ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2005

Sgt. Thomas P. Karlok
Custodian of Records
Galveston Police Department
P.O. Box 658
Galveston, Texas 77553-0658

OR2005-08162

Dear Mr. Karlok:

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# 231852.

The City of Galveston (the "city") received a request for the following information:

1. All written complaints submitted to the city's police department (the "department") in the past five years alleging excessive use of force;

2. Any investigative documents generated as a result of those and other complaints of excessive force during the same period;

3. All documents relating to disposition of those investigations.

You have submitted among other documentation supporting your arguments:

Exhibit D. A representative sample of disposition sheets from department internal affairs investigations into complaints that were declared "unfounded," "exonerated," or "not sustained;"

Exhibit E. A representative sample of a department internal affairs investigation in which a department officer received a written reprimand;

Exhibit F. A representative sample from a department internal affairs investigation of a department officer that resulted in a 90-day suspension of the officer involved;

Exhibit G. A representative sample of completed internal affairs investigations conducted by the department.

You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information in Exhibit G includes affidavits for a warrant of arrest, as well as several complaints. 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. Article 15.04 provides that "[t]he affidavit made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense." Crim. Proc. Code art. 15.04. Case law indicates that a complaint can support the issuance of an arrest warrant. *See Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi1990, pet. ref'd); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref'd) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976).

However, you also claim that these documents are confidential under section 143.089(g) of the Local Government Code. Generally, all information maintained pursuant to section 143.089(g) is confidential. *See* Local Gov't Code § 143.089. Thus, in this instance, there would be 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). In this instance, article 15.26 is more specific than the general confidentiality provision in section 143.089(g). *See also* Gov't Code § 311.026 (where general statutory provision conflicts with specific provision, specific provision prevails as exception to general provision). Therefore, to the extent the marked affidavits and marked complaints were presented to a magistrate in support of the issuance of an arrest warrant, they are public under article 15.26 of the Code of Criminal Procedure and must be released in their entirety. To the extent these documents were not so presented to a magistrate, we will address them together with the other submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section excepts from disclosure information deemed confidential by statute, such as section 143.089 of the Local Government Code. You inform us the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer's civil service file that the civil service director is required to maintain, and an internal file that a police department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055. Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state the information submitted in Exhibits D, E, and G relates to internal affairs investigations by the department that did not, or have not, resulted in removal, suspension, demotion, and uncompensated duty. You inform us that Exhibits D, E, and G are maintained by the department pursuant to section 143.089(g). Based on your representations and our review of the submitted information, we conclude that this information is confidential pursuant to section 143.089(g). Therefore, the city must withhold Exhibits D, E, and G under section 552.101 of the Government Code.[1]

You inform us that the information submitted in Exhibit F is maintained both by the department under section 143.089(g), as well as by the city's civil service commission under section 143.089(a). While the information the department maintains is confidential under section 143.089(g), the information maintained by the civil service commission is not confidential. Therefore, the information in Exhibit F maintained by the department under section 143.089(g) must be withheld under section 552.101. The information in Exhibit F maintained by the city's civil service commission may not be withheld under section

[1] As our ruling on this issue is dispositive, we need not address your claim that these exhibits are excepted under section 552.108 of the Government Code.

552.101. However, you contend that this information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provided documentation showing, that a civil lawsuit has been filed against department officers alleging, among other claims, the excessive use of force by the officers named in the lawsuit. This lawsuit, Civil Action No. 04-596 in the United States District Court for the Southern District of Texas, Galveston Division, was filed on October 14, 2005. You state the present requests were received on June 15, 2005. We therefore agree that litigation was pending on the date the city received the present request.

We now examine whether the information at issue relates to the pending litigation. You explain the 143.089(a) record at issue concerns a sustained complaint against a department officer that resulted in a ninety-day suspension. This record pertains to an incident separate from the incident upon which the lawsuit at issue is based; we note these incidents occurred more than two years apart. You have not explained how this separate information is related to the pending litigation. You have thus failed to establish that section 552.103 applies to this information. *See* Gov't Code §§ 552.301, .302; Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Therefore, the information in

Exhibit F maintained by the city's civil service commission may not be withheld under section 552.103.

You also claim that 143.089(a) records of other officers named in the lawsuit are excepted from disclosure under section 552.103. However, you have not submitted these records. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Section 552.103 is a discretionary exception, and as such, does not constitute a compelling reason to withhold information that is presumed public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the section 143.089(a) records of the other officers involved in the lawsuit may not be withheld under section 552.103 and must be released.

In summary, to the extent the marked affidavit and marked complaint in Exhibit G were presented to a magistrate in support of the issuance of an arrest warrant, they must be released under article 15.26. To the extent these documents were not so presented to a magistrate, they and the information in Exhibits D, E, and G are confidential under section 143.089(g) of the Local Government Code and must be withheld under section 552.101. The information in Exhibit F maintained by the department pursuant to section 143.089(g) is also confidential under section 143.089 and must be withheld under section 552.101. The remaining information at issue 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).

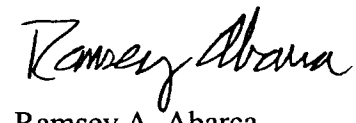
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/sdk

Ref: ID# 231852

Enc. Submitted documents

c: Mr. Marty Schladen
The Galveston County Daily News
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(w/o enclosures)