



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 4, 2010

Ms. Donna L. Clarke
Assistant Criminal District Attorney
County of Lubbock
P.O. Box 10536
Lubbock, Texas 79408-3536

OR2010-06396

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# 377898.

The Lubbock County Medical Examiner's Office (the "medical examiner") received a request for the medical examiner's report for a named individual. You state you have released some information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, including section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a

photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11. You state the submitted information consists of photographs of the deceased taken during an autopsy. Although you state neither of the statutory exceptions to confidentiality is applicable in this instance, the requestor asserts that the submitted photographs are subject to disclosure under authority of other law. Accordingly, we will address the requestor's assertions.

The requestor is a representative of Advocacy, Inc. ("Advocacy"), which has been designated as the state's protection and advocacy system ("P&A system") for purposes of the federal Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. §§ 10801-10851, and the Developmental Disabilities Assistance and Bill of Rights Act ("DDA Act"), 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 C.F.R. §§ 51.2 (defining "designated official" and requiring official to designate agency to be accountable for funds of P&A agency), 51.22 (requiring P&A agency to have a governing authority responsible for control).

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 medical examiner photographs 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,*

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.

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.

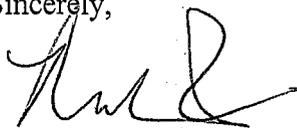
Advocacy argues that it has a right of access under PAIR to the information at issue. We understand Advocacy to assert that the PAIR program provides it access to information to the same extent as the DDA Act and the PAMII Act. Section 794e(f)(2) of title 29 of the United States Code provides that an eligible P&A system shall "have the same general 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 must be withheld under section 552.101 of the Government Code in conjunction with article 49.25 of the Code of Criminal Procedure.

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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 377898

Enc. Submitted documents

cc: Requestor
(w/o enclosures)