


**TEXAS  
POLICE CHIEFS  
ASSOCIATION**

2019 TPCA Annual Conference  
April 16, 2019

## Records Retention Requirements and Subpoena Issues for Legal Advisors

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**ROSS | GANNAWAY, PLLC**  
Attorneys at Law

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## Texas Open Records Act



- AKA “The Public Information Act”
- Everything is public with few exceptions:
  - 552.101
    - Common Law Privacy
  - 552.102
    - Dates of Birth/Personnel File
  - 552.117/552.1175
    - Police Officer Confidentiality

Remember, civilian employees must opt-in to confidentiality of personal information, through submitting a form pursuant to 552.023  
Keep copy of Open Records Decision No. 684 handy

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## RECORD RETENTION/PUBLIC INFORMATION ACT



Is a Social Media Post a Government Record?

- A city's social media post is considered a government record subject to the Local Government Records Act and Record Retention Schedule
- Public Information Act applies to a public official and employees posting on social media provided such is done in the official's or employee's official capacity, and the information pertains to official business of the government

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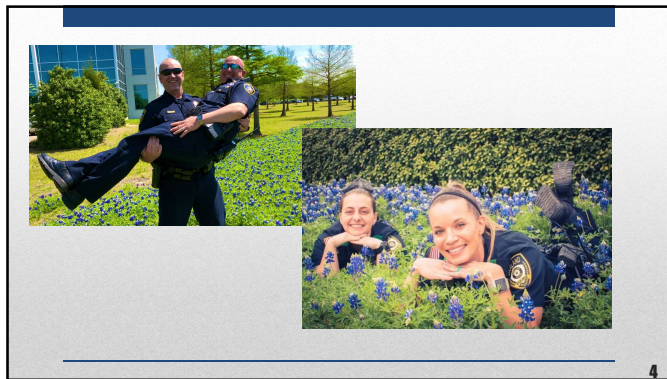
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### **TITLE VII (and ADA and the Texas Commission on Human Rights Act)**



#### **What must be kept?**

- Personnel records
  - includes applications and records containing information on hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship
- Records related to apprenticeship
  - chronological list of names and addresses of all applicants with dates of application, sex, and minority group identification (or a file of applications containing the same information)
- EEO-1 Reports

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### **TITLE VII (and ADA and the Texas Commission on Human Rights Act)**



#### **How long must it be kept?**

- Personnel Records
  - If no EEOC charge filed – one year from date record made or personnel action taken (whichever is longer)
  - If EEOC charge filed – until final disposition of charge or action
- Records Related to Apprenticeship
  - 2 years from date application received or period of successful applicant's apprenticeship (whichever is longer)



#### **In what form should it be kept?**

- No form specified, but keep records regarding racial or ethnic identity separate from other records available to decision-makers

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## ADEA



### What must be kept?

- **Payroll Records**
  - must contain employee's name, address, date of birth, occupation, rate of pay, and compensation earned per week
- **Personnel Records**
  - applications
  - resumes
  - replies to job advertisements
  - records relating to promotion, demotion, or transfer
  - test papers
  - results of physical exams
  - job advertisements

Employee Benefit Plans/Written Seniority or Merit-Rating Systems

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## ADEA



### How long should it be kept

- Payroll Records – 3 years
- Personnel Records
  - if no EEOC charge filed – one year from date of personnel action to which record relates
  - if EEOC charge filed – until final disposition of charge or action
- Benefit, Seniority or Merit-Rating Plans – full period that plan or system is in effect, plus one year from its termination



### In what form should it be kept?

- No form specified, except if any benefit plan, seniority system or merit-rating system is not in writing, a summary memorandum must be kept

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## FMLA



### What must be kept?

- Basic payroll and identifying employee data
  - name
  - address
  - occupation
  - rate or basis of pay and terms of compensation
  - daily and weekly hours worked per pay period
  - additions to or deductions from wages
  - total compensation paid
- Dates FMLA leave taken (including hours of leave of less than a day)
- Copies of all notices given to or received from employee under FMLA
- Any documents describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves
- Premium payments of employee benefits
- Records of any dispute regarding designation of leave as FMLA leave

