



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2011

Mr. John C. West
Office of the Inspector General
Texas Department of Criminal Justice
4616 West Howard Lane, Suite 250
Austin, Texas 78728

OR2011-04496

Dear Mr. West:

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# 413349.

The Office of the Inspector General (the "OIG") of the Texas Department of Criminal Justice received a request from Disability Rights Texas ("DRTX"), formerly Advocacy, Incorporated, for twelve specified categories of information related to mental health treatment of inmates and inmates who died while in custody at the Allred Unit since January 1, 2010. The OIG states it will release some of the requested information, with employment-related information redacted pursuant to the previous determination in Open Records Letter No. 2005-01067 (2005) and social security numbers redacted pursuant to section 552.147(b) of the Government Code.¹ The OIG claims the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.130, and 552.134.

¹Open Records Letter No. 2005-01067 serves as a previous determination that the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code, are excepted from disclosure under section 552.117(a)(3) of the Government Code. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Although you assert the submitted investigation documents are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.130, and 552.134, we note the requestor is a representative of DRTX, which may have a right of access to the requested information under federal law. DRTX has been designated as the state protection and advocacy system ("P&A system") for 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, sections 15041 through 15045 of title 42 of the United States Code, and the Protection and Advocacy of Individual Rights Act ("PAIR Act"), 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 at 2 (2002) (designated state P&A system is Advocacy, Incorporated); *see also* 42 C.F.R. §§ 51.2 (for requirements applicable to P & A for individuals with mental illness program, defining "designated official" and requiring official to designate agency to be accountable for funds of P&A agency), 51.22 (for requirements applicable to P & A for individuals with mental illness program, requiring P&A agency to have a governing authority responsible for control); 45 C.F.R. §§ 1386.19 (for state system for protection and advocacy of rights of individuals with developmental disabilities, defining "designating official"), 1386.20 (for state system for protection and advocacy of rights of individuals with developmental disabilities, requiring official to designate agency to be accountable for funds and conduct of P&A agency).

PAIMI provides, in relevant part, that DRTX, 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, PAIMI provides that DRTX 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[.]

Id. § 10805(a)(4)(B)(i)-(iii). The term “records” as used in the above-quoted provision

includes reports prepared by any staff of a facility rendering care and treatment [to the individual] 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 P&A system’s access to records under PAIMI). Further, PAIMI defines the term “facilities” and states it “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). The DDA Act 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 –

(ii) any individual with a developmental disability, in a situation in which--

(I) the individual, by reason of such individual’s mental or physical condition, is unable to authorize the system to have such access;

(II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and

(III) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect[.]

Id. § 15043(a)(2)(B), (I)(ii). The DDA Act states 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 PAIR Act provides, in relevant part, that a P&A system will “have the same . . . access to records and program income, as are set forth in [the DDA Act].” 29 U.S.C. § 794e(f)(2).

Criminal case number 2010-00805 is an investigative report related to the death of an inmate while incarcerated at the Allred Unit, a Texas Department of Criminal Justice prison. This report contains information that reflects the inmate at issue suffered from mental illness.² In its request for information to the department, DRTX explains it intends to investigate the deaths at issue for possible incidents of abuse or neglect of individuals with mental illness or disabilities as governed by PAIMI. We also understand DRTX to assert there is a reasonable inference that abuse or neglect may have occurred. *See* 42 C.F.R. § 51.2 (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”); *Prot. & Advocacy Sys., Inc. v. Freudenthal*, 412 F.Supp.2d 1211, 1219 (D. Wyo. 2006) (“The law is well established that in requesting records, P & A makes the decision as to whether probable cause exists.”). Thus, DRTX has

²We note there is no indication any of the inmates at issue in the remaining submitted reports were diagnosed with a mental illness and were receiving mental health treatment

a right of access to this report pursuant to PAIMI if the inmate at issue does not have a legal guardian, conservator, or other legal representative. See 42 U.S.C. § 10805(a)(4)(B).

We note a state statute is preempted by federal law to the extent it conflicts with that federal law. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) (“Where a state statute conflicts with, or frustrates, federal law, the former must give way.”); *MCI Sales and Service, Inc. v. Hinton*, 329 S.W.3d 475, 481 (Tex. 2010) (“a law passed by Congress-acting within its enumerated powers-and signed by the President preempts any state law to the contrary, rendering it without effect”). 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 Servs., Inc. v. Gerard*, 274 F.Supp.2d 1063 (N.D.Iowa 2003); *Iowa Prot. and Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D.Iowa 2001); cf. 42 U.S.C. § 10806(b)(2)(C). Similarly, Texas law states, “[n]otwithstanding other state law, [a P&A system] . . . is entitled to access to records relating to persons with mental illness to the extent authorized by federal law.” Health & Safety Code § 615.002(a). Thus, although the OIG claims exceptions to disclosure for criminal case number 2010-00805 under sections 552.101, 552.102, 552.108, 552.130, and 552.134 of the Government Code, all of the asserted claims for information related to this report are preempted by PAIMI to the extent PAIMI is applicable to it. Accordingly, the OIG must release criminal case number 2010-00805 to the requestor pursuant to subsections (a)(1)(A) and (a)(4)(B) of section 10805 of title 42 of the United States Code and section 15043 of title 42 of the United States Code if the inmate at issue does not have a legal guardian, conservator, or other legal representative. To the extent the requestor does not have access to this report pursuant to PAIMI, we will consider the OIG’s claimed exceptions with respect to it. In addition, as we have no information before us to allow us to conclude the remaining documents relate to an inmate who was diagnosed with a mental illness and receiving mental health treatment, we cannot conclude the requestor has a right of access to the information pursuant to PAIMI and will, therefore, address the applicability of the claimed exceptions to disclosure to the remaining information.

You assert the submitted information is excepted under section 552.134 of the Government Code. Section 552.134(a) relates to inmates of the department and provides the following:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov’t Code § 552.134(a). However, section 552.134 is explicitly made subject to section 552.029, which provides in relevant part the following:

Notwithstanding . . . Section 552.134, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

(1) the inmate's name, identification number, age, birthplace, physical description, or general state of health or the nature of an injury to or critical illness suffered by the inmate;

....
(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Id. § 552.029(1), (8). On review, we agree the submitted records constitute information about inmates for purposes of section 552.134. However, the records contain information that concerns the deaths of and alleged crimes involving inmates. Thus, the OIG must release basic information concerning the deaths and crimes. Basic information includes the time and place of the incident, names of inmates and department officials directly involved, a brief narrative of the incident, a brief description of any injuries sustained, and information regarding criminal charges or disciplinary actions filed as a result of the incident. The department must withhold the remaining information under section 552.134 of the Government Code.³

To conclude, the OIG must release criminal case number 2010-00805 to the requestor pursuant to subsections (a)(1)(A) and (a)(4)(B) of section 10805 of title 42 of the United States Code and section 15043 of title 42 of the United States Code if the inmate at issue does not have a legal guardian, conservator, or other legal representative. The OIG must also release basic information concerning the deaths of and crimes involving inmates in the submitted information. The department must withhold the remaining information under section 552.134 of the Government Code.

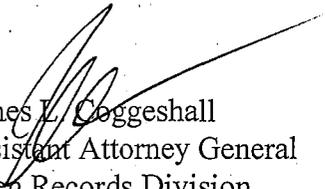
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tf

Ref: ID# 413349

Enc. Submitted documents

c: Requestor
(w/o enclosures)