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

DAVID A. ESCAMILLA, TRAVIS COUNTY ATTORNEY, *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, *Defendant*.	§	261st JUDICIAL DISTRICT

DEFENDANT ATTORNEY GENERAL'S PRETRIAL BRIEF

TO THE HONORABLE COURT:

Defendant Ken Paxton, Attorney General of Texas, files this pretrial brief in anticipation of the trial on the merits in this cause set for August 8, 2017.

I. INTRODUCTION

The Court is faced with a single, narrow issue in this cause: Whether the information at issue is subject to an express exception to the required disclosure of public information otherwise mandated by the Texas Public Information Act (PIA), chapter 552 of the Government Code. *See* Tex. Gov't Code § 552.006 (no authorization to withhold public information except as expressly provided by PIA). Whether an express exception to disclosure applies is a question of law. *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 323 (Tex. App.—Austin 2002, no pet.). And the burden to make such a showing rests entirely with the governmental body resisting disclosure of the requested public information. *Id.* ("To withhold information, a governmental body must establish that . . . withholding the information is permitted by one of the [PIA's] enumerated exceptions to disclosure.").

Here, Plaintiff asserts the information at issue is excepted from disclosure by subsection 552.108(a)(1) of the Government Code, an express exception to disclosure under the PIA and part of what is often referred to as the "law enforcement exception."

Pl.'s 2d Am. Pet. at 5–7. Plaintiff alleges no other exception to disclosure recognized by the PIA. Accordingly, the sole issue properly before this Court is whether Plaintiff has demonstrated the information at issue is excepted from disclosure by subsection 552.108(a)(1) of the Government Code. If Plaintiff has not made such a showing, the Court should order Plaintiff to release the requested information.

II. BACKGROUND

Generally, a governmental body that receives a written request for information it wishes to withhold from public disclosure and that it considers to be within one of the PIA's express exceptions must request an open records ruling from the Attorney General. Tex. Gov't Code § 552.301. The PIA mandates that a governmental body seeking a decision from the Attorney General must, among other requirements, submit to the Attorney General a copy of the specific information requested, or a representative sample thereof, as well as written comments explaining why an asserted exception applies to the information. *Id*. § 552.301(e)(1)(A), (D). The Attorney General "shall promptly render a decision requested under [the PIA] . . . determining whether the requested information is within one of the exceptions of [the PIA]." *Id*. § 552.306(a).

A governmental body need not seek the decision of the Attorney General if the governmental body does not wish to withhold the requested information and instead intends to willingly make the information available to the requestor. *Id*. § 552.007. A governmental body may, but is not required to, seek the decision of the Attorney General if there has been a "previous determination" that the requested information falls within an exception to disclosure. *Id*. § 552.301(a). And a governmental body is prohibited from seeking the decision of the Attorney General if the governmental body has previously requested and received a determination from the Attorney General concerning the precise

information at issue in the pending request and the Attorney General or a court determined that the information is not subject to an exception to disclosure under the PIA. *Id*. § 552.301(f).

The PIA provides a limited waiver of sovereign immunity that allows a governmental body to seek de novo review of an Attorney General decision. "The only suit a governmental body may file seeking to withhold information from a requestor is a suit . . . against the attorney general" that "seeks declaratory relief from compliance with a decision by the attorney general issued under [the PIA]." *Id*. § 552.324. Generally, the only exceptions to required disclosure that a governmental body may raise in a suit brought pursuant to section 552.324 are "exceptions that the governmental body properly raised before the attorney general in connection with its request for a decision under [the PIA]." *Id*. § 552.326.

As is relevant to this lawsuit, on July 12, 2016, Plaintiff David A. Escamilla, Travis County Attorney (Plaintiff or the County Attorney), received a request under the PIA from Laura Bates on behalf of Intervenor Tara Coronado, for information relating to a specified criminal prosecution, including "all paperwork regarding the Deferred Prosecution Agreement[.]" Pl.'s 2d Am. Pet. at 3. Following its receipt of Bates's request, the County Attorney appropriately requested the decision of the Attorney General as to whether the requested records were within an exception to required disclosure; namely, subsection 552.108(a)(1) of the Government Code. *See* Def.'s Ex. A. In its written comments to the Attorney General, the County Attorney stated it objected to the release of "all of the information requested" and asserted "all of this information may be withheld under Government Code section 552.108(a)(1)." *Id*. at 2. The County Attorney additionally submitted representative samples of the information requested, including a copy of the

deferred prosecution agreement referenced in the request. *Id*. In a footnote, the County Attorney informed the Attorney General as follows:

> 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.