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## FMLA



### How long must be kept?

- 3 years



### In what form should it be kept?

- No form specified



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## TWCA



### What must be kept?

- All records related to employee injuries including fatal injuries and occupational diseases
- Must include:
  - employee's name, address, date of birth, sex, wage, length of service, social security number, and occupation
  - the reported cause and nature of the injury
  - the part of the body affected
  - a description of any equipment involved
  - date, time, and location where the injury occurred
  - name of employee's immediate supervisor
  - name of any witnesses (if known)
  - name and address of treating health care provider (if known)
  - any voluntary benefits paid by employer under TWCA

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## TWCA



### How long must it be kept?

- 5 years from last day of year of occurrence or for as long as OSHA regulations specify (whichever is longer)



### In what form should it be kept?

- No form specified

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## This Is The Law!

- Texas Gov't Code, Subchapter J establishes that the Texas State Library & Archives Commission "shall issue" records retention schedules.
- These regulations establish mandatory *minimum* retention periods.
- There are regulations that govern general records *and* Public Safety.
- Destruction of government records contrary to these provisions is criminal.

<http://www.tsl.texas.gov/slr/recordspubs/localretention.html>

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**Corinth Police Department**  
**BOLO**  
THIS INFORMATION IS FOR FCV ONLY

OFFENSE DESCRIBED: Assault on a Public Officer - North Texas      DATE: 04/03/2019

COMMITTED BY: Corinth Police Department      PHONE: 940.276.1800

LOCATION(S): Near Texas Highway

BRIEF: On April 1st, 2019 the Corinth Police Department learned from the Onagah Police Department that they were investigating a shooting on North Texas. Corinth Police Department was dispatched to the scene and upon arrival, officers observed a shooting victim, a suspect, and a white pickup truck. The suspect was taken into custody and the victim was transported to the hospital. The suspect was identified as [REDACTED] and the victim as [REDACTED]. The suspect was charged with Assault on a Public Officer and the victim was charged with Possession of a Firearm.




"This is intended to make you smile, enjoy the laugh and have a great day!"

FOR FCV ONLY      #BackInTheCommunity

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## Retention Period Applies Regardless of Medium on Which it is Maintained

Many records are maintained electronically in many locations, but electronically stored data used to create a record must be retained, along with the hardware and software necessary to access the data, for the retention period, unless backup copies of the data generated from electronic storage are retained on paper or on microfilm for the retention period.




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## Retention Period Is Measured In Calendar Years

- From the date of its creation
- Applies *only* to an official record (not copies made for convenience or for working copies created for informational purposes)
- Each local government must determine in what department the "official record" will be housed/maintained
- Should establish policies and procedures for the systematic disposal of copies



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## Applicable Retention Period?

- If a record is maintained in a bound volume in which pages are not designed to be removed, it must be retained from the date of last entry
- If two or more records are not severable, the combined record must be retained for the longest time period applicable
- If the retention period on the record is "permanent" and it is badly damaged, the government must obtain permission from the director and librarian of the Texas State Library to dispose of it [Form SLR 501]
- Remember, when in doubt-always go with the longer retention period.

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## Abbreviations Used In This Schedule

AV – As long as administratively valuable  
 FE – Fiscal year end  
 TAC – Texas Administrative Code  
 US – Until superseded  
 LA – Life of asset  
 CE – Calendar year end




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### Retention Period of "AV" "Administratively Valuable"

- This designation provides the maximum discretion for determining the retention period for a record described
- Must ensure that if a record is designated "AV" that no other minimum retention period applies
- Make sure that an "official record" is clearly defined, especially in this era of electronic communications
- Safer to establish fixed retention periods for all categories of records; AV records may accumulate

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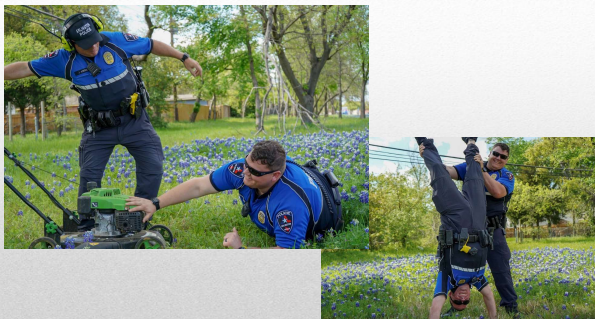
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### General Records

