ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2007

Mr. Charles K. Eldred
Attorney for Public Information
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2007-15235

Dear Mr. Eldred:

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# 293801.

The Texas Youth Commission (the "commission") received a request for 15 categories of information relating to the use of pepper spray. You state that some of the requested information has been released. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.[1] We have also received and considered comments from the requestor, Advocacy, Incorporated ("Advocacy"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address Advocacy's assertion that the commission is in violation of the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business

[1]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.

days after receiving the request. *See* Gov't Code § 552.301(a), (b). In addition, not later than the tenth business day after receiving the requestor's written request for information, the governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general and (2) a copy of the governmental body's written communication to the attorney general. Gov't Code § 552.301(d).

The requestor asserts that she was not provided notice of the commission's request for a decision from this office within the ten business day time period mandated under section 552.301(d). The commission informs us that it received the request on August 17, 2007. The commission requested a ruling from our office on August 31, 2007. Accordingly, we find that the commission's request for a ruling was timely submitted. Additionally, we note that the commission's request for a decision to this office indicates that the requestor was sent a copy of the request for a decision. The requestor asserts that she never received this correspondence. Whether the commission provided the copy of the comments to this requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* Therefore, based on the commission's representations and our review, we conclude that the commission complied with the procedural requirements of section 552.301 in requesting this ruling, and we will address the commission's arguments against disclosure.

We note, however, that the requestor asserts a right of access to the submitted information under federal law.[2] Such a right of access, if applicable, would preempt the protection afforded by section 552.111 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, 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).

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[2]Although Advocacy "assume[s] that the [information] in question" pertains to "any and all records evidencing or purporting to evidence any injuries and/or deaths of TYC youth/student(s) resulting from the direct or indirect use of pepper spray[,]" we note that the commission has not submitted such information for our review.

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).[3]

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 the commission's draft training curriculum regarding the use of pepper spray in its facilities. 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.[4] 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

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[3]We 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).

[4]Use 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.

(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 not have a right of access to the submitted information under either the PAIMI Act or the DDA Act.

We now turn to the commission's argument under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." *See* Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state that Exhibit C consists of "a draft of the training materials that are currently being developed to implement" an executive directive concerning the use of pepper spray. Although you inform us that the submitted information consists of a draft document, you have not informed us that this information will be released to the public in its final form. Therefore, we find that the commission may only withhold the draft document if it will be released in its final form. However, if the commission does not release or intend to release the final form, we find that the commission failed to demonstrate that the "draft" analysis applies, and the commission may not withhold the information under section 552.111.

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).

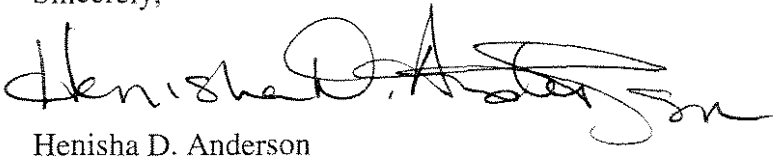
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



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Assistant Attorney General
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HDA/jb

Ref: ID# 293801

Enc. Submitted documents

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