Id. at 1 n.1.

The Attorney General issued Open Records Letter Ruling OR2016-21139 (the letter ruling) in response to the County Attorney's request. Def.'s Ex. B. In the letter ruling, the Attorney General acknowledged the County Attorney's note indicating that a portion of the information submitted for the Attorney General's review was the subject of a previous letter ruling issued by the Attorney General. *Id*. at 1. However, the Attorney General concluded the County Attorney could not rely on this previous decision because "the law, fact, and circumstances on which the previous ruling was based [had] changed." *Id*. at 2. The Attorney General then considered the submitted information in light of the County Attorney's asserted exception to disclosure. The Attorney General determined the County Attorney could generally withhold the requested information—with the exception of "basic information"—under subsection 552.108(a)(1), based on the County Attorney's representation that the information related to a pending criminal case. *Id*. at 2. Regarding the submitted deferred prosecution agreement, however, the Attorney General concluded that subsection 552.108(a)(1) did not apply because the County Attorney had failed to demonstrate release of the agreement would "interfere with the detection,

investigation, or prosecution of crime[.]" The letter ruling directed the County Attorney to release most of the agreement.[1] *Id.* at 3.

Following the issuance of the letter ruling, the County Attorney filed this lawsuit under section 552.324 of the Government Code, seeking declaratory relief from the Attorney General decision. *See* Pl.'s 2d Am. Pet. at 1. The requestor then intervened as allowed under section 552.325(a) of the Government Code, and brought separate mandamus claims against the County Attorney pursuant to section 552.321 of the Government Code. *See* Intervenor's 1st Am. Pet. This proceeding followed.

III. THE PUBLIC INFORMATION ACT

The PIA places the public's interest in obtaining public information above the interest of a governmental body in denying access to the information:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.

Tex. Gov't Code § 552.001(a). By the PIA's design, virtually all information held by a governmental body is presumed to be open and subject to required disclosure unless an express exception to disclosure applies. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648, 663 (Tex. App.—Austin 2006, no pet.). A governmental body seeking to withhold information bears the burden of establishing the applicability of an established exception to required public disclosure. *See Thomas v. Cornyn*, 71 S.W.3d 473, 480–81 (Tex. App.—Austin 2002, no pet.); *Arlington Indep. Sch.*

[1] The letter ruling directed the County Attorney to withhold a date of birth within the agreement pursuant to Tex. Gov't Code § 552.101 and the doctrine of common-law privacy. Ex. B at 3.

Dist., 37 S.W.3d at 157. As noted above, whether information is subject to the PIA and whether an exception to disclosure applies are questions of law. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000); *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 163; *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 674 (Tex. 1995). "[T]he burden to produce the disputed information, and to preserve it of record for the appeal, lies with the governmental body seeking to assert an exception to the [PIA]." *Dominguez v. Gilbert*, 48 S.W.3d 789, 795 (Tex. App.—Austin 2001, no pet.).

The PIA is to be "liberally construed in *favor* of granting a request for information." Tex. Gov't Code § 552.001(b) (emphasis added); *see Dallas Morning News*, 22 S.W.3d at 356; *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157. "The practical effect of a statutory directive for liberal construction of an act is that close judgment calls are to be resolved in favor of the stated purpose of the legislation." *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 552 (Tex. App.—Austin 1983, writ ref'd n.r.e.). "Exceptions to the disclosure requirement of the PIA are narrowly construed." *Tex. State Bd. of Chiropractic Exam'rs v. Abbott*, 391 S.W.3d 343, 347 (Tex. App.—Austin 2013, no pet.) (citing *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157). "The Open Records Act's core provision provides that the public is entitled to information 'collected, assembled, or maintained by a governmental body.'" *Holmes v. Morales*, 924 S.W.2d 920, 922 (Tex. 1996) (referring to section 552.021). The PIA does not authorize withholding or limiting the availability of public information except as expressly provided. Tex. Gov't Code § 552.006.