Reports of accidents on city property or in any other situation where a city may be a party to a suit:

- **Retention period:** Adults-accident: 3 years from date of report if no claim is filed; 3 years after settlement or denial of the claim if a claim is filed, whichever is applicable
- **Retention period:** Minors-accident: date minor reaches "majority age" + 3 years if no claim filed; 3 years after settlement or denial of claim if claim is filed, whichever applicable

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## General Records

Complaints *from the general public* that do not fall within a separate category and/or complaints relating to government policy (*i.e.*, not public safety complaints!)

- **Retention period:** Resolution or dismissal of the complaint + 2 years

Correspondence, Internal Memoranda and Subject Files

- Check the retention period for information directly linked to subject of correspondence/memoranda

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## General Records

CORRESPONDENCE, INTERNAL MEMORANDA, AND SUBJECT FILES GR1000-26a	<b>Administrative</b> - Incoming/outgoing and internal correspondence pertaining to the formulation, planning, implementation, modification, or redefinition of the programs, services, or projects of a local government and the administrative regulations, policies, and procedures that govern them. May also include subject files, which are collections of correspondence, memos and printed materials on various individuals, activities and topics.	4 years.	Retention Note: Review before disposal; some correspondence of this type may merit PERMANENT retention for historical reasons.
CORRESPONDENCE, INTERNAL MEMORANDA, AND SUBJECT FILES GR1000-26b	<b>General</b> - Incoming/outgoing and internal correspondence pertaining to the regular and routine operation of the policies, programs, services, or projects of a local government. May also include subject files, which are collections of correspondence, memos and printed materials on various individuals, activities and topics.	2 years.	Retention Note: Records management officers should use caution before disposal of these records to ensure the records should not be classified under administrative correspondence (GR1000-26a).
CORRESPONDENCE, INTERNAL MEMORANDA, AND SUBJECT FILES GR1000-26c	<b>Routine</b> - Correspondence and internal memoranda such as letters of transmittal, requests for publications, internal meeting notices, and similar routine matters. May also include subject files, which are collections of correspondence, memos and printed materials on various individuals, activities and topics.	AV.	

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## General Records, cont'd

PUBLIC INFORMATION ACT REQUESTS	Includes all correspondence and documentation relating to requests for records under the Public Information Act (Chapter 552, Government Code).		
	Non-exempted records and withdrawn requests.	Date request for records fulfilled or withdrawn + 1 year.	
	Exempted records.	Date of notification that records requested are exempt from disclosure + 2 years.	

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## General Records, cont'd

LEGAL OPINIONS GR 1000-30	Formal legal opinions rendered by counsel or the Attorney General for a local government, including any written requests for opinions, concerning the governance and administration of a local government.	PERMANENT.	Retention Note: For retention of opinions rendered for a Public Information Act Request see GR1000-34. For retention of informal legal opinions and other correspondence provided by counsel see GR1000-26a.
LITIGATION CASE FILES GR1000-31		AV after decision of a local government not to file a lawsuit or decision that a lawsuit will not be filed against it; dismissal of a lawsuit for want of prosecution or on motion of the plaintiff; or final decision of a court (or of a court on appeal, if applicable) in a lawsuit.	Retention Notes: a) Includes all cases to which a local government is a party unless the case file is of a type noted elsewhere in this or other commission schedules. b) Review before disposal; some case files may merit PERMANENT retention for historical reasons.

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## General Records, cont'd



Public Relations Records (news, press releases)

- **Retention period:** 2 years; review before disposal; some records may merit PERMANENT retention for historical reasons GR1000-33



Organizational charts

- **Retention period:** Until superseded\* GR1000-35

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## There is another schedule for Police & Fire!

