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LAW REVIEW

"TEXAS CIVIL SERVICE PERSONNEL FILES: OFFICER PRIVACY VS. TRANSPARENCY"

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I. INTRODUCTION

Imagine your brother, sister, son, or daughter has an altercation with local law enforcement. This comes as a shock to you because you have never known your family member to exhibit confrontational behavior towards law enforcement. For this reason, you are certain that the law enforcement officer is at fault. At any rate, your family member is now out on bond. He or she sports a black eye and busted lip and faces criminal charges as a result of the incident.

With this in mind, you start to ask around in the community about the reputation of the twelve-year veteran law enforcement officer at the center of the incident. His reputation is negative; he is known for being hot-headed and heavy-handed. Incidentally, the officer has connections within the city council: his uncle, a former council member, has influence with the city's governing body and the

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police chief. At any rate, you have passed being inquisitive and are outright suspicious. You contact the police department to learn how to complete a Texas Public Information Act request.[1] Specifically, you want four pieces of information: (1) the number of complaints the law enforcement officer had from before the incident; (2) any allegations against the law enforcement officer; (3) the circumstances that led to the incidents; and (4) the result of any prior complaints.

A week later, the governmental body releases information in response to your request; however, there is only one significant incident. The law enforcement officer received one written reprimand for falling asleep while on duty during his second year of employment. How can that be? You've heard about half-a-dozen incidents where citizens filed complaints, and there is not a word about those incidents in the documents that the governmental body has released to you. After doing more research, you realize the city that employs the officer has adopted an organization known as Municipal Civil Service that governs how it organizes its police and fire department. According to a lawyer-friend, the city only has to release records from complaints that end in disciplinary action against the employee. This means the city can withhold requested information—it can either destroy the records or file them away in a secret file—from any investigation that does not result in formal disciplinary action against the officer. Since you already know this officer has family connections with the power players in the city, you cannot help but think that the city is protecting him. You feel the situation reeks of corruption, and that the contents of the previous complaint investigations should be open for you to view and use to make an informed decision on whether to complain about the officer's recent actions.

The fictional situation outlined above can happen any day here in Texas under the section of law mentioned in the preceding story. Texas municipalities with a population of over 10,000 and an established paid fire department or police department can vote to adopt Texas Local Government Code, Title 5, also known as the Civil Service Code.[2] The law governs how municipalities organize their fire and police departments regarding hiring, firing, promoting, and disciplining.[3] The purpose of the Civil Service Code is "to secure efficient fire and police departments composed of capable personnel who are free from political influence and who have permanent employment tenure as public servants."[4] These stated reasons sound right and just. No one wants his or her law enforcement officers or firefighters beholden to political whims and influenced by the potential outcome of every election, right? Citizens should want knowledgeable and experienced officers and firefighters for their city instead of endangering officers' and firefighters' careers to any new wave of change that the city council might embrace.

[1] Tex. Gov't Code § 552.021 (Government bodies are required under this law to make available public information to the public during normal business hours.).
[2] Tex. Loc. Gov't Code § 143.004.
[3] *Id.* § 143.001(a).
[4] *Id.*

II. HISTORY

The civil service system is an organization of public sector employment established to reduce political influence and cronyism that dominated in what was known as the patronage or spoils system.[5] Before the civil service system, government jobs were often given out as rewards for political support by those who were victorious in the latest political contest.[6] Those already occupying the positions were often abruptly fired without cause.[7]

During the nineteenth Century, pressure mounted to remove the spoils system from the national government.[8] Congress enacted the Pendleton Act of 1883 to create the U.S. Civil Service Commission in response to the assassination of President Garfield.[9] The Act outlawed mandatory political contributions that had traditionally been the beginning of a *quid pro quo* that landed the contributor a government job.[10] It also required entrance exams for aspiring government employees, which are still a hallmark of civil service employment.[11] Over several decades and subsequent political power swaps, federal employees attained their positions based on the merit system outlined in civil service reform, not as rewards in the patronage system.[12]

A. Adoption by the States

Many states have adopted a system of civil service to implement a merit-based employment structure for government jobs.[13] Texas codified its civil service statute in 1987.[14] The statute gives local municipalities the option to adopt the system outlined in the Civil Service Code by a vote of local residents.[15] If adopted, the government leaders must appoint a civil service commission that officiates the hiring, promotion, and disciplinary functions of police and fire department employees hired under the Civil Service Code.[16]