IV. PLAINTIFF HAS FAILED TO DEMONSTRATE SUBSECTION 552.108(A)(1) OF THE GOVERNMENT CODE EXCEPTS THE INFORMATION AT ISSUE FROM DISCLOSURE.

The County Attorney claims the information at issue is excepted from required public disclosure pursuant to subsection 552.108(a)(1) of the Government Code. Pl.'s Trial Br. at 5–7. But the information at issue consists only of a deferred prosecution agreement (the "agreement" or "information at issue") that was provided by the County Attorney to the defendant in a pending criminal prosecution; accordingly, the information may not be withheld from other members of the public pursuant to section 552.108 of the Government Code because further release of the record will not interfere with the detection, investigation, or prosecution of crime.

Government Code section 552.108 states in relevant part as follows:

> (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of [the PIA] if:
>
> (1) release of the information would interfere with the detection, investigation, or prosecution of crime; [or]
>
> (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Tex. Gov't Code § 552.108(a)(1)–(2). In order to withhold the information at issue the County Attorney must demonstrate that, pursuant to subsection (a)(1), release of the agreement "would interfere with the detection, investigation, or prosecution of crime."

The Attorney General submits to the Court that the arguments contained in the County Attorney's pretrial brief are insufficient to meet this burden in light of the uncontroverted facts surrounding the agreement. The face of the document reveals that it is signed by the defendant and that the County Attorney provided the defendant with a

copy of the agreement. IAI at 6–7.[2] Nothing in the document speaks to the public availability of the agreement nor has either party indicated that the agreement must be kept in confidence between the parties. [redacted] Pl.'s Trial Br. at 6. But this argument offers only a vague assertion of interference and is further diminished by the face of the agreement itself. [redacted] Moreover, the existence of the agreement is already known to the public. *See* Def. Ex. C (Eric Dexheimer, *How Travis County Keeps Some Case Records from Domestic Abuse Victims*, AUSTIN AMERICAN-STATESMAN (Feb. 24, 2017)).[3] [redacted]

Plaintiff next argues that, far more broadly, release of this deferred prosecution agreement will interfere with Plaintiff's ability to "effectively prosecute" hypothetical

[2] The Attorney General will cite to the information at issue to be presented to the Court for in camera review as "IAI."

[3] Available at: http://www.mystatesman.com/news/how-travis-county-keeps-some-case-records-from-domestic-abuse-victims/P7qDaiiYD17T8Mny8eOg5I/ (last visited July 24, 2017).

criminal cases in the future that are unrelated to the case forming the basis of the agreement before the Court. Pl.'s Trial Br. at 6–7. The Court should reject this theory. The case at bar concerns the public release and availability of a single deferred prosecution agreement. The County Attorney has not marshalled evidence demonstrating that the release of *this specific agreement* would "interfere with the detection, investigation, or prosecution of crime" in any other particular investigation. The criminal defendant here has already signed and entered into an agreement with the County Attorney. [redacted] Consequently, the release of this agreement would have no apparent effect upon the future disposition of this criminal case. And the County Attorney has offered no support for the contention that the law enforcement exception should be so broadly construed as to allow for the withholding of records concerning one law enforcement matter on the premise that the release of similar records in the aggregate could conceivably harm the government's efforts in future unrelated matters.

"Exceptions to the disclosure requirement of the PIA are narrowly construed." *Tex. State Bd. of Chiropractic Exam'rs*, 391 S.W.3d at 347. And the text of subsection (a) demonstrates the Legislature's intent that the exception to be applied narrowly and on an investigation-by-investigation basis. Notably, a governmental body may not withhold under the law enforcement exception any information that relates to an investigation which ultimately resulted in conviction or deferred adjudication. *See* Tex. Gov't Code § 552.108(a)(2). The County Attorney must demonstrate that the release of *this* agreement would harm its law enforcement interests in *this* criminal case, or in some specific, presumably related investigation. But the County Attorney cannot make such a

showing here because the deferred prosecution agreement is already final and binding upon the criminal defendant.

