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March 22, 2011

Honorable Greg Abbott
Attorney General of Texas
300 W. 15th St.
Austin, Texas 78711
Attention: Open Records Division

via hand delivery

Re: Public Information Act Request to Harris County Constable Precinct 4 by Darren D. Chaker – Requestor's Response to Harris County's March 2, 2012 letter brief

Dear General Abbott:

This law firm has been retained to represent Darren D. Chaker in connection with the above-referenced Public Information Act request. This letter brief is in response to the March 2, 2012 letter and attached memorandum brief submitted by the Harris County Attorney on behalf of Harris County Constable Precinct 4 ("the Constable").

I. The request and response.

Mr. Chaker on February 4, 2012 submitted a Public Information Act request to the Constable, seeking seven categories of information. (A copy of the request is attached as Exhibit C to the Constable's March 2 letter and memorandum.)

The Constable responded that he had no responsive documents to the requests numbered 3 through 7. Those requests are therefore not at issue.

The Constable admitted to possessing documents responsive to the requests numbered 1 and 2, but refused to release any information whatsoever. Those requests were as follows:

1. The name, sex, ethnicity, salary, title, current unit assigned to (as applicable to sworn deputies) and dates of employment of <u>each</u> employee of your Office. (Sec. 552.022(2));

2. Any report concerning Darren Chaker and any dispatch log, or tape recording associated with any call for service pertaining to Darren Chaker between 2008-2012. [Footnote omitted; the footnote pointed out that "front page" offense report information cannot be withheld.]

Ex. C to Constable's Memorandum. The Constable, in a February 24, 2012 letter to your office, initially contended that the requested material was excepted from disclosure under Tex. Gov't Code §§ 552.101 (confidential by law), 552.108 (law enforcement records), and 552.135 (school district informer).

In his March 2, 2012 letter and memorandum, the Constable contends that his initial citation to Section 552.135 was a "scrivener error" and that he intended instead to cite Section 552.152 (substantial threat of physical harm to employee or officer of governmental body). Constable Memo at 2 fn.2.

The Constable appears to make the following arguments for withholding the requested information:

- There is allegedly an open investigation – by an agency other than the Constable – "on a matter relating to Chaker and/or persons mentioned by Chaker." Constable Memo at 3. The Constable thus claims that Mr. Chaker's Request #2 calls for material excepted from disclosure by Section 552.108.

- Because the Constable's office "engages in crime prevention," the release of information regarding employees requested by Mr. Chaker's Request #1 would, according to the Constable, interfere with law enforcement and thus is excepted from disclosure by Section 552.108. Constable Memo at 3.

- Because employees of the Constable's office sometimes work undercover, the release of information regarding employees requested by Mr. Chaker's Request #1 would, according to the Constable, "subject the officers to a substantial threat of physical harm" and thus is excepted from disclosure by Section 552.152. Constable Memo at 3-4.

The Constable has failed to carry his burden of proving the application of any of the cited exceptions. The requested material thus should be ordered released.

II. Mr. Chaker's Request #2 calls for presumptively public information, the release of which the Constable has failed to prove would interfere with law enforcement.

A. Mr. Chaker is entitled to basic "front page" information. Both case law and the Public Information Act itself explicitly recognize that "information that is basic information about an arrested person, an arrest, or a crime" must be disclosed under the Act. Tex. Gov't Code § 552.108(c); *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 184-85 (Tex. Civ. App. – Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (per curiam); OR 2003-0491. This basic information is sometimes called "front page" information, but may be found anywhere in the relevant documents.

The Constable has failed to make any argument whatsoever as to why the basic information that is *required* to be disclosed by the Act must be withheld. At the very minimum, Mr. Chaker is entitled by law to this basic information.

B. The Constable has failed to show "with detailed evidence" how release of the requested information would allegedly interfere with law enforcement. The burden of proving the applicability of Section 552.108's "law enforcement exception" rests on the Constable. He may not carry this burden through "vague assertions of risk," *Texas Dep't of Public Safety v. Cox Texas Newspapers, L.P.*, 343 S.W.3d 112, 119 (Tex. 2011). Instead, he must show "with *detailed* evidence or expert testimony" the specific interference with law enforcement that would come about if the requested information were released. *Id. See also Thomas v. Cornyn*, 71 S.W.3d 473, 486-90 (Tex. App. – Austin 2002, no pet.) (finding law enforcement exception inapplicable when governmental entity offered no evidence other than its assertion that the exception applied; "the sheriff failed to explain how disclosure of the information would interfere with law enforcement"); Tex. Att'y Gen. ORD-409 (1984) (law enforcement agency did not prove exception because it had "not indicated how release of the name of a burglary victim would, in a particular instance, unduly interfere with law enforcement or crime prevention").