- "Local Schedule PS"
- Applicable to public safety agencies-police & fire
- Whichever schedule provides the longer retention period—must apply that time period to the record
- Revised and effective in 2016




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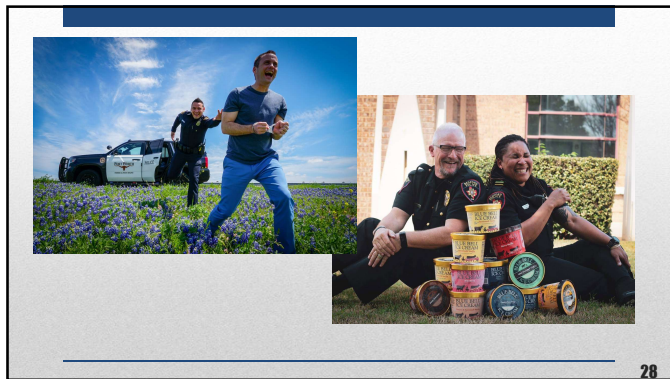
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## Personnel & Payroll Records

- There are federal requirements for retention periods, but depending on how the record is described, state law provides for a longer time period.
- Note that “personnel files” is not scheduled for retention as a unit—documents normally placed in the “personnel file” are addressed separately.



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## Personnel Chapter 3

GR 1050-12	Employee Service Record	DOS + 75 Years
GR 1050-52(b)	Earnings and Deduction Records	DOS + 75 years
GR 1050-54	Leave Records	DOS + 75 years

Aptitude and Skills Test Record GR1050-02

- Tests: retention period until superseded + 2 years
- Test papers of persons taking tests: 2 years

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## Personnel



Awards & Commendations GR1050-03

- **Retention period:** DOS + 5 years

Conflict of Interest Affidavits GR1050-05

- **Retention period:** 5 years after leaving the position for which the affidavit was filed

Counseling Program Files GR1050-06

- **Retention period:** 3 years after termination of counseling

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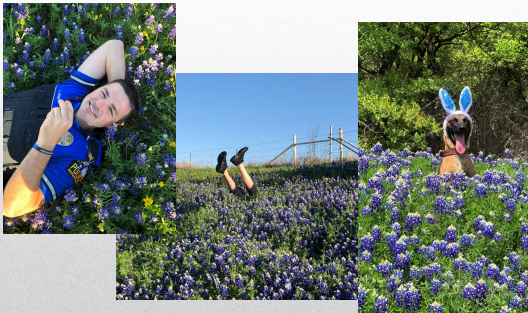
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## Disciplinary/Adverse Action Non-Public Safety Personnel



Records relating to considerations of adverse actions (demotion, probation, termination, suspension, leave without pay) against an employee, *including* witness and employee statements, interview reports, exhibits, reports of findings, and decisions and judgments

- **Retention period:**

- Chapter 143 cities: PERMANENT
- 2 years after case closed or action taken

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### Disciplinary/Adverse Action Police & Fire Internal Investigations

- Records documenting the initiation, investigation, and disposition of internal affairs investigations of alleged misconduct
- For the purposes of this records description (for *all* employees), "formal discipline" is disciplinary action *at or above the level of written reprimand*.\*
- "Informal discipline" is discipline below the level of a written reprimand
- Retention periods date from the completion of the investigation

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### Disciplinary/Adverse Action Police & Fire Internal Investigations

Investigations of shootings which result in death or injury to any person

- Retention period: PERMANENT

Investigations resulting in sustained formal discipline

- Retention period: 15 years

Investigations resulting in sustained informal discipline or investigations whose findings are inconclusive

- Retention period: 5 years, provided a one-year infraction free period precedes the date of destruction

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### Disciplinary/Adverse Action Police & Fire Internal Investigations

Investigations whose findings are not sustained, unfounded, or exonerated

- Retention period: 3 years

\*\*Written complaints and records of oral complaints received from the public concerning conduct of public safety personnel *that do not lead to an internal affairs investigation*

- Retention period: date of determination not to conduct IA +2 years.

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## Personnel

Employee Security Records (1050-10)

- **Retention period:** until superseded, date of expiration, or DOS + 2 years

Employee Selection Records (1050-11)

- **Retention period:** 2 years from creation (or receipt) of the record or the personnel action involved\*

Employee Advertisements or Announcements (1050-13)

- **Retention period:** 2 years



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## Personnel

Employment Applications GR1050-14

- **Retention period:** 2 years from date of creation/date of personnel action involved, whichever is later-*except* transcripts of persons hired is DOS + 5 years



Equal Employment Opportunity Records and Reports GR1050-16

- **Retention periods:** 3 years for EEO reports and analyses, statistical data compiled from source documentation used to complete EEO reports; Case files relating to discrimination complaints, supporting investigations, exhibits, decisions-the records must be retained through the resolution of the case + 3 years.