Finally, Plaintiff suggests that the Attorney General's conclusion regarding the agreement at issue here would necessarily require the release of any information provided by the government to a criminal defendant pursuant to Tex. Code Crim. Proc. art. 39.14. Pl.'s Trial Br. at 11–12. But the Attorney General has held in similar instances that information released to a party pursuant to legal mandate may still be shown to be excepted from required public disclosure. *See, e.g.*, Tex. Att'y ORD-454 (1986); *see also* Tex. Gov't Code § 552.007(a) (public information *voluntarily* made available by a governmental body must be made available to any person). Plaintiff does not allege the information at issue was made available to the criminal defendant pursuant to article 39.14 or similar; moreover, even in such instance Plaintiff would be required to demonstrate that release of an agreement that was executed by and provided to a defendant would interfere with its criminal prosecution.[4] As the County Attorney has failed to make such a showing, this claim should be denied.

V. PLAINTIFF'S "PREVIOUS DETERMINATION" CLAIM IS NOT IS NOT RELEVANT TO THE QUESTION BEFORE THE COURT.

Plaintiff argues separately that the Attorney General was prohibited from addressing the applicability of subsection 552.108(a)(1) to the agreement when rendering the letter ruling in dispute. Pl.'s Trial Br. at 11 ("As such, Defendant should not have revisited, let alone reversed, the ruling in Letter Ruling OR2016-10351 that the [agreement] is excepted from disclosure by section 552.108(a)(1)."). But Plaintiff offers

[4] Although the conclusion reached the letter ruling is not consistent with the Attorney General's prior ruling concerning this record, the approach is consistent with the Attorney General's handling of similar law enforcement records that are procedurally provided to criminal defendants, including traffic citations and DIC23 and DIC24 notices provided to DWI suspects.

no statutory support for the contention that the Attorney General is somehow bound by a prior informal open records ruling when a governmental subsequently requests an Attorney General decision and submits the relevant records for the Attorney General to review a second time.

As explained above, a governmental body seeking to withhold information pursuant to one of the PIA's exceptions must request a decision of the Attorney General, unless there has been a previous determination that the information is excepted from disclosure. Tex. Gov't Code § 552.301(a). In that instance, the governmental body may rely on the prior decision and choose to forgo a request for a subsequent Attorney General decision. *See* Att'y Gen. ORD-673 (2001). But it does not follow that—should the governmental body instead choose to request a second Attorney General opinion and submit the same records for review—the Attorney General is then compelled to recognize a "previous determination" and render a decision identical to that of a prior informal open records ruling, even when the Attorney General has identified the prior ruling to be in error. In 2016, the Attorney General issued over 28,000 informal open records rulings. The Attorney General is not and should not be bound by a prior, erroneous determination made in an informal ruling; rather the statute "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 Pub. Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (construing statutory predecessor to PIA). The Attorney General declined to follow his previous determination in this instance.

Further, a "previous determination" is not an exception to disclosure in its own right; it simply offers an alternative to the general PIA requirement that a governmental body request the Attorney General's decision should it desire to withhold public

information. In this instance, however, the County Attorney *did* request an Attorney General decision and submitted the information at issue for the Attorney General to review. In turn, the Attorney General issued a ruling finding that the information at issue is not excepted from disclosure and must be released. The only recourse for the County Attorney at the point it received the adverse ruling was to file suit for declaratory relief as allowed under the PIA. *See* Tex. Gov't Code § 552.324. The question before the Court in a suit brought under section 552.324 is whether the information at issue is subject to the exception to disclosure asserted by Plaintiff, and Plaintiff bears the burden of demonstrating that such an exception applies. *See City of Fort Worth v. Cornyn*, 86 S.W.3d at 323.

Furthermore—even if the County Attorney could demonstrate it is now entitled by law to rely upon an earlier informal open records letter ruling, notwithstanding a subsequent ruling to the contrary—the question of whether the information at issue is excepted from disclosure is still squarely before the Court because the requestor has intervened and pleaded mandamus claims under section 552.321 of the Government Code. Texas courts will consider a requestor's mandamus action under the PIA on the merits of the governmental body's claimed exceptions, even if the Attorney General has issued a ruling determining the information at issue to be excepted from disclosure. *See, e.g., Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112 (Tex. 2011). Indeed, a requestor need not even wait for the Attorney General to render his opinion prior to filing suit seeking the disclosure of public information. *Kallinen v. City of Houston*, 462 S.W.3d 25, 28 (Tex. 2015), *reh'g denied* (June 26, 2015). Accordingly, the County Attorney would still be required to demonstrate the asserted exception to disclosure applies to the information at issue, even if the Attorney General had found that

the County Attorney could withhold the information at issue in accordance with a prior letter ruling. This claim should be denied.

