



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 16, 2008

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

OR2008-08204

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# 312790.

The Texas Department of Criminal Justice Office of the Inspector General (the "OIG") received a request for all investigative information pertaining to the deaths in custody of two named inmates. You state you have provided the requestor with some of the requested information. You claim that the submitted investigation documents are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor, Advocacy, Incorporated ("Advocacy"). See Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we note that you have redacted the social security number of one of the deceased inmates named in the request. 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. See *id.* § 552.147(b). Thus, because the inmate to whom the redacted social security number belongs is no longer living, the information may not be withheld under section 552.147.

Although you represent that the submitted investigation documents are excepted under sections 552.101 and 552.108, we note that the requestor is a representative of Advocacy who claims that she has a right of access to the requested information under federal law.

Advocacy has been designated in Texas as the state protection and advocacy system ("P&A system") for the 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, and the Developmental Disabilities Assistance and Bill of Rights Act ("DDA"), sections 15041 through 15045 of title 42 of the United States Code. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); *see also* 42 CFR §§ 1386.19, .20 (defining "designated official" and requiring official to designate agency to be accountable for funds and conduct of P&A agency).

The PAIMI provides, in relevant part, that Advocacy, 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, the PAIMI provides that Advocacy 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 section 10805(a)(4)(B) includes "reports prepared by any staff of a facility rendering care and treatment [to the individual] . . . that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents[.]" *Id.* § 10806(b)(3)(A); *see also* 42 C.F.R. § 51.41(c) (addressing scope of right of access under PAIMI). Further, the PAIMI defines the term "facilities" and states that 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).

In this case, Advocacy states, and the information reflects, that one of the named inmates (“inmate No. 1”) suffered from mental illness, and that Advocacy received information that the named individual died while he was an inmate in a Texas Department of Criminal Justice prison. Advocacy explains that it intends to investigate this death for possible incidents of abuse or neglect of an individual with a mental illness as governed by PAIMI. Further, Advocacy asserts that the individual at issue does not have a legal guardian, conservator, or other legal representative. Additionally, Advocacy explains that “based on [its] experience investigating possible incidents of abuse and neglect, injury to and particularly the death of an individual with a disability in a prison raises a reasonable inference that abuse or neglect may have occurred.” 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).

Finally, Advocacy asserts that, pursuant to federal law, any state confidentiality laws shall not restrict Advocacy’s right of access to the requested records. In this regard, 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); *Iowa Protection and Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D.Iowa 2001). Cf. 42 USC § 10806(b)(2)(C). Thus, in this instance, even though the OIG claims exceptions to disclosure for the submitted investigation documents under sections 552.101 and 552.108 of the Government Code, all of the asserted claims for information related to inmate No. 1 are preempted by PAIMI. Accordingly, based on Advocacy’s representations, we determine that Advocacy has a right of access to the submitted information related to inmate No. 1 pursuant to subsection (a)(1)(A) of section 10805 of title 42 the United States Code, and the OIG must release the information at issue to the requestor.

With respect to the second inmate (“inmate No. 2”), Advocacy asserts that because the inmate was housed in a prison unit that provides mental health care and treatment to some of its inmates, and that research studies of have shown that a large percentage of the Texas jail population has been or is receiving mental health services, it is indisputable that inmate No. 2 had a mental illness for which he was being treated while in prison. The submitted investigation documents related to inmate No. 2, however, reflect that inmate No. 2 was, in fact, not diagnosed with a mental illness and was not receiving mental health treatment. Therefore, Advocacy has failed to demonstrate the applicability of subsection (a)(1)(A) of

section 10805 of title 42 the United States Code to the submitted information pertaining to inmate No. 2. Accordingly, Advocacy does not have a right of access to this information. Thus, we will consider the OIG's claimed exceptions with respect to the submitted investigation documents related to inmate No. 2.

Section 552.108(a)(1) excepts from disclosure "[i]nformation 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). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted investigation documents related to inmate No. 2 pertain to a pending criminal investigation. Based on this representation and our review of the submitted documents, we conclude that the release of this information would interfere with the detection, investigation, or prosecution of crime. *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).

However, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. *See* 531 S.W.2d at 186-87; Open Records Decision No. 127 (summarizing types of information considered to be basic information). Thus, with the exception of basic information, which you state you have released, the OIG may withhold the submitted investigation documents pertaining to inmate No. 2 under section 552.108(a)(1) of the Government Code.¹ We note that the OIG has the discretion to release all or part of this information that is not otherwise confidential by law. Gov't Code § 552.007.

In summary, the requestor has a right of access to the information pertaining to inmate No. 1 pursuant to subsection (a)(1)(A) of section 10805 of title 42 the United States Code. With the exception of basic information, the OIG may withhold the information pertaining to inmate No. 2 under section 552.108 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

¹ As our ruling is dispositive, we need address your remaining arguments against disclosure for this information.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

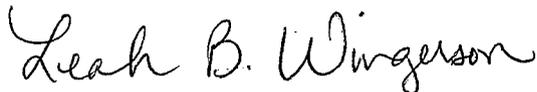
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 312790

Enc. Submitted documents

c: Ms. Beth Mitchell
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