ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 8, 2004

Mr. Gary A. Scott
Assistant City Attorney
City of Conroe
P.O. Box 3066
Conroe, Texas 77305

OR2004-4639

Dear Mr. Scott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203022.

The Conroe Police Department (the "department") received a request for the investigation and personnel file of a named police officer and the names of other police officers disciplined during the past three years for similar reasons to the named police officer. You claim that the submitted information in Exhibit A and the information responsive to request regarding other officers are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including section 143.089 of the Local Government Code. Section 143.089 contemplates two different types of personnel files: one that the city's civil service director is required to maintain as part of the officer's civil service file, and one that the police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).

Section 143.089(g) provides:

> A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file

> to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney General,* 851 S.W.2d 946 (Tex. App.—Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio,* 851 S.W.2d at 949; *see also City of San Antonio v. San Antonio Express-News,* 47 S.W.3d 536 (Tex. App.—San Antonio 2000, pet denied) (information reasonably relating to officer's employment relationship with department and maintained in the department's internal file pursuant to section 143.089(g) is confidential). In cases in which a police department takes disciplinary action against a police officer, it is required by section 143.089(a)(2) to place records relating to that investigation and disciplinary action in the personnel files maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). Such records contained in the file maintained under section 143.089(a) are not confidential under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 2 (1990). *See* Local Gov't Code § 143.089(c)(1), (2) (information relating to disciplinary actions against police officer placed in officer's personnel file in accordance with section 143.089(a)(2) shall be removed if disciplinary action taken without just cause or charge not supported by sufficient evidence).

You represent that the information in Exhibit A is maintained in the department's internal personnel file in accordance with section 143.089(g). Based on your representations and our review of the submitted information, we conclude that the information in Exhibit A is confidential pursuant to section 143.089(g) of the Local Government Code. Consequently, the department must withhold the information in Exhibit A from the requestor under section 552.101 of the Government Code. We note that Exhibit A contains a complaint that resulted in disciplinary action that must also be maintained in the civil service file. You state that you have released the responsive information, if any, contained in the named police officer's civil service file pursuant to section 143.089(a).

We note that Exhibit A contains an arrest warrant affidavit. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Crim. Proc. Code art. 15.26. Generally, information held in the internal file of a police department must be withheld in its entirety. Thus, there is a conflict of laws between section 143.089(g) and article 15.26. However, where information falls within both a general and a specific

statutory provision, the specific provision prevails over the general. *See Cuellar v. State*, 521 S.W.2d 277 (Tex.Crim.App.1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986). We find that the public availability provision in article 15.26 of the Code of Criminal Procedure is more specific than the general confidentiality provision in section 143.089. Thus, article 15.26 more specifically governs the public availability of the submitted affidavit and prevails over the more general confidentiality provision in section 143.089. *See Lufkin v. City of Galveston*, 63 Tex. 437 (1885) (when two sections of an act apply, and one is general and the other is specific, then the specific controls); *see also* Gov't Code § 311.026 (where a general statutory provision conflicts with a specific provision, the specific provision prevails as an exception to the general provision). Therefore, the department must release the submitted affidavit to the requestor. The remainder of Exhibit A must be withheld under section 552.101 of the Government Code.

We now address the request for identification of all other police officers who have "been disciplined over the past [three] years for the same or similar allegations." You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. You have not submitted any information responsive to this request. Rather, you state that you are not required to create new information in response to the request.

We initially note that the Public Information Act (the "Act"), chapter 552 of the Government Code, does not require a governmental body to create new information in responding to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that receives the request for it. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). But a governmental body must make a good-faith effort to relate a request to any responsive information that may be within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Thus, if the department has information responsive to request item three that it seeks to withhold, the department is required to submit it to this office for review. *See* Gov't Code § 552.301(e).

If a governmental body does not comply with section 552.301 in requesting an attorney general decision, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Thus, section 552.101 can provide a compelling reason for overcoming the presumption of openness. However, because you have not submitted the information, we have no basis for finding it confidential.

Thus, if the department has information responsive to request item three, we have no choice but to order the information released per section 552.302.

In summary, you must release the arrest warrant affidavit in Exhibit A. You must withhold the remainder of the department's internal file regarding the named police officer pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Because the department has not complied with section 552.301, to the extent information responsive to the request for files of other police officers exists, it must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

W. David Floyd
Assistant Attorney General
Open Records Division

WDF/sdk

Ref: ID# 203022

Enc. Submitted documents

c: Ms. Laura Kalish
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(w/o enclosures)