CONCLUSION

The County Attorney has failed to demonstrate the information at issue is excepted from required public disclosure; accordingly, the Attorney General respectfully asks the Court to deny the County Attorney's claims and order that the information at issue be released to the requestor.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

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First Assistant Attorney General

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Deputy Attorney General for Civil Litigation

NICHOLE BUNKER-HENDERSON
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/s/ Matthew R. Entsminger
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ATTORNEYS FOR DEFENDANT KEN PAXTON,
ATTORNEY GENERAL OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Attorney General's Pretrial Brief has been served on July 24, 2017, on the following attorneys-in-charge, by mail, and in redacted form by email:

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ATTORNEY FOR INTERVENOR/CROSS-PLAINTIFF

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

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

DAVID A. ESCAMILLA, TRAVIS COUNTY ATTORNEY, *Plaintiff,*	§	IN THE DISTRICT COURT OF
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DEFENDANT ATTORNEY GENERAL'S PRETRIAL BRIEF

APPENDIX

EXHIBITS

A. Plaintiff's July 15, 2016, correspondence to the Office of the Attorney General

B. Attorney General Open Records Letter Ruling OR2016-21139

C. Eric Dexheimer, *How Travis County Keeps Some Case Records from Domestic Abuse Victims,* AUSTIN AMERICAN-STATESMAN (FEB. 24, 2017)

DEFENDANT'S EXHIBIT A

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OR-2016-16940
16940

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-1CR-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@traviscountytx.gov.

Sincerely,

Ann-Marie Sheely

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)

DEFENDANT'S EXHIBIT B

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

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

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

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

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

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

We note portions of the agreement are subject to section 552.101 of the Government Code.[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.