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[5] Inez Feltshcer Stepman & Jarrett Stepman, *Civil Service Reform for the 21st Century: Restoring Democratic Accountability to the Administrative State*, AM. LEGIS. EXCH. COUNCIL 1, 3 (March 2017), https://www.alec.org/app/uploads/2017/03/2017-Center-Point_-21st-Century-Civil-Service_Final.pdf.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Pendleton Act (1883)*, NAT'L ARCHIVES, https://www.ourdocuments.gov/doc.php?flash=false&doc=48 (last visited Nov. 30, 2020).
[10] PENDLETON CIV. SERV. REFORM ACT, Pub. L. No. 47-27, 22 Stat. 403 (1883).
[11] *Id.* at 404.
[12] *Id.*
[13] Milton Conover, *Merit Systems of Civil Service in the States*, 19 AM. POL. SCI. REV., no. 3, 544, 544–45 (1925).
[14] Tex. Loc. Gov't Code § 143.089.
[15] *Id.*
[16] *Id.*

III. THE ISSUE

Removing political influence from police departments sounds like a noble goal. Citizens of our communities should have confidence that the men and women who swear to protect and serve the community will remain impartial and objective when it comes to exercising the authority vested in them by the state. Yet, the devil may lurk in the details. The protections from political influence and patronage serve to insulate officers from the unfair loss of their jobs in routine transfers of power from one police administration to another. But do these same protections create a shield that police officers, and the civil service departments they work for, can use to hide malfeasance? This article discusses the protection offered to police officers that work for police departments in communities that have elected to organize according to the Civil Service Code.

IV. CIVIL SERVICE PERSONNEL FILES

The "Personnel File" of the new system formed in Chapter 143.089 of the Texas Local Government Code is mentioned in two separate sets of files:

> (a) The director or the director's designee *shall maintain a personnel file* on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to [any commendation, misconduct, or periodic evaluation].
>
> . . .
>
> (g) 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.[17]

This first type of file mentioned in section (a), more commonly referred to as the A-File, is the file that all civil service departments must maintain.[18] The A-file must contain any document pertaining to any commendation, congratulation, or honor the employee receives.[19] The A-File must also contain documentation of any misconduct if the letter, memorandum, or document is from the employing department, and the misconduct actually resulted in disciplinary action against the

[17] *Id.* § 143.089(a), (g) (emphasis added).
[18] *Id.* § 143.089(a).
[19] *Id.* § 143.089(a)(1)-(3).

employee.[20] Officers are entitled to notification and written response when documents are of a negative nature.[21] Furthermore, officers are entitled to copies of anything within the personnel files and may not be released to others without the consent of the officer.[22]

The other type of file mentioned in section (g), also known as the G-File, is more mysterious. Civil service departments are not required to maintain a G-File, and the code states it is, "for the department's use."[23] Further, A-File documents are released either with the officer's permission or when required by law, such as when a Texas Public Information Act request demands it.[24] However, the statute strictly forbids the release of G-File documents, and the civil service commission's director, or their designee, receives any request for release.[25]

The G-File could be a necessary tool to operate an efficient modern municipal police department. However, this secretive departmental personnel file raises several concerns, such as hindering law enforcement transparency and shielding officers from public scrutiny.

If police departments are allowed to keep law enforcement officers' files private, how does the public know that their civil service police department is not abusing this privilege? To better understand the depth of this concern, we must review the chronological history of these files in the local government code and the arguments used to compel their release.

V. TEXAS OPEN RECORDS ACT REQUESTS

By 1990, the language of sections (f) and (g) of the Local Government Code Chapter 143.089 had already confused those charged with releasing information via the Texas Open Records Act (later the Texas Public Information Act). Texas Attorney General, Jim Maddox, opined in a published opinion that the plain language of the statute was ambiguous:

> Subsection (g) is subject to two differing interpretations. First, it may be argued that the legislature intended the department personnel file to merely duplicate the civil service file since all requests for information from the department's file are to be forwarded to the director of the civil service. This requirement would be unnecessary if the department file were intended to hold

[20] *Id.* § 143.089(a)(2).
[21] DAVID B. BROOKS, 22 TEXAS PRACTICE SERIES: MUNICIPAL LAW AND PRACTICE § 5.03 (2d ed. 2019).
[22] *Id.*
[23] Tex. Loc. Gov't Code § 143.089(g).
[24] *Id.* § 143.089(f).
[25] *Id.* § 143.089(g).