Here, the Constable has provided no detailed evidence or any explanation beyond "vague assertions" as to how release of the information sought in Mr. Chaker's Request #2 would interfere with law enforcement. Significantly, it appears that the Constable's office does *not* have any ongoing investigation; its memorandum instead alleges that "The Spring Independent School District has an open criminal investigation on a matter relating to Chaker and/or persons mentioned by Chaker." Mr. Chaker made a similar request to the Spring ISD, which has *agreed* to release basic "front page" information, unlike the Constable. Exhibit 1 hereto.

The Constable merely asserts, without any explanation or proof, that release of the requested information would allegedly interfere with law enforcement. This conclusory assertion does not meet the standard of particularized proof that release of the information would interfere in any manner with law enforcement.

The clear import of *Texas DPS v. Cox Texas Newspapers*, as well as this Office's decisions and letter rulings, is that a governmental body must offer some detailed and credible explanation to invoke the law enforcement exception. No such explanation is offered by the Constable. The material sought in Mr. Chaker's Request #2 therefore must be released.

III. Mr. Chaker's Request #1 calls for "super public" information that has been made public already; there can be no exceptions to release of such information.

A. Section 552.022(a)(2) mandates release of the requested information. The Public Information Act specifically makes public "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body" unless such information is

explicitly "made confidential" under the Act or other law. Tex. Gov't Code § 552.022(a)(2). This is precisely the information requested in Mr. Chaker's Request #1.

Information specifically made public under Section 552.022(a) is generally known as "super public" or "core public" information. *See, e.g.*, *Texas DPS v. Cox Texas Newspapers*, 343 S.W.3d at 122 (Wainwright, J., concurring); *In re City of Georgetown*, 53 S.W.3d 328, 341 (Tex. 2001). "This is the type of public information at the core of government functions, generally relating to laws actually enacted, decisions of the judiciary, votes of the Legislature, and how the government spends the people's money." *Texas DPS v. Cox Texas Newspapers*, 343 S.W.3d at 122 (Wainwright, J., concurring). Indeed, even the Constable admits that this information is "super public." Constable Memo at 3.

The Constable has cited no specific law making the requested information confidential. As core public information, it must be released.

B. The Constable has failed to prove the law enforcement exception. Much has he has with Request #2, the Constable makes a conclusory argument that release of the super-public information sought in Request #1 would interfere with law enforcement. Constable Memo at 3. The Constable's argument consists solely of irrelevant generalities. He claims that his office investigates "matters such as technology and internet crime" and then asserts, without any explanation whatsoever, that withholding information regarding public employees "could prevent crime." *Id.* The Constable's argument is wholly conclusory and makes no logical sense. (The Constable also appears to make some argument that the possibility Mr. Chaker might publish the public information once it is released; as discussed below, this argument is substantively without merit and is clearly legally irrelevant under the Act.)

Further, Section 552.108 is a discretionary exception, and therefore does not make the requested information confidential under the Act.

C. The Constable has waived any "personal safety" argument, and in any event has failed to prove the exception. The Constable also attempts to rely on Section 552.152 of the Act, which allows the withholding of information if, "under the *specific circumstances* pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm." (Emphasis added.) As the Constable admits, this exception was not raised within 10 days of the request. It is therefore waived.

Even if this exception had not been waived, the Constable has failed to prove its application. Like his other arguments, the Constable's invocation of this exception is wholly conclusory. He contends that some officers work undercover, "and due to their specific circumstances" – which are never explained or elaborated upon by the Constable – "disclosure of their information would subject the officers to substantial threat of physical harm." The Constable further argues that because other officers have worked undercover in the past, and others might in the future, information regarding *all* officers should be withheld. Constable Memo at 4.

The Constable has utterly failed to *show*, with any evidence at all, any "specific circumstances" of any employee that would lead to "a *substantial threat* of *physical harm*" if the requested super-public information is released. Rather, the Constable relies on his assertion that having officers serve undercover – in the past, in the present, or even potentially in the future – is alone enough to justify withholding.

This is an important issue. If the Constable's argument is accepted, especially given the lack of any particular evidence in support, then *every* law enforcement agency can easily overcome the statutory requirement to release this core public information by simply asserting that officers may in the future work undercover. The text of the Act – the expression of the Legislature's intent – requires much more. The information listed in Section 552.022 enjoys a special status and requires a showing that the information is expressly "made confidential" by other provisions of the Act or other law. Here, the Constable has failed to produce any evidence of any "substantial" threat or any danger of physical harm. Of course, undercover officers do not use their real names, and the other information sought – sex, ethnicity, salary, title, job assignment and dates of employment – are too general to endanger any undercover officer.