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

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

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

Sincerely,

Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/bhf

Ref: ID# 626940

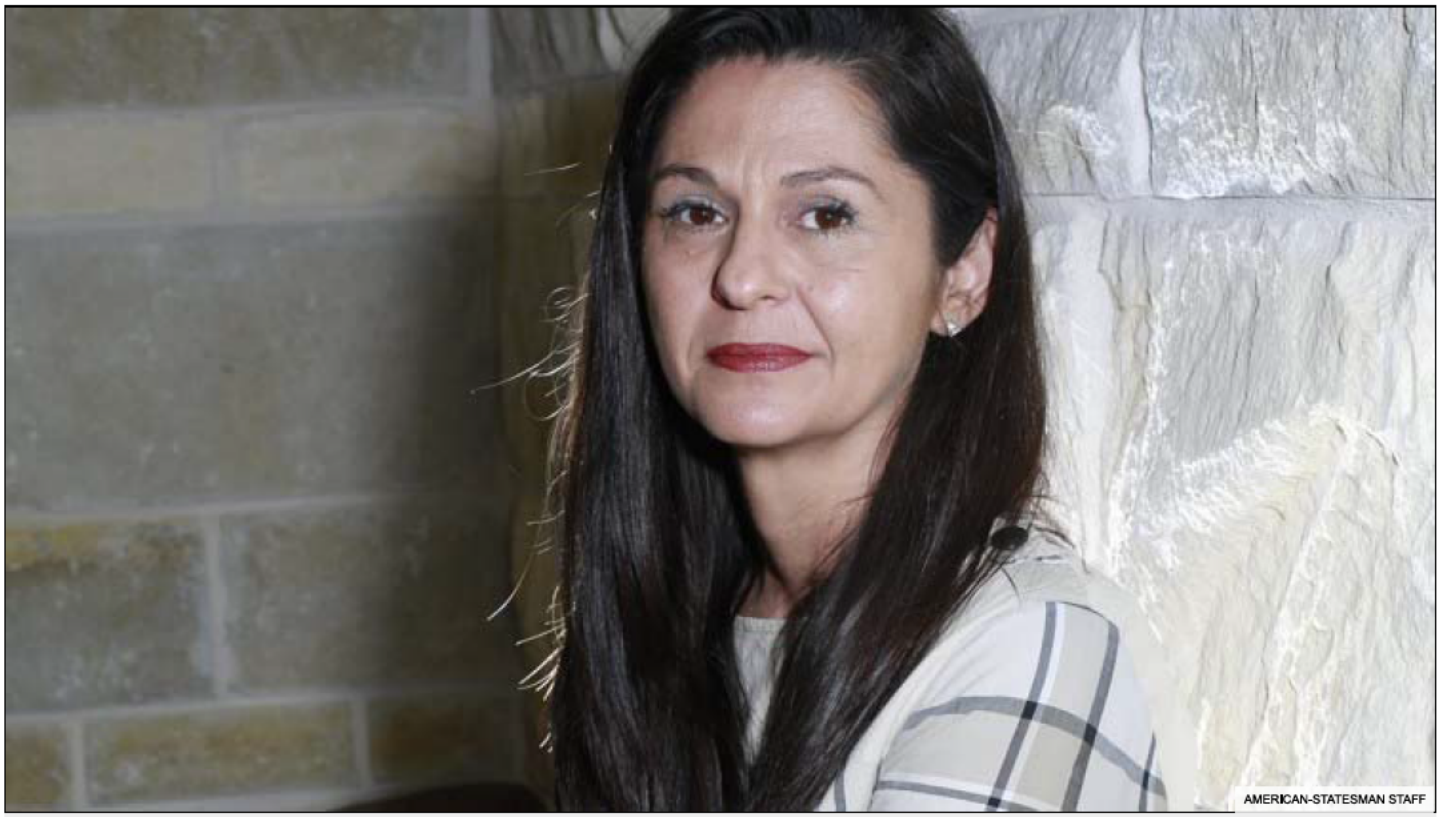
Enc. Submitted documents

c: Requestor
(w/o enclosures)

How Travis County keeps some case records from domestic abuse victims

METRO-STATE By Eric Dexheimer - American-Statesman Staff

DEFENDANT'S EXHIBIT C



Tara Coronado at her office in North Austin on Friday

Posted: 6:21 p.m. Friday, February 24, 2017

When Tara Coronado asked last year to see a copy of the agreement her ex-husband had signed with Travis County prosecutors to settle criminal charges that he'd hit her, she had no idea what a dust-up she would cause.

The office of Travis County Attorney David Escamilla wouldn't turn over the document. Now, nearly a year on, Coronado's request has blown into a pitched open records legal battle pitting Travis County against Attorney General Ken Paxton, who has ordered the papers released.

The dispute highlights a little-known tactic Travis County prosecutors use to dispose of about 1 in 5 family violence cases. In so-called deferred prosecutions, all charges against the alleged batterer are dropped. In exchange, he or she agrees to abide by a set of rules for up to two years, such as attending counseling and not having contact with the victim.

If the defendant fails to follow the agreement, prosecutors can refile the charges. If the person completes the program without any hitches, he or she can then ask a judge to expunge the case, meaning evidence of the incident in the public record is wiped away.

Escamilla said deferred prosecutions are an essential tool in handling domestic violence charges — particularly for relatively weak cases, such as those in which compelling evidence is lacking or in which the victim cannot or will not testify against the abuser. Mack Martinez, who runs the office's domestic violence unit, noted that as many as 80 percent of family violence cases feature reluctant witnesses.

"Domestic violence cases are the hardest cases we make," he said.

Other counties — Harris and Tarrant — also regularly use a form of deferred prosecution for domestic violence cases. Bexar County uses it only "under very limited circumstances," a spokeswoman said. To qualify, she added, the complainant "must be in full support of the agreement (and) the defendant must stipulate on the record in open court to his or her guilt."

Martinez said the Travis County attorney's office used the tactic in about 600 of its 3,200 cases annually. Escamilla said that because the case is considered pending during the counseling period, it is not subject to open records laws. And once the defendant completes the program successfully, it is considered an investigation that did not result in a conviction — meaning it is shielded from public view then, too.