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## Personnel

Equal Pay Record GR1050-17

- **Retention period:** 2 years

Grievance Records GR1050-20

- **Retention period:** 2 years\*

Job Evaluations/Performance Appraisals GR1050-21

- **Retention period:** Until superseded + 2 years\* OR DOS +2 years




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## Personnel



Position Descriptions/Classifications GR1050-26

- **Retention period:** until superseded or position abolished + 4 years

Reduction in Force Plans GR1050-27

- **Retention period:** until superseded, or if implemented, 2 years from the date of last RIF action under the Plan

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## Personnel

Training & Educational Attainment Records GR1050-28

- **Retention period:** DOS + 5 years
- Same period applies for Police (4325-01) & Fire (4525-01) when the training academy is affiliated with the hiring city!



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## Personnel

Employee Exit Interviews GR1050-35

- **Retention period:** DOS + 2 years

Criminal History Checks GR1050-36

- **Retention period:** Refer to Tex. Gov't Code, Chapter 411, Subchapter F for appropriate retention and use of this information

Employee Acknowledgment Forms GR1050-37

- **Retention period:** US or DOS + 2 years, as applicable

Volunteer Service Files GR1050-39

- **Retention period:** US or DOS + 3 years




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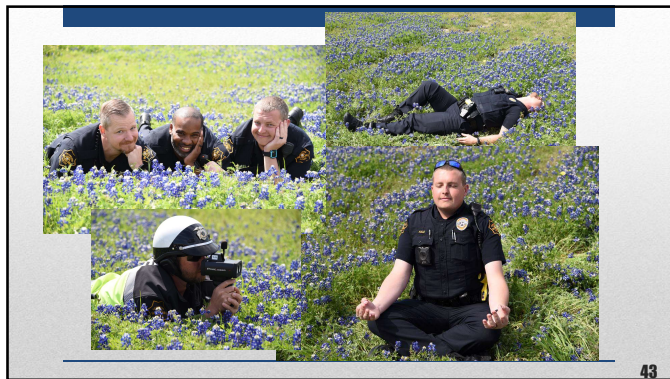
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### What to do about E-Mail?

- E-mails may very well constitute “official records” of the City—be careful about deleting.
- E-mails and electronic information, including how you create a document (called “metadata”) is discoverable in litigation
- Public Information Act—if there is a pending request, *no deleting!*
- Relative informality of e-mail is deceptive—they can and will be used against you.



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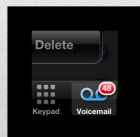
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### How about voice mail/telephone recordings?

- Subject to the Public Information Act
- If your city's phone system records telephone conversations and/or voice-mail, you should check with your Records Management Officer to see how those are classified in the retention schedule
- If there is no administrative need to keep phone conversations beyond a date-certain, then have your computer folks set up an auto-delete.
- Again, if litigation or a PIA, stop auto-deletes!




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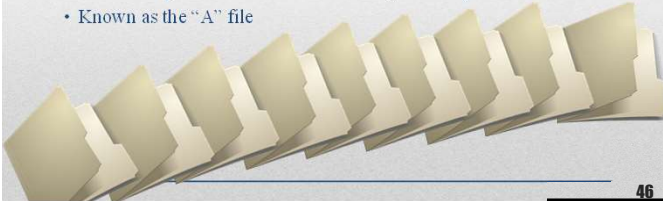
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### Civil Service Personnel Files

- Maintained under §143.089
- §143.089(a) states that a Civil Service Director (or designee) shall maintain a personnel file on each fire fighter and police officer
- Known as the "A" file



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### §143.089 "G" File

- A police or fire department may maintain a personnel file on a fire fighter or police officer . . . 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 police officer or fire fighter
- The department "shall" refer the requestor to the director

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### IA Pro G file?

- OR2018-15663
  - Fort Worth uses IA Pro
  - Tasers/uses of force entered into system
  - City represented that information was "maintained in different locations within the IA Pro system depending on the status of the review of the officer's conduct."
  - AG (informally) ruled that information was therefore maintained independently of the departmental confidential file.