The Constable relies heavily on an Open Records Letter Ruling, OR 2012-01502 (incorrectly described in the memo as an "Open Records Decision"). Memo at 3-4. This reliance is directly contrary to the procedures of the Attorney General's office, which disallows citation to letter rulings: "Unlike Open Records Decisions, these informal letter rulings are applicable only to the specific documents and circumstances surrounding them; therefore, ***Open Records Letter Rulings should not be cited as precedent when briefing to the Office of the Attorney General.***" (At https://www.oag.state.tx.us/open/index_orl.php; emphasis added).

D. Much of the information sought has already been made public. Names, titles, and salaries of at least some employees of the Constable's office are publicly available. See Exhibit 2 hereto (listing from *The Texas Tribune* online news site). The Constable cannot selectively withhold from Mr. Chaker information that has previously been made public. *See, e.g., Austin Chronicle Corp. v. City of Austin*, 2009 WL 483232 (Tex. App. – Austin 2009, no pet.).

IV. The Constable's discussion of the Requestor is irrelevant and improper.

In an apparent attempt to prejudice the Attorney General's office, the Constable's memo engages in various criticisms of Mr. Chaker and speculation about what might be done with information that is made public. This attempt is patently improper under the Public Information Act.

The Act provides that a public entity "shall treat all requests for information uniformly without regard to the position or occupation of the requestor ..." Tex. Gov't Code § 552.223. Further, if information has been made public, it "must be made available to *any person*." *Id.* § 552.007(b). A public entity may not even ask a requestor what he or she intends to do with the requested information. *Id.* § 552.222 (prohibiting inquiries to requestors except under certain circumstances not applicable here). The Requestor is confident that the Attorney General's office will not be influenced by the Constable's improper attempt to appeal to irrelevant issues.

V. The Constable's attempt to withhold the evidence upon which he relies is improper.

The Constable's memorandum references seven exhibits, designated Exhibits A through G. Exhibits A and C are documents drafted by Mr. Chaker, copies of which he possesses. The remaining documents have not been supplied to the requestor. These documents include two affidavits upon which the Constable relies heavily in his memorandum (Exhibit B, Patrick Smith affidavit; Exhibit F, Randall Richards affidavit). The exhibits that the Constable has withheld also includes excerpts from the Constable's publicly available website (Exhibit G).

The Constable, by letter to the Attorney General of March 19, 2012, contends that he is not required to produce copies of the exhibits to the requestor. The Constable's position is contrary to the clear language of the Public Information Act, and amounts to an improper attempt to use "secret" evidence to sustain his substantial burden of proving the applicability of exceptions to the Public Information Act.

Section 552.301(e) of the Act requires a governmental body to provide to the requestor all "written comments to the attorney general." The Act does not allow the submission of substantive arguments in secret affidavits. At most, the governmental body is allowed to *redact* the material "[i]f the written comments disclose or contain the substance of the information requested." *Id.*

Presumably, the exhibits to the Constable's memorandum do not merely restate the information the Constable seeks to withhold, but also provide facts and/or arguments on which the Constable relies in invoking exceptions to the Act. A governmental body cannot keep secret its arguments as to why the requested information allegedly is exempt from disclosure; a requestor is entitled to know those arguments and respond to them. That is the entire purpose of Section 552.301(e). The Constable apparently seeks to circumvent those requirements by contending that he is entitled to put evidence and arguments in affidavits attached to his comments to the Attorney General and maintain that those attachments are not "written comments to the attorney general." Such a contention is contrary to both the purpose and the express language of the Act.

Mr. Chaker has requested production of the exhibits and acknowledged that they may be produced in redacted form (only to the extent that the exhibits set forth the substance of the disputed requested information). Exhibit 3. The Constable has declined to provide even redacted copies of the exhibit.

Mr. Chaker therefore respectfully requests that the Attorney General direct the Constable to provide copies of the exhibits to the requestor, and to provide Mr. Chaker an additional ten days to file any necessary supplemental letter briefing unless the Attorney General determines that the disputed records be released. In the alternative, Mr. Chaker requests that the Attorney General disregard all evidence (other than the disputed information itself) submitted by the Constable that the Constable has refused to provide to the requestor.

VI. Conclusion.

In light of the foregoing, Mr. Chaker respectfully requests that this office direct the Constable to release the requested information. In the alternative, Mr. Chaker requests that this office direct the Constable to provide Mr. Chaker with copies of the exhibits to his memorandum (with redactions, if necessary, limited to the substance of the disputed requested information), and provide Mr. Chaker with an additional ten days to file any necessary supplemental letter briefing.

Sincerely,

GRAVES, DOUGHERTY, HEARON & MOODY
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By:
James A. Hemphill

JAH/ntk
Enclosures

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