> different information than the civil service file. Furthermore, since section 143.089 limits the kind of information that may be placed in a personnel file maintained by a civil service department, a harmonious reading of the statute would require the police or fire department personnel file to be likewise limited. On the other hand, the referral requirement can be viewed simply as an accommodation to the public and other agencies requesting personnel information from police and fire departments by directing them to the agency that is authorized to release personnel information.[26]

The legislative intent of the statute was researched and based on the testimony of Ron DeLord, President of the Combined Law Enforcement Associations of Texas.[27] Due to the concern that the amendment requiring the A-File and allowing the G-File would conflict with the Open Records Act, the phrase "unless the release of the information is required by law" was added to subsection (f).[28] Unfortunately, this opinion did little to prevent continued questions as to the proper application of the new authority. Particularly, the example documents submitted were not clearly labeled regarding whether they were from the commission file (a) or the departmental file (g). These files continued, regardless of their uncertain confidentiality.

In *City of San Antonio v. Tex. Atty. Gen.*, the Texas Attorney General, and two intervenors, sued the City of San Antonio for its' police department's refusal to release certain officer personnel files under the Texas Open Records Act.[29] The Texas court of appeals in Austin reversed summary judgment and remanded the case.[30] The court stated that the statute was quite clear in its purpose, for "allegations of misconduct made against a police officer shall not be subject to compelled disclosure under the Act unless they have been substantiated and resulted in disciplinary action."[31] Further, the court stated that the plain, simple, and unambiguous terms in the statute did not lend themselves to conflicting interpretations.[32] The court concluded that the "terms of subsection (g) permit only one reasonable construction—the legislature intended to deem confidential the information maintained by the City police department for its own use under subsection (g)."[33]

The court pointedly answered one of the foremost concerns that this article seeks to address when it discussed the appellee's arguments stating, "[t]he people have a legitimate interest in knowing how a public officer performs his duties,

[26] Tex. Att'y Gen. ORD-562 (1990).
[27] *Id.*
[28] Tex. Loc. Gov't Code § 143.089(f).
[29] 851 S.W.2d 946, 947 (Tex. App.—Austin 1993).
[30] *Id.*
[31] *Id.* at 949.
[32] *Id.*
[33] *Id.*

particularly when these duties involve law enforcement, and it is essential for public accountability that the disputed information be subject to compelled disclosure under the Act."[34] While giving credence to the weight of this concern, the court nevertheless pointed out that the elected legislature had chosen to address that public interest through the statute.[35] The wisdom of the legislature's decision was not a subject for judicial review.

The secondary concern that exempting these files from compelled disclosure could lead to widespread concealment of department misdeeds and corruption was also addressed in the opinion. The court acknowledged that, although this was a possibility, it unreasonably assumed bad faith on the part of the departments that were either directly or indirectly placed in the position to administer the records by free elections.[36] Conversely, the court held that if the mere possibility of a concealed misdeed or corrupt act was reason enough to compel all records, then the statutory exceptions to the Texas Open Records Act would necessarily need to be repealed.[37] This is an interesting point of view, because while arguing for one side, we often forget to objectively consider the best arguments against our own beliefs. Chapter 552 of the Texas Open Records Act provides multiple statutory exceptions to disclosure, including exceptions for: confidential information; confidentiality of certain personnel information; and certain law enforcement, corrections, and prosecutorial information.[38]

Tex. Atty. Gen. is still good law. Yet, as is generally true, when given an inch, many will try to take a mile. Five years later, in *City of San Antonio v. San Antonio Exp.-News*, the San Antonio Police Department pushed the limits of the *Tex. Atty. Gen*. decision by using the section (g) file as a depository for any record the San Antonio Police Department wanted to shield from compelled disclosure.[39] In this case, a reporter requested all reports concerning law enforcement's use of pepper spray from the preceding two years.[40] The city repeatedly denied the request.[41] The reporter and newspaper subsequently jointly filed suit seeking declaratory relief and a writ of mandamus, requesting enforcement of the Texas Public Information Act.[42] The trial court granted the relief and the city appealed.[43]