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### Is there legal guidance clarifying A v. G files?

Numerous  
Informal Attorney  
General  
Decisions

*Abbott v. City of  
Corpus Christi*,  
109 S.W.3d 113  
(Tex.App.-Austin  
2003, no writ)

Documents/IA  
investigation that  
support formal  
discipline must  
be included in  
the A file.

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### What to do if formal discipline is overturned?

#### A v. G FILE

- Numerous informal AG rulings say "move documents from A file to departmental G file"

#### COMMISSION RECORDS

- Informal AG rulings have stated that the hearing examiner decision is a record of the Commission
- TLGC §143.010(h)
- TLGC §143.011

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## What about G files and Background investigations?

- Occupations Code 1701.451(a-1) "... Shall make the person's employment records available ..."
- Texas AG Opinion OR2012-12033
- Right of Access to G file?

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## Does An Officer or Fire Fighter Have a Right of Access to Their "G" File?

- NO
- We have received numerous informal letter rulings from the AG, upholding the confidentiality of the "G" file
- AG agrees that the provisions in the PIA (§552.022 "Official Right of Access") does not apply to the "G" file; neither do they apply to §143.089(e)
- But see SB 433!



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## Subpoenas - Personnel Files



NOT A PUBLIC INFORMATION  
ACT REQUEST!

- Must file Motion to Quash/Motion for Protective Order
- Provide documents ONLY to court for *in camera* review
- Draft order for Court to submit with filing

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## Subpoenas - Other

- Juvenile – Texas Family Code Chapter 58
- Child Abuse/CAC – Texas Family Code §264.408
- Mental Health Records – Texas Health & Safety Code, Chapter 61
- HIPAA authorizations included!
  - See ORD 681
- Federal Subpoenas – Federal Rule 45/out-of-state
- TRCP 176.8 – Enforcement of Subpoena.

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## Michael Morton Act

- Code of Criminal Procedure Article 39.14 (h) & (k)
- Requires the *State* to disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state (including law enforcement records/personnel records) that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.
- No requirement (unlike Brady) that information be “material”
- WIDE OPEN
- *Think about:*
  - Impact on disciplinary processes available to employees?
  - What do your job descriptions say about testifying in court?

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## Why it matters...



- Civil liability for *Brady* violations under §1983
  - Not for a prosecutor . . . absolute immunity, but . . .
- Personal liability for everyone else involved . . . including Chiefs*

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### Obligations Relating to Production of Files

#### What do the prosecutors want to see?

-Everything that may develop into something problematic – and they may blame it on PD for failure to provide!

- Records retention on personnel material?
  - *Brady* concerns – no statute of limitations on *Brady*
- Michael Morton includes county AND municipal courts!-no exception for fine-only offenses

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### Hiring/Discovery

- Consider adding a disqualifier:
  - "An applicant may not be certified for a beginning position with the \_\_\_\_\_ Police Department if he or she has been rejected as a witness by a criminal prosecutor for Brady violations and/or being placed on a Brady Disclosure list."
- Can add a question or questions about prior inclusion on a *Brady* list as part of background

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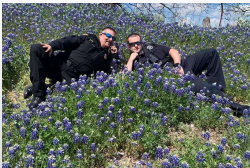
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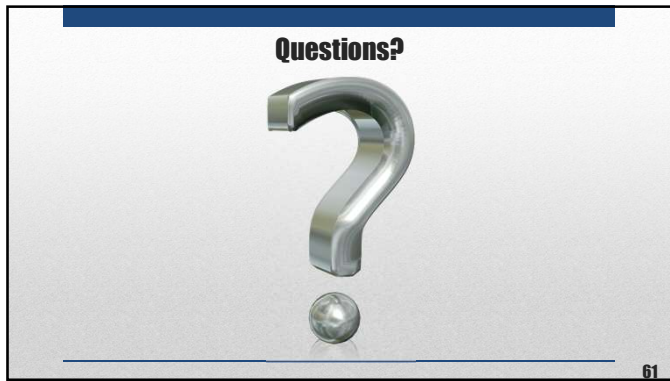
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