"We're not in disagreement with Ms. Coronado's position philosophically," he said. "But our legal and ethical constraints require us to do otherwise."

The secrecy troubles open records lawyers. "Why should a prosecutor's deal with any defendant be withheld from the public?" said Bill Aleshire, an Austin open records attorney who is representing Coronado. "How do we know the prosecutors are giving the same kind of deal to a rich person as to a poor person?"

Anti-domestic violence advocates say they are concerned that offering repeat abusers a deal that might erase the incident from the public record can be dangerous. Previous domestic violence offenses can be used to enhance new charges, so erasing older cases narrows prosecutors' options.

"We strongly advocate for survivors' access to information pertaining to their safety," said Derrick Crowe, a spokesman for SAFE, an Austin nonprofit that has helped Coronado in her effort to shake loose records from her case. "We also often find deferred prosecution in domestic violence cases to be problematic because it can result in decreased accountability on the part of the batterer, and therefore increased risk for the survivor of abuse."

Bitterly contested case

Court documents filed as part of the open records case show that when Coronado showed up at the Bee Cave Police Department on May 11, 2013, her "right eye appeared to be swollen and bruised." She had cuts on her knee, elbow and ankle, and bruises on her back. She said that she was going through a divorce and her husband had hit her.

Chet "Ed" Cunningham, a former star football player at the University of Texas who also played in the NFL, was charged with a Class A misdemeanor. Coronado was granted a two-month emergency protective order against him, records show.

The criminal case dragged as they fought over custody and divorce arrangements. Coronado wavered about pursing charges. Finally, Travis County prosecutors offered the deferred prosecution deal last April.

Because the case is considered ongoing, Escamilla said he could not comment on it. Cunningham's attorney, Mindy Montford, was recently named assistant to new District Attorney Margaret Moore, a position she said prohibited her from commenting.

Cunningham denied any abuse and said he agreed to the deal only to put the bitterly disputed case behind him. He said assurance that the agreement was to remain shielded from public view was also crucial. "We absolutely would've gone to trial if it hadn't been private," he said.

Coronado said she wanted the case to go to trial. When prosecutors told her they'd decided to strike a deal, she said, "I was kicked-in-the-stomach devastated."

She acknowledged that she agreed to the deferred prosecution deal that prosecutors explained to her. But she said she was never told the charges against her ex-husband would be dismissed.

The open records issue came to a head soon after the deal was struck. Coronado said she ran into her ex-husband at their son's basketball game. That violated her understanding of the terms of the deal, which she said she thought called for him to stay 200 yards away from her.

She took photographs and requested video from the school. When she sent them to the Travis County attorney's office, though, she said she was told the terms actually said Cunningham only had to stay away from her home or place of business.

Angry at what she saw as a more permissive deal than she'd understood — or restrictions that had been altered without her knowledge — Coronado asked to see the settlement. That's when Travis County told her she couldn't.

Suspicion and mistrust

While declining to speak directly about Coronado's case, Martinez said he had never altered the conditions of a deferred prosecution. Still, advocates say not being able to see the details of such an arrangement doesn't make sense.

"I don't understand how the agreement is supposed to work if no one, especially the victim, is allowed to know the terms," said Jeana Lungwitz, director of the Domestic Violence Clinic at the UT Law School. "I suspect not many defendants self-report their violations."

Open records disputes are sent to the attorney general's office for resolution. Escamilla said his office had submitted several other identical requests to the state agency and had been assured he had good legal reason to withhold the deferred prosecution agreements.

But in September, Paxton's office changed course on Coronado's request. It ordered Escamilla to turn over Cunningham's deal with Travis County. The reasoning: The county had already treated the document as public by showing it to Cunningham.

Escamilla's office appealed that decision to state district court. On Feb. 1, he asked the judge to seal certain documents in the case and close the courtroom to the public for a hearing. The Austin Bulldog, a nonprofit online news outlet that covers the city, filed an objection, which postponed the hearing.

"You've got to wonder why they're doing these deals," Aleshire said. "It just adds to suspicion and mistrust."


About the Author

ERIC DEXHEIMER Eric Dexheimer is a member of the Austin American-Statesman's investigative team.