The court refused to expand the prior interpretation the city argued was appropriate, because it did not believe the legislature intended to prevent the

[34] *Id.* at 950.
[35] *Id.*
[36] *Id.* at 951.
[37] *Id.*
[38] Tex. Gov't Code § 552.
[39] City of San Antonio v. San Antonio Exp.-News, 47 S.W.3d 556, 558 (Tex. App.—San Antonio 2000, pet. denied).
[40] *Id.* at 559.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 560.

disclosure of documents by placing then into a G-File.[44] This decision, refusing to make such a gross expansion of the previous interpretation, brought balance to the statute's purpose. According to these two opinions, the legislative amendment created the G-File to be a collection point for unsubstantiated claims against a law enforcement officer, but it was not created as a catchall for any document that might cast them in an unfavorable light.

The pendulum swung back in favor of secrecy with *In re Jobe*, based on its narrow interpretation of the phrase "from the employing department."[45] In *In re Jobe*, the plaintiff sued a former law enforcement officer for intentional infliction of emotional distress.[46] The plaintiff sought to release records of police disciplinary actions against the former law enforcement officer, which eventually led to his suspension.[47] The law enforcement officer's estate appealed the trial court's ruling and asked the appellate court to issue a writ of mandamus compelling the trial court judge to vacate the two orders requiring the release of the documents.[48] The court ruled:

> It seems quite clear that the legislative intent as set out in the statute is that any letter, memorandum, or document which leads to a disciplinary action against a fire fighter or police officer must be included in the (a) file, if "the letter, memorandum, or document is from the employing department." That limitation excludes supporting documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity with the department (emphasis added).[49]

This essentially removes any documents from a department's A-File that are not actually drafted or generated by the department.[50] Under this interpretation, the informative documents that would shed the most light on the source of the investigation—the evidence supporting and/or refuting the claims and the witnesses that came forward—would all be discarded or held from public view in the G-File.[51] Only the bare bones outcome of the investigation that resulted in disciplinary action would be filed in the A-File and available to the public.[52]

In *Abbott v. City of Corpus Christi*, the court disagreed with the City of Corpus Christi's interpretation of *Tex. Atty. Gen*.[53] In that case, the city requested

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[44] *Id.* at 563.
[45] *In re* Jobe, 42 S.W.3d 174, 180 (Tex. App.—Amarillo 2001, no pet.).
[46] *Id.* at 176.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.* at 180.
[51] *Id.* at 176.
[52] *Id.*
[53] 109 S.W.3d 113, 119 (Tex. App.—Austin 2003, no pet.).

an open records decision from the Attorney General's Office in response to a request for the release of all documents related to complaints against the Corpus Christi Police Department and its officers.[54] The city disagreed with the Attorney General's opinion and filed for a declaratory judgment.[55] The city won summary judgment, and the Attorney General appealed.[56] The court reasoned that the district court incorrectly relied on *In re Jobe* in its decision.[57] In a letter ruling, the district court stated that the documents excluded did not fall within the 143.089(a)(2) standard:

> If the phrase, "from the employing department" were to mean "held by" or "in the possession of" the police department, as the Attorney General argues, then that phrase would essentially be redundant and meaningless in the context of the statute. Section 143.089 only pertains to documents within the possession of police and fire departments. Therefore, the phrase "from the employing department" must serve to narrow the scope of documents if it is to have any meaning at all.[58]

The Austin court of appeals disagreed with the Amarillo court of appeals believing that the legislature did not intend to restrict the scope to those documents solely created by a supervisory officer.[59] The appellate court further stated that "the file must nonetheless consist of any and all materials forwarded to the civil service commission by the employing department, whether or not those materials were written, generated, or created by the department."[60] The appellate court referred to the Attorney General's letter opinion in its holding concerning whether the legislature intended to give departments such wide discretion to determine what should or should not be included in the A-File.[61] Attorney General Abbott's letter stated the office's position that any document related to "misconduct that resulted in disciplinary action" must be in the A-File.[62]

