



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 5, 2007

Ms. Patricia Fernandez
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2007-13020

Dear Ms. Fernandez:

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# 289737.

The Texas Department of Family and Protective Services (the "department") received a request for information related to any children in "the temporary custody or care of the [department] who spent one or more nights in an unlicensed or non-licensed facility or any other non-licensed or unlicensed location at any time during the years 2006 or 2007 to date." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor, Advocacy, Incorporated ("Advocacy"). *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Before addressing the department's claims under sections 552.101 and 552.103 of the Government Code, we first address the arguments of the requestor, Advocacy, that it has a

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

special right of access to all of the requested information. Advocacy has been designated in Texas as the state protection and advocacy system (the “P&A system”) for the purposes of the federal Protection and Advocacy for Individuals with Mental Illness Act (the “PAIMI”), sections 10801 through 10851 of title 42 of the United States Code, and the Developmental Disabilities Assistance and Bill of Rights Act (the “DDA”), sections 15041 through 15045 of title 42 of the United States Code. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 CFR §§ 1386.19, .20 (defining “designated official” and requiring official to designate agency to be accountable for funds and conduct of P&A agency).

The PAIMI provides, in relevant part, that Advocacy, as the state’s P&A system, shall

1) have the authority to--

(A) investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred[.]

42 U.S.C § 10805(a)(1)(A). Further, the PAIMI provides that Advocacy shall have access to all records of

(B) any individual (including an individual who has died or whose whereabouts are unknown);

(i) who by reason of the mental or physical condition of such individual is unable to authorize the [P&A system] to have such access;

(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and

(iii) with respect to whom a complaint has been received by the [P&A system] or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect[.]

42 U.S.C § 10805(a)(4)(B). The term “records” as used in the above-quoted section 10805(a)(4)(B) includes “reports prepared by any staff of a facility rendering care and treatment [to the individual] . . . that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents[.]” *Id.* § 10806(b)(3)(A). Additionally, the federal regulations promulgated under the PAIMI

address the scope of the P&A system's right of access, and states that the term "records" should include, but not be limited to:

- (1) Information and individual records, obtained in the course of providing intake, assessment, evaluation, supportive and other services, including medical records, financial records, and reports prepared or received by a member of the staff of a facility or program rendering care or treatment[.]

42 C.F.R. § 51.41(c)(1). Advocacy states in its August 14, 2007 letter that based on newspaper coverage and complaints it has received, it has probable cause to believe that the department is housing children with developmental disabilities and mental illnesses in "substandard, unauthorized, unsafe, and ill-supervised office facilities." Advocacy explains that pursuant to the PAIMI it is investigating these reports that children with disabilities are being subjected to abuse or neglect, or being placed in significant risk of being subjected to abuse or neglect. See 42 C.F.R. § 51.2 (stating that the probable cause decision under PAIMI may be based on reasonable inference drawn from one's experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect). Advocacy further states that in addition to its "direct experience in representing multiple children subject to these unauthorized placements, the inference that the children suffering in this way are covered by the Acts may be drawn from the eligibility criteria used in placing children in [residential treatment centers] and in therapeutic foster care . . . and used to designate the degree of psychological, behavioral, and medical needs experienced by these children. See *Office of Protection and Advocacy for Persons with Disabilities v. Armstrong*, 266 F.Supp.2d 303, 314 (D.Conn. 2003) (finding that the agency did not have to make a threshold showing of mental illness before it can gain access to their records); *Michigan Prot. & Advocacy Serv., Inc. v. Miller*, 849 F.Supp. 1202, 1207 (W.D.Mich. 1994) (finding that evidence that a facility has previously housed individuals who are mentally ill, as well as evidence that some current residents may be mentally ill is sufficient under PAIMI to merit access).

The department contends that because department offices are not considered "facilities" as the term is defined in the PAIMI, Advocacy is not entitled to the requested information. We disagree with this interpretation. The PAIMI defines the term "facilities" and states that the term "may include, but need not be limited to, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." 42 U.S.C. § 10802(3). In *Connecticut Office of Protection and Advocacy For Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, (Conn. 2006), the court concluded that the Department of Health and Human Services had reasonably interpreted the term "facilities" for the purposes of the PAIMI to include non-residential facilities that provided care or treatment to individuals with mental illness. The department in this instance is entrusted with rendering care and treatment to the children at issue. Thus, the fact that the location of the care and treatment provided is not at a standard department location does not prohibit Advocacy's access to the information. Therefore, we conclude that Advocacy has a right of access to the requested information pursuant to the PAIMI.

Advocacy further asserts that, pursuant to federal law, any state confidentiality laws shall not restrict Advocacy's right of access to the requested records. In this regard, we note that a state statute is preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995). Further, federal regulations provide that state law must not diminish the required authority of a P&A system. *See* 45 C.F.R § 1386.21(f); *see also Iowa Prot. and Advocacy Services, Inc. v. Gerard*, 274 F.Supp.2d 1063 (N.D.Iowa 2003) (broad right of access under section 15043 of title 42 of United States Code applies despite existence of any state or local laws or regulations which attempt to restrict access; although state law may expand authority of P & A system, state law cannot diminish authority set forth in federal statutes); *Rasmussen*, 206 F.R.D. 630, 639 (S.D.Iowa 2001). *Cf.* 42 USC § 10806(b)(2)(C). Thus, in this instance, even though the department raises section 552.103 of the Government Code, and a state statute claim under section 552.101 of the Government Code for the requested information, they are preempted by the PAIMI. Accordingly, based on Advocacy's representations, we determine that Advocacy has a right of access to the requested information pursuant to subsection (a)(1)(A) of section 10805 of title 42 the United States Code and the department must release the information at issue to the requestor.

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. 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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/mcf

Ref: ID# 289737

Enc. Submitted documents

c: Ms. Lucy Wood
Advocacy, Inc. - Central Texas Region
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(w/o enclosures)