunity to inspect or obtain copies of public records that pertain to cause number C-1-CR-13-180014, styled "The State of Texas v. Chet Edward Cunningham," including, but not limited to, all investigative reports, statements, witness statements, court documents, filings, memorandums, plea paperwork, any written documentation of investigation and proceedings in this case, specifically including all paperwork regarding the Deferred Prosecution Agreement and any correspondence regarding such Agreement.

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

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

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

Thank you for considering my request.

Sincerely,

Laura Bates

DAVID A. ESCAMILLA
COUNTY ATTORNEY

STEPHEN H. CAPELLE
FIRST ASSISTANT

JAMES W. COLLINS
EXECUTIVE ASSISTANT

314 W. 11TH STREET
GRANGER BLDG., 5TH FLOOR
AUSTIN, TEXAS 78701

P. O. BOX 1748
AUSTIN, TEXAS 78767

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



FILE COPY

TRANSACTIONS DIVISION

JOHN C. HILLE, JR., DIRECTOR †

BARBARA J. WILSON

TENLEY A. ALDREDGE

JENNIFER KRABER

ANN-MARIE SHEELY

REGISTERED
Member of the College
of the State Bar of Texas

JUL 15 2016

OPEN RECORDS DIVISION

July 15, 2016

Hand Delivered

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

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

Dear Mr. Gordon:

The Travis County Attorney's Office ("TCAO") received an open records request from Laura Bates on July 12, 2016. Pursuant to Government Code section 552.301, we request a ruling for this open records request. Requestor seeks all public records relating to the matter of *The State of Texas v. Chet Cunningham*, TCAO case No. C-ICR-13-180014, including, but not limited to, all investigative reports, statements, witness statements, court documents, filings, memorandums, plea paperwork, any written documentation of investigation and proceedings in this case, specifically including all paperwork regarding the Deferred Prosecution Agreement and any correspondence regarding such Agreement. Below is our supplemental brief setting forth the exceptions to disclosure.¹

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

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

Government Code section 552.108 states in relevant part:

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

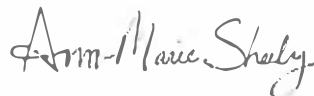
(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

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

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

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

Sincerely,



Ann-Marie Sheely
Assistant County Attorney

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



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 19, 2016

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

OR2016-21139

Dear Ms. Sheely:

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

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

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

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

EXHIBIT J

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

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

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

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

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

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

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

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

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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, appearing to read "Sid Pounds", written in a cursive style.

Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/bhf

Ref: ID# 626940

Enc. Submitted documents

c: Requestor
(w/o enclosures)

EXHIBIT 3

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

DAVID A. ESCAMILLA, TRAVIS	§	IN THE DISTRICT COURT OF
COUNTY ATTORNEY,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY GENERAL	§	
OF TEXAS,	§	
<i>Defendant.</i>	§	261st JUDICIAL DISTRICT

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

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

I. REQUESTS FOR DISCLOSURE

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

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

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

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

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

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

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

4. For any testifying expert...

Response: None.

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

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

II. REQUESTS FOR ADMISSIONS

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

ADMIT

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

ADMIT

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

ADMIT

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

ADMIT

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

ADMIT

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

ADMIT

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

ADMIT

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

ADMIT

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

ADMIT

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

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

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

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

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

ADMIT

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

ADMIT

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

ADMIT

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

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

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

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

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

ADMIT

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

ADMIT

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

ADMIT

III. INTERROGATORIES

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

Answer to RFA No. 14 is an admission.

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

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

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

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

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

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

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

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

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

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

IV. REQUESTS FOR PRODUCTION

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

Answer to RFA No. 14 is an admission.

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

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

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

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

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
Deputy Attorney General for Civil Litigation

NICHOLE BUNKER-HENDERSON
Chief, Administrative Law Division

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

ATTORNEYS FOR DEFENDANT KEN PAXTON,
ATTORNEY GENERAL OF TEXAS

CERTIFICATE OF SERVICE

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

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ATTORNEY FOR PLAINTIFF

/s/ Matthew R. Entsminger
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VERIFICATION

STATE OF TEXAS

§

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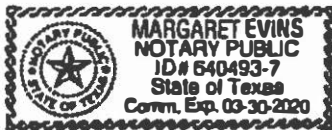
COUNTY OF TRAVIS

§

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

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

Debbie Lee



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

EXHIBIT 4



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

March 19, 2001

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

AUTHORITY

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

BACKGROUND

Section 552.301 of the Government Code states in pertinent part:

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

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

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

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

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

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

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

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

DISCUSSION

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

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

³See Gov’t Code § 552.001.

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

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

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

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

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

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

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

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

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

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

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

PREVIOUS DETERMINATIONS

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

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

4. the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.⁶

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

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

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;⁷
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and⁸

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

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

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

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

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

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

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

Open Records Decision No. 634 at 10 (1995) (emphasis added). This decision constitutes a previous determination for requested records or information if: the requested information falls within the specific, clearly delineated category of information that is protected by FERPA (criterion "1"), and the governmental body from which the information is requested is an educational agency or institution as that term is defined in FERPA⁹(criterion "2"). This is because the decision concludes that the information is excepted from disclosure under section 552.101 of the Government Code (criterion "3"), the law, facts, and circumstances on which the conclusions of Open Records Decision No. 634 were based equally apply to the present request (criterion "4"), and the decision explicitly authorizes an educational agency or institution to withhold the information without the necessity of again seeking a decision from this office (criterion "5"). However, if, for example, the governmental body from which the information is requested is a police department rather than an educational agency or institution as that term is defined in FERPA, then Open Records Decision No. 634 cannot be relied upon by the police department as a previous determination, because neither criterion "2" nor criterion "4" is met. Likewise, there are numerous prior decisions of this office that may meet all of the above-stated criteria except the fifth. These prior decisions provide guidance to a governmental body of whether particular information *may be* excepted

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

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

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

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

SUMMARY

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

Yours very truly,

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

JOHN CORNYN
Attorney General of Texas

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