ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2010

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2010-02086

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 369923 (PIR No. 09-26614).

The Office of the Attorney General (the "OAG") received a request for 1) records the Medicaid Fraud Control Unit (the "MFCU") prepared regarding its investigation into the death of a named person; 2) records evidencing the MFCU's certification, licensure, or audit of the Rosewood Nursing Home from May 23, 2008 to the date of the request; and 3) other records regarding the named person. The OAG released some information and asserts the remainder is excepted from public disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions the OAG claims and reviewed the submitted information. We have also received and considered the requestor's comments. *See id.* § 552.304 (interested party may submit written comments regarding availability of requested information).

First, the requestor asserts the OAG failed to comply with subsections 552.301(b) and (e) of the Government Code. Section 552.301(b) requires a governmental body to ask for a decision from this office and state the exceptions that apply within ten business days after it receives a written request. *Id.* § 552.301(b). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the

written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The OAG states it received the request for information on November 13, 2009. This office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Public Information Act (the "Act"). The OAG informs us it was closed November 25 - 27, 2009; therefore, these days were not business days for the purpose of calculating the Act's deadlines. Thus, the tenth and fifteenth business-day deadlines for the instant request were December 2 and 9, 2009, respectively. Because this office received the OAG's request for a decision with asserted exceptions and information required under section 552.301(e) on December 2 and 9, 2009, respectively, the OAG's submissions were timely and in compliance with subsections 552.301(b) and (e). Furthermore, contrary to the requestor's contention, by asserting all of the Act's exceptions, the OAG did comply with section 552.301(b).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. Federal and state statutes prohibit the disclosure of information concerning clients of a state plan for medical assistance, except for a purpose directly connected with the administration of the plan. *See* 42 U.S.C. § 1396a(a)(7); 42 C.F.R. § 431.301; Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 of the Human Resources Code provides:

> (a) Except for purposes directly connected with the administration of the [Department of Aging and Disability Services' (the "department")][1] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a). In Open Records Decision No. 584, this office concluded "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Open Records Decision No. 584 at 3 (1991). Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003.

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[1]*See* Act of June 10, 2003, 78th Leg., R.S., ch. 198, 2003 Tex. Gen. Laws 611, 641 (abolished Texas Department of Human Services); Gov't Code § 531.001(4) (established department).

The MFCU is charged by federal law to "conduct a Statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program," and to "review complaints alleging abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan . . . ." 42 C.F.R. § 1007.11. The OAG explains Medicaid is a medical assistance program administered by the Texas Health and Human Services Commission, which oversees the five state agencies comprising the Texas health and human services system, including the department. The MFCU states it obtained the individual client information to conduct investigations in accordance with its federal mandate. Thus, we conclude the information is subject to the confidentiality protection of section 12.003 of the Human Resources Code. *See* Hum. Res. Code § 21.012 (if governmental agency other than department obtains information concerning applicants for or recipients of department's assistance programs, then agency shall adopt rules to prevent disclosure of such information for purposes not directly connected with administration of assistance programs).

However, the requestor asserts a right of access to the information under federal law. The requestor is a representative of 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"), 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 C.F.R. §§ 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 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 Advocacy shall

> (4) . . . 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 [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 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); *see also* 42 C.F.R. § 51.41(c) (addressing P&A system's access to records under PAIMI). 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 –
>
> > (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[.]

42 U.S.C. § 15043(a)(2)(B), (I)(ii). The DDA Act states the term "record" includes

> (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[.]

Id. § 15043(c).

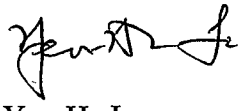
In this case, the records at issue are records from an investigation of abuse or neglect prepared by the MFCU, which is an agency charged with investigating allegations of abuse or neglect of patients in health care facilities receiving state Medicaid payments. 42 C.F.R. § 1007.11. Advocacy states the named individual had developmental disabilities. Advocacy received information the named individual died while a resident of the nursing home and has probable cause to believe the death was the result of abuse and neglect. *See* 42 C.F.R. § 51.2 (stating 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). Thus, Advocacy further explains that pursuant to its federal mandate, it initiated an investigation of this death. Finally, Advocacy asserts the nursing home is a facility operated by the department that provides care and treatment to persons with intellectual disabilities who receive Medicaid payments. We note Attorney General Opinion JC-0461 concluded that based on the plain language of federal statutes and regulations, the underlying purpose of the PAIMI and DDA Act, and court interpretations of these laws, a P&A system may have access to individuals with mental illness or developmental disabilities and their records irrespective of guardian consent. Attorney General Opinion JC-0461 (2002). Accordingly, Advocacy asserts 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 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 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 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). Similarly, Texas law states, "[n]otwithstanding other state law, [a 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, in this

instance, even though the OAG claims confidentiality under section 12.003 of the Human Resources Code, this claim is preempted by the PAIMI. We further note the PAIMI would also preempt the OAG's assertions under other state confidentiality law and section 552.108 of the Government Code. Therefore, based on Advocacy's representations, we determine, pursuant to section 10805(a)(4)(B) of title 42 the United States Code and the comparable provisions of the DDA Act, Advocacy has a right of access to the submitted information created by the MFCU. The OAG must release this information to the requestor. We note Advocacy acknowledges it must maintain the confidentiality of records which, under federal or state law, are required to be maintained in a confidential manner by a provider of mental health services. 42 U.S.C. § 10806(a).

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, 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,



Yen-Ha Le
Assistant Attorney General
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YHL/sdk

Ref: ID# 369923

Enc. Submitted documents

c: Requestor
(w/o enclosures)