In *Abbott*, the court attempted to right the wrong in the *In re Jobe* decision. The now fifteen-year-old section of the local government code grows through adolescence and matures precedent by precedent. The courts wrestle back and forth with how to interpret the statute regarding where to file documents and which of the Texas Public Information Act exemptions will apply. However, this is only one of the avenues in which these hidden documents can come to light. While release through a public information request is the most open, there are still questions as to

[54] *Id.* at 116.
[55] *Id.*
[56] *Id.* at 117.
[57] *Id.* at 120.
[58] *Id.* at 119.
[59] *Id.* at 120.
[60] *Id.*
[61] *Id.*
[62] *Id.*

whether these documents can and should be used to shed light on an officer's character or to impeach their testimony in court.

The courts in *In re Jobe* and *Abbott* thought it proper to review the files *in camera* and rule on the location in which they should be properly filed.[63] The judges here reviewed the files in question in a private viewing, away from the opposing party, to protect the confidentiality of documents as a part of the trial process.

Next, we must discuss the availability of these files when the stakes are higher, such as in criminal matters. What are the concerns with releasing these types of files when the accused's liberty is on the line? What about *Brady* and *Morton* concerns? How are these files treated when they are subject to *subpoena duces tecum* and during discovery?

VI. BRADY V. MARYLAND

The state of Maryland convicted John Brady and Donald Boblit of first-degree murder and sentenced them to death in 1959.[64] Brady admitted to his involvement in the murder but claimed Boblit had actually killed the victim.[65] At Brady's separate trial, the prosecution withheld a written statement by Boblit, who confessed to committing the murderous act by himself.[66] On appeal, the Maryland court of appeals affirmed the conviction and remanded the case for a retrial only on the question of punishment.[67] Brady appealed the case to the Supreme Court, which granted certiorari.[68]

The Supreme Court found that the withheld confession of Boblit amounted to exculpatory evidence and that withholding it violated Brady's due process rights.[69] The Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[70]

Brady concerns come to light in this discussion when the personnel files of the law enforcement officers involved contain evidence favorable to the defense. The Court has defined evidence as favorable when, "it may make the difference between conviction and acquittal."[71] Further, the Texas Court of Criminal Appeals

[63] *Id.*; *In re* Jobe, 42 S.W.3d 174, 181 (Tex. App.—Amarillo 2001, no pet.).
[64] Brady v. Maryland, 373 U.S. 83, 84 (1963).
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 85.
[69] *Id.* at 88.
[70] *Id.* at 87.
[71] United States v. Bagley, 473 U.S. 667, 676 (1985).

held that favorable evidence includes both exculpatory and impeachment evidence.[72]

Although *Brady* concerns are more commonly associated with exculpatory evidence that the prosecution must divulge, the broader definition of favorable evidence includes records that could impeach a law enforcement officer's character.[73] These types of records are often found in the civil service personnel files we are discussing.

Jonathan Abel, a fellow of Stanford University's Constitutional Law Center, wrote:

> These files contain valuable evidence of police misconduct that *can be used to attack an officer's credibility on the witness stand and can make the difference between acquittal and conviction*. But around the country, state statutes and local policies prevent prosecutors from accessing these files, much less disclosing the material they contain.[74]

In fact, in Texas, since the state rules for discovery require the disclosure of *Brady* evidence, some prosecutors do not review police officers' personnel files. In a telephone interview with Abel in 2014, Chief Counsel, Scott Durfee, of the Harris County District Attorney's Office, stated that his office does not review the files because they are, "already publicly available."[75] In the same article, Felony Division Chief, Kevin Petroff, of the Galveston County District Attorney's Office, stated, "[p]olice personnel files are actually available to defense attorneys by either open-records requests or subpoena, just as they are to us. That arguably takes them out of traditional notions of 'Brady' evidence."[76]

Texas criminal case discovery is mandated by the Texas Code of Criminal Procedure.[77] But as already discussed, the G-File records are not subject to open records requests as the judicial record has deemed them confidential. Then how does this coincide with *Brady*? Who gets to decide what information in the G-Files is, or could be, exculpatory, useful in impeachment, or mitigating? Once again, *in camera* review saves the day. For example, in *Canada v. State*, the state requested an *in camera* inspection of the records in question to determine if any portion of

