



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2007

Mr. David M. Swope
Assistant County Attorney
Harris County Attorneys Office
1019 Congress, 15th Floor
Houston, Texas 77002

OR2007-08061

Dear Mr. Swope:

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# 282012.

The Harris County Medical Examiner (the "medical examiner") received a request for information related to a specified autopsy report. You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304.

Section 552.108(a)(1) of the Government Code excepts from disclosure information 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)(1). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. The medical examiner is not a law enforcement agency. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (holding that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information

relating to the incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency with custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement agency wishes to withhold the information.

In this case, you have provided an affidavit from the City of Houston Police Department stating that the requested information is related to a pending criminal investigation. Based upon these representations and our review, we find that release of the information at issue would interfere with the detection, investigation, or prosecution of crime. We therefore conclude that section 552.108(a)(1) is applicable in this instance. *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. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We note, however, that the requestor asserts a right of access to the submitted 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). In this instance, the requestor is a representative for 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 Act”), 42 U.S.C. §§ 10801-10851, and the Developmental Disabilities Assistance and Bill of Rights Act (“DDA Act”), 42 U.S.C. §§ 15041-15045. *See Tex. Gov. Exec. Order No. DB-33*, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 CFR §§ 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 Act provides, in relevant part, that a P&A system “shall . . . have access to all records of . . . any individual who is a client of the system if such individual . . . has authorized the system to have such access[.]” 42 U.S.C § 10805(a)(4)(A). 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).

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 –

(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 Act 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).¹

¹We note that 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 Act, 42 U.S.C § 15041-15045. See 29 U.S.C § 794e(f)(2).

The PAIMI Act and the DDA Act 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 those acts. In this instance, the submitted information consists of an autopsy report and related records that are being utilized for law enforcement purposes. We note that the submitted information is not among the information specifically listed as a “record” in sections 10806(b)(3)(A) and 15043(c).

Advocacy notes, however, that the information listed in sections 10806(b)(3)(A) and 15043(c) was not meant to be an exhaustive list.² 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 Act and/or the DDA Act. 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 Act and the DDA Act. 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, the submitted information is not among the information specifically listed as “records” in sections 10806(b)(3)(A) and 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

²Use 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.

not have a right of access to the submitted information under either the PAIMI Act or the DDA Act. We therefore conclude that the submitted information may be withheld pursuant to section 552.108(a)(1) of the Government Code.

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 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); *Texas 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 Office of the Attorney General 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 282012

Enc. Submitted documents

c: Ms. Christine Smith
Advocacy, Inc.
1500 McGowen, Suite 100
Houston, Texas 77004
(w/o enclosures)