



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 20, 2005

Mr. Marc Barenblat  
Staff Attorney  
State Board for Educator Certification  
1701 North Congress Avenue, 5<sup>th</sup> Floor  
Austin, Texas 78701

OR2005-06473

Dear Mr. Barenblat:

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# 228391.

The State Board for Educator Certification (the "board") received a request for all information related to disciplinary complaints filed against a named individual "that are or have been investigated by [the board's] Professional Discipline Unit, including but not limited to the findings and/or results of any such investigation." Correspondence from the requestor indicates that the board has released some information. You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.107, 552.111, 552.114, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.<sup>1</sup> We have also considered comments submitted by the requestor, asserting that the requestor, Advocacy, Incorporated ("Advocacy"), has a special right of access under federal law to the information at issue. *See Gov't Code* § 552.304 (permitting interested party to submit comments explaining why information should or should not be released).

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<sup>1</sup>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.

Initially, we must address the board's obligations under the Act. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). You state that the board received this request on May 2, 2005. Therefore, the board was required to submit the information required by section 552.301(e) by May 23, 2005. Although your correspondence with this office is dated May 23, 2005, it was postmarked May 25, 2005. Consequently, the board failed to comply with the requirements of section 552.301.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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); Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.107 and 552.111 are discretionary exceptions under the Act and may be waived by the governmental body. Thus, these exceptions do not demonstrate compelling reasons to withhold information from the public. *See, e.g.*, Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). The board has, therefore, waived its claims under sections 552.107 and 552.111. We note, however, that sections 552.026, 552.101, 552.114, 552.130, and 552.137 of the Government Code can provide compelling reasons to overcome the presumption.

Before addressing the board's claims under these sections, we first address the arguments of requestor Advocacy that it has a special right of access to all of the submitted information. Advocacy has been designated in Texas 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"), 42 U.S.C. §§ 10801-10851. *See* Attorney General Opinion JC-0461 (2002). Advocacy argues that this federal provision gives it a special right of access to the records at issue.

PAIMI provides, in relevant part, that Advocacy shall

- (4) in accordance with [another section] of this title, have access to all records of -

(A) any individual 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;

(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 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 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; and

(C) any individual with a mental illness, who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy, whenever—

(i) such representative has been contacted by such system upon receipt of the name and address of such representative;

(ii) such system has offered assistance to such representative to resolve the situation; and

(iii) such representative has failed or refused to act on behalf of the individual[.]

42 U.S.C § 10805(a)(4)(A), (B), (C). The federal regulations promulgated under PAIMI define “records” to include

(4) Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors, or related entities, except that nothing in this section is intended to preempt State law

protecting records produced by medical care evaluation or peer review committees.

42 C.F.R. § 51.41(c)(4). In this case, Advocacy states in its May 24, 2005 letter that in March, 2002, a named juvenile died while being physically restrained by educators in a special education classroom in the Killeen Independent School District (the "district"). The juvenile was a foster child with an emotional disturbance who was under the managing conservatorship of the Texas Department of Family and Protective Services.<sup>2</sup> Advocacy explains that, in response to newspaper coverage regarding the death, it initiated an investigation into the death of the juvenile. Advocacy states, and information it has submitted for our review reflects, that Advocacy is investigating the abuse or neglect of an individual with a mental illness as defined by PAIMI. See 42 U.S.C. § 10802(4)(B)(ii) (defining term "individual with mental illness"). Thus, we understand Advocacy to represent that the above requirements for Advocacy to have access to the records at issue are met in this case.

The board argues, however, that the language of section 51.41(c)(4) is unclear regarding whether this provision grants Advocacy access only to the records of agencies that license or certify facilities, or whether this provision also applies to agencies that license or certify individual administrators or educators. The board states that it is the designated authority responsible for Texas educator certification, and that it enforces standards of conduct for certified educators in Texas public schools. The board suggests that section 51.41(c)(4) is applicable only to the records of agencies that license or certify facilities, and not to the board's records, which pertain to the licensing of individual administrators and teachers. We disagree with this interpretation because the plain wording of the regulation does not limit the certification and licensure review to that of a facility only. See *Requirements Applicable to PAIMI*, 62 Fed. Reg. 53,548-1, 53,560 (Oct. 15, 1997) (codified at 42 C.F.R. pt. 51) (intent of PAIMI is to enable P&A system access to all relevant records, even those stored or maintained by entities other than service provider or facility, whether or not such entities actually produced the records). The 10th Circuit Court of Appeals considered the definition of "records" available to a system under section 51.41(c)(4), which was promulgated to implement PAIMI. See *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10<sup>th</sup> Cir. 2003). The court reasoned that the statutory phrase "all records of ... any individual," found in section 10805 is quite broad. *Hammons* 323 F.3d at 1270. Therefore, despite the exception stated in section 51.41(c)(4), the court concluded: "examining the language of the statute and according it a straightforward interpretation, we conclude, like the Third Circuit, that "all records of . . . any individual" . . . include peer review and quality assurance records relating to a patient and his or her care." *Id.* Given the broad scope of records to which

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<sup>2</sup>The Department of Family and Protective Services was then referred to as the Department of Protective and Regulatory Services. See Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 198, § 1.27, 2003 Tex. Sess. Law Serv. 611, 641 ("A reference in law to the Department of Protective and Regulatory Service means the Department of Family and Protective Services.").

Advocacy may have access, we find that Advocacy's right of access in this case is found in section 51.41(c)(4) of title 42 of the Code of Federal Regulations. Accordingly, because the information at issue consists of records of an individual as defined by section 10805(a)(4), Advocacy has a right of access to the information under PAIMI.

Finally, 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 CFR § 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). Therefore, we conclude that the board must release the requested information to Advocacy.<sup>3</sup>

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

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<sup>3</sup>Because we have determined that Advocacy has a right of access to the submitted information under section 51.41(c)(4), we do not address the board's other arguments concerning Advocacy's right of access under other provisions of PAIMI, or its arguments against disclosure under provisions of the Act.

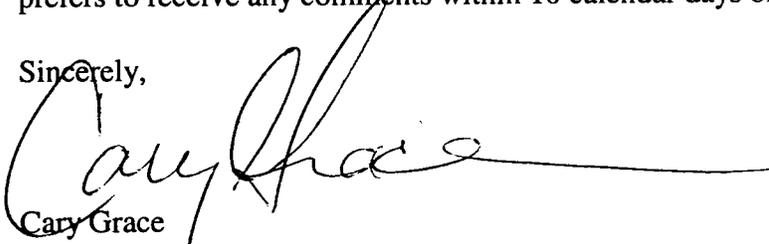
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *Tex. 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 228391

Enc. Submitted documents

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