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[72] Harm v. State, 183 S.W.3d 403, 408 (Tex. Crim. App. 2006).
[73] *See* United States v. Henthorn, 931 F.2d 29, 30 (9th Cir. 1991) (holding that upon the defendant's request, the prosecution must search the testifying officer's personnel file for impeachment evidence); *see also* State v. Laurie, 653 A.2d 549, (N.H. 1995) (holding that withholding evidence from the detective's personnel file that negatively reflected his character and credibility denied the defendant due process).
[74] Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 743 (2015) (emphasis added).
[75] *Id.* at 771.
[76] *Id*.
[77] Tex. Crim. Proc. Code, art. 39.14, §§ (a), (h).

the files required disclosure under *Brady*.[78] The municipal court conducted an *in camera* review of the files and found that none of them required disclosure and that "[t]he requested files [were] confidential" and "that the records contain[ed] no exculpatory materials as contemplated by *Brady*."[79] The court cited *Thomas v. State*,[80] in which the Texas Court of Criminal Appeals ordered a trial court to use an *in camera* inspection to review Crime Stoppers tip information and decide if it contained *Brady* evidence.

The opinion in *Canada* further outlines how the rules of evidence fall in line with the trial court's finding that the G-File records were confidential. The petitioner appealed based partially on the argument that the trial court erred by finding these files confidential.[81] The petitioner argued that she could have cross-examined the responding officer about complaints found in the confidential files.[82] Citing Texas Rules of Evidence Rule 608[83] and 613[84] concerning impeaching a witness's character or reputation for truthfulness or untruthfulness (608) and a witness's prior statement and bias or interest (613), the petitioner's argument fell flat. According to Rule 608, she would not have been able to enter extrinsic evidence—in this case prior complaints—to establish the alleged untruthfulness.[85] Likewise, Rule 613 restricts the use of extrinsic evidence to establish a witness's bias or interest.[86]

Further, the court held that the questions regarding prior complaints filed against the responding officer would not have been relevant in the current adversity since the files in question would have contained complaints from which no disciplinary actions were taken. The court reviewed the rules of evidence regarding relevance by citing Rule 401[87] that states evidence is relevant when "it has any tendency to make a fact more or less probable than it would be without the evidence" if "the fact is of consequence in determining the action."[88] The court finished its reasoning by citing Rule 402[89], which bars such evidence on two fronts: first, irrelevant evidence is inadmissible, and second, evidence prohibited by statute is inadmissible.

The U.S. Fifth Circuit Court of Appeals has also endorsed the use of *in camera* review as the prudent manner in which to balance the relevance of the

[78] 547 S.W.3d 4, 17 (Tex. App.—Austin 2017, no pet.).
[79] *Id.*
[80] 837 S.W.2d 106, 114 (Tex. Crim. App. 1992).
[81] *Canada*, 547 S.W.3d at 10.
[82] *Id.*
[83] Tex. R. Evid. 608.
[84] *Id.* at 613.
[85] *Id.* at 608(b).
[86] *Id.* at 613(b)(2).
[87] *Id.* at 401.
[88] Canada v. State, 547 S.W.3d 4, 21 (Tex. App.—Austin 2017, no pet.).
[89] Tex. R. Evid. 402.

documents against the government's interest in maintaining confidentiality.[90] In *Coughlin*, the court encouraged *in camera* inspection according to the ten *Frankenhauser* factors.[91] While *Frankenhauser* is no longer good law, the factors for reviewing confidential material are still instructive of what our judges consider when reviewing similar documents *in camera*.

VII. THE MICHAEL MORTON ACT - 83(R) S.B.1611

Michael Morton was wrongfully convicted in 1987 in Williamson County, Texas for bludgeoning his wife, Christine Morton, to death in their bed while their three-year-old son was in the house.[92] In the case, the prosecutor suppressed exculpatory evidence that was favorable to Morton, a bloody bandana found in a wood line adjacent to the alley that ran behind the Morton home.[93] DNA testing in 2011 exonerated Morton after he spent 25 years in Texas prisons.[94] Another man, Mark Alan Norwood, was convicted for Christine Morton's murder and the murder of Debra Masters Baker in 1988.[95] Norwood also bludgeoned Baker to death while she was in bed, in her home, in neighboring Austin, Texas.[96]

