



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 14, 2013

Ms. Elaine Nicholson  
Assistant City Attorney  
City of Austin  
P.O. Box 1088  
Austin, Texas 78767-8828

OR2013-00777

Dear Ms. Nicholson:

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# 476125.

The City of Austin (the "city") received a request for information related to a named individual. You claim the requested 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 comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note, and you acknowledge, the city has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.301; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by

law or affects third party interests. *See* Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider your argument regarding this exception.

Although you assert the submitted information is excepted under section 552.101 of the Government Code, we note the requestor is a representative of Disability Rights Texas (“DRTX”), formerly known as Advocacy, Inc., 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 (the “PAIMI”), 42 U.S.C. §§ 10801-10851, the Developmental Disabilities Assistance and Bill of Rights Act (the “DDA”), 42 U.S.C. §§ 15041-15045, and the Protection and Advocacy of Individual Rights Act (the “PAIR”), 29 U.S.C. § 794e. *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), .22 (requiring P&A agency to have a governing authority responsible for control).

The 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 [P&A] 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 DRTX 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 provision

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). Additionally, the federal regulations promulgated under the PAIMI address the P&A system’s right of access and provide that the term “records” includes “[i]nformation and individual records, obtained in the course of providing intake, assessment, evaluation, supportive and other services, including medical records, . . . and reports prepared or received by a member of the staff of a facility . . . rendering care or treatment.” 42 C.F.R. § 51.41(c)(1). Further, the PAIMI defines the term “facilities” and states 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). 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 [P&A] 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[.]

...

(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[.]

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

The requestor states the deceased individual suffered from a disability and DRTX received information this individual died while under the care and treatment of a specified residential facility and a specified medical center. DRTX explains it intends to investigate this death for possible incidents of abuse or neglect of an individual with developmental disability as defined by federal law. *See* 42 USC § 15002(8) (defining term “developmental disability”); *see id.* § 10805(a)(4). DRTX asserts the individual at issue does not have a legal guardian, conservator, or other legal representative acting on his behalf with regard to the investigation of possible abuse and neglect and his death. Additionally, DRTX states it has probable cause to believe the individual’s death may have been the result of abuse and 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).

We note 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. & Advocacy Servs., Inc. v. Gerard*, 274 F. Supp. 2d 1063 (N.D. Iowa 2003) (broad right of access under section 15043 of title 42 of the 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); *Iowa Prot. & Advocacy Servs., 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, the [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, the PAIMI and the DDA grant DRTX access to “records,” and, to the extent state law provides for the confidentiality of “records” requested by DRTX, its federal rights of access under the PAIMI and the DDA preempt state law. *See* 42 C.F.R. § 51.41(c); *see also Equal Employment Opportunity Comm’n*, 905 F. Supp. at 382. Accordingly, we must address whether the information at issue constitutes “records” of an individual with a mental illness as defined by the PAIMI or a disability as defined by the DDA.

Although the definition of “records” is not limited to the information specifically described in sections 10806(b)(3)(A) and 15043(c) of title 42 of the United States Code, we do not believe Congress intended for the definitions to be so expansive as to grant a P&A system access to any information it deems necessary.<sup>1</sup> Such a reading of the statute 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 this analysis, we believe the information specifically described 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. Prot. & 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 system] ‘shall have access’ under § 10805[.]”).

We note the information at issue consists of records related to medical treatment provided to the named individual in a facility as defined by the PAIMI. Thus, in this instance, even though the city claims this information is excepted from disclosure under section 552.101

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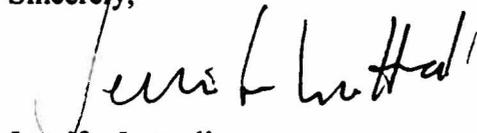
<sup>1</sup>Use of the term “includes” in section 10806(b)(3)(A) of title 42 of the United States Code indicates the definition of “records” is not limited to the information specifically listed in that section. *See St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202 (5th Cir. 1996); *see also* 42 C.F.R. § 51.41.

of the Government Code, this claim is preempted by the PAIMI and the DDA. Accordingly, based on the requestor's representations, we determine that DRTX has a right of access to the information at issue pursuant to subsections (a)(1)(A) and (a)(4)(B) of section 10805 of title 42 the United States Code and subsections (a)(2)(B), (I)(iii), and (J)(i) of section 15043 of title 42 the United States Code. Thus, the city must release the submitted information to this requestor.<sup>2</sup>

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](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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 476125

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>Because the requestor has a right of access under subsections (a)(1)(A) and (a)(4)(A) of section 10805 of title 42 the United States Code and subsections (a)(2)(B), (I), and (J)(i) of section 15043 of title 42 the United States Code to the information being released, if the city receives another request for this information from a different requestor, then the city should again seek a decision from this office.