



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2009

Ms. Donna L. Clarke
Assistant Criminal District Attorney
Lubbock County
916 Main Street, Suite 1101
Lubbock, Texas 79401

OR2009-13032

Dear Ms. Clarke:

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# 355397.

The Lubbock County Medical Examiner's Office (the "medical examiner") received a request for all records pertaining to the determination of death and the autopsy reports of a named individual. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. 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).

You assert the responsive information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108. A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* §§ 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal

conduct. Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency possesses information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information under section 552.108 if (1) it demonstrates that the information relates to the pending case and (2) this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. You represent to this office that the Lubbock Police Department objects to the release of the information at issue because its release would interfere with a pending criminal investigation. Based on this representation and our review of the submitted records, we conclude that the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e.*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, section 552.108(a)(1) is generally applicable to the submitted records.

However, the requestor is a representative of Advocacy who claims that she has a right of access to the requested information under federal law. Such a right of access, if applicable, would preempt the protection afforded by section 552.108 of the Government Code. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause); *Delta Airlines, Inc. v. Black*, 116 S.W.3d 745, 748 (Tex. 2003) (discussing federal preemption of state law). Accordingly, we turn to the question of whether Advocacy has a right of access to the requested records pursuant to federal law.

Advocacy has been designated in Texas as the state protection and advocacy system (“P&A system”) for the purposes of the federal Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI”), sections 10801 through 10851 of title 42 of the United States Code, the Developmental Disabilities Assistance and Bill of Rights Act (“DDA”), sections 15041 through 15045 of title 42 of the United States Code, and the Protection and Advocacy of Individual Rights Act (“PAIR”), section 794e of title 29 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

(4) . . . 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[.]

Id. § 10805(a)(4)(B)(i)-(iii). 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 or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records." *Id.* § 10806(b)(3)(A); *see also* 42 C.F.R. § 51.41(c) (addressing scope of right of access under PAIMI).

The DDA provides, in relevant part, that a P&A system, shall

(B) have the authority to investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred;

...

(I) have access to all records of-

(i) any individual with a developmental disability who is a client of the system if such individual, or the legal guardian, conservator, or

other legal representative of such individual, has authorized the system to have such access[.]

(J)

(i) have access to the records of individuals described in subparagraphs (B) and (I), and other records that are relevant to conducting an investigation, under the circumstances described in those subparagraphs, not later than 3 business days after the [P&A system] makes a written request for the records involved[.]

42 U.S.C § 15043(a)(2)(B), (I)(i), (J)(i). The DDA states that the term “record” includes

- (1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;
- (2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and
- (3) a discharge planning record.

Id. § 15043(c).

The PAIMI and the DDA grant a P&A system, under certain circumstances, access to “records.” Each of the acts has a separate, but similar, definition of “records.” The principle issue which we must address in this instance is whether the submitted information constitutes a “record” under either of these acts. In this instance, the submitted information consists of an autopsy report and related records that pertain to the medical examiner’s examination of the named individual. The medical examiner does not itself provide care, treatment, services, support, or other assistance to individuals with developmental disabilities, and Advocacy does not explain whether the medical examiner provides its reports to a facility that provides care, treatment, services, support, or other assistance to developmentally disabled individuals. *See id.* §§ 10806(b)(3)(A), 15043(c)(1). Advocacy also does not explain how the medical examiner is charged with investigating reports of abuse, neglect, injury, or death occurring at such a facility, nor how the submitted reports were created for this purpose. *See id.* §§ 10806(b)(3)(A), 15043(c)(2). The submitted records are not discharge planning records. *See id.* § 15043(c)(3). Thus, we conclude Advocacy has failed to demonstrate that the submitted information is among the information specifically listed as a “record” in the PAIMI or the DDA.

Advocacy argues, however, that the information listed in sections 10806(b)(3)(A) and 15043(c) was not meant to be an exhaustive list.¹ Advocacy contends that it was Congress's intent to grant a P&A system access to any and all information that the system deems necessary to conduct an investigation under the PAIMI and/or the DDA. We disagree. By the statutes' plain language, access is limited to "records." See *In re M&S Grading, Inc.*, 457 F.3d 898, 901 (8th Cir. 2000) (analysis of a statute must begin with the plain language). While we agree that the two definitions of "records" are not limited to the information specifically enumerated in those clauses, we do not believe that Congress intended for the definitions to be so expansive as to grant a P&A system access to any information it deems necessary. Such a reading of the statutes would render sections 10806(b)(3)(A) and 15043(c) insignificant. See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (statute should be construed in a way that no clause, sentence, or word shall be superfluous, void, or insignificant). Furthermore, in light of Congress's evident preference for limiting the scope of access, we are unwilling to assume that Congress meant more than it said in enacting the PAIMI and the DDA. See *Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995) (stating that statutory construction must begin with language of statute; to do otherwise would assume that Congress does not express its intent in words of statutes, but only by way of legislative history); see generally *Coast Alliance v. Babbitt*, 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress's plain language in statute, agency cannot carry out Congress's intent, remedy is not to distort or ignore Congress's words, but rather to ask Congress to address problem).

Based on the above analysis, we believe that the information specifically enumerated in sections 10806(b)(3)(A) and 15043(c) is indicative of the types of information to which Congress intended to grant a P&A system access. See *Penn. Protection & Advocacy Inc. v. Houstoun*, 228 F.3d 423, 426 n.1 (3rd Cir. 2000) ("[I]t is clear that the definition of "records" in § 10806 controls the types of records to which [the P&A agency] 'shall have access' under § 10805[.]") As previously noted, Advocacy failed to show that the submitted information is among the information specifically listed as "records" in section 10806(b)(3)(A) or 15043(c). Furthermore, we find that the submitted information is not the type of information to which Congress intended to grant a P&A system access. Accordingly, we find that Advocacy does not have a right of access to the submitted information under either the PAIMI or the DDA.

Advocacy argues that it has a right of access under PAIR to the information at issue. We understand Advocacy to assert that the PAIR program provides it access to information to the same extent as the DDA Act and the PAMII Act. Section 794e(f)(2) of title 29 of the United States Code provides that an eligible P&A system shall "have the same general

¹Use of the term "includes" in sections 10806(b)(3)(A) and 15043(c) of title 42 of the United States Code indicates that the definitions of "records" are not limited to the information specifically listed in those sections. See *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir. 1996); see also 42 C.F.R. § 51.41.

authorities, including access to records . . . , as are set forth in subtitle C” of the DDA, 42 U.S.C § 15041-15045. *See* 29 U.S.C § 794e(f)(2). As noted above, we have concluded that neither the PAMII Act nor the DDA Act apply to the records at issue. Accordingly, we have no basis for finding that Advocacy has a right of access to the records at issue by virtue of the PAIR program.

In summary, the submitted information may be withheld under section 552.108(a)(1) of the Government Code. ~~As our ruling is dispositive, we need not address your remaining argument against disclosure.~~

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 355397

Enc. Submitted documents

cc: Requestor
(w/o enclosures)