Texas Governor Rick Perry signed Senate Bill 1611, The Michael Morton Act, into law on May 16, 2013.[97] The Act streamlined discovery in Texas and went beyond *Brady* by mandating that almost any relevant information will be turned over to the defense. Any and all offense reports, documents, papers, written or recorded statements of the defendant, witnesses, or other law enforcement officers would be delivered to the defense in accordance with the Act.[98] Further, any books, accounts, letters, photographs, objects, or other items would be made available as

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[90] Coughlin v. Lee, 946 F.2d 1152, 1160 (5th Cir. 1991).
[91] *Id.*; Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (In the context of discovery of police investigation files in a civil rights case, however, at least the following considerations should be examined: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; *(9) whether the information sought is available through other discovery or from other sources;* and (10) the importance of the information sought to the plaintiff's case.) (emphasis added).
[92] *Michael Morton*, INNOCENCE PROJECT, https://innocenceproject.org/cases/michael-morton/ (last visited Nov. 30, 2020).
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Michael Morton Act, 83d Leg., R.S., ch. 49, § 1, 2013 Tex. Gen. Laws 106-08 (codified at Tex. Code Crim. Proc., art. 39.14).
[98] *Id.*

well.[99] But notice, the information still has to be relevant, and we know from the opinion in *Canada* that these files will likely not even meet that low bar. So, are police employment records contained in a department's Civil Service G-File now subject to discovery after the Morton Act? Simply put, no. The files are still statutorily inadmissible, and any request for their admission can again be determined by an *in camera* review by the presiding judge.

VIII. SUBPOENA DUCES TECUM

Some would look for a "work around" when presented with the challenge of obtaining such well-guarded records. One way to secure a law enforcement officer's private civil service G-File records could be to have the officer produce them in court. After all, the file is presumably accessible to the officer and is no doubt in the possession of the law enforcement agency. While this is a common issuance in criminal cases where officers are often required to bring with them specified documents or other articles of evidence, there is little chance it would be successful as a discovery tool.

In *Ealoms v. State*, a Texas petitioner attempted to use a subpoena duces tecum in this manner.[100] The court cited *Martin v. Darnell* to distinguish between a defendant's due process right to favorable evidence (*Brady*) and the supposed creation of a constitutional right to discovery.[101] The *Martin* court stated:

> A defendant's due process right to have the State disclose favorable evidence does not create a constitutional right to discovery. Nor does it entitle the defense to conduct her own search to argue the relevance of particular information, even in the absence of a statute declaring the information confidential. In *Ritchie,* with the observation that such a review would not prevent a defendant from requesting specific information of which he was aware and arguing the information was material to his defense, the Court determined that *a defendant's due process rights would be satisfied by an in camera review by the trial court* to determine the validity of the defendant's contentions. [102]

Once again, Texas courts send petitioners to the judge's chambers for a discretionary review of private files.

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[99] *Id.*
[100] 983 S.W.2d 853, 857–58 (Tex. App.—Waco 1998, pet. ref'd).
[101] *Id.* at 859.
[102] 960 S.W.2d 838, 842 (Tex. App.—Amarillo 1997, no pet.) (citations omitted).

IX. CONCLUSION

The legislative intent of Texas Local Government Code Chapter 143.089 has withstood multiple challenges over the years. Records of incidents that rise to the level of formal discipline are included in the A-File, which is a public record that may be viewed by any interested party and made available during discovery if requested. But records kept by departments for their own use, the G-File, are not treated the same. The legislature carved out this file to meet the need for government confidentiality and to protect law enforcement officers from baseless allegations, and the investigations that stem from them, which stain their reputations.

Our system of government in Texas, ratified by the post-reconstruction Constitution of 1876, vests the power to decide almost every judicial position in the state to the electorate. Therefore, citizens can remove the power of discretion that our judges took an oath to administer by voting them off of the bench. Ultimately, that is the only recourse if we disagree with a judge's decision after they review the confidential personnel files of a civil service police department's officer involved in a case. The *in camera* review allows the files to remain confidential and for the highest authority in the dispute to consider their relevance and/or value to the plaintiff. Undoubtedly, this approach is named the proper avenue for such determination in case after case. We may not always like the secretive nature of a department's files, but we can be assured they cannot avoid the eyes of justice in the most literal sense.