ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2010

Ms. Nneka C. Egbuniwe
Deputy General Counsel
Parkland Health and Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2010-05712

Dear Ms. Egbuniwe:

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# 376979.

Dallas County Hospital District d/b/a Parkland Health and Hospital System (the "district") received a request for: 1) the entire clinical or medical record of a named deceased individual; 2) the entire jail record of the individual; 3) all investigative reports and supporting documentation pertaining to the individual's death; 4) district policies and procedures pertaining to inmate care and treatment; 5) any peer review committee documents pertaining to the individual's death; 6) information pertaining to district staff or employees who responded to the service call regarding the individual; 7) information relating to the training of staff or employees; 8) time logs of district staff or employees during the individual's incarceration; 9) documents evidencing agreements between the district and the Dallas County Sheriff's Office or Dallas County (collectively, the "county") for the provision or delivery of psychiatric, psychological, or mental health services to county inmates; and 10) documents evidencing agreements between the district and the county for the provision or delivery of medical, clinical, or other health-related service to county inmates.[1] You state

[1]We note the district received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify request).

the district released information responsive to items 1, 4, 6, 7, and 8.[2] You claim the submitted information is excepted from disclosure under section 552.101 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, 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 the district did not submit information responsive to items 9 and 10 of the request. You state the district submitted a representative sample of information, to the extent the district locates additional responsive information. *See id.* § 552.301(e)(1)(D) (governmental body must submit, in connection with request for attorney general decision, the requested information or representative samples thereof). In our opinion, however, the submitted information is not representative of documents evidencing agreements between the district and the county. Please be advised that this open records letter applies to only the types of information you have submitted for our review. Therefore, this opinion 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. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public). To the extent information responsive to items 9 and 10 of the request existed on the date the district received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* ORD 664.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, including the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

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[2]Advocacy states the district has withheld all requested documents. Whether the district actually provided any information responsive to items 1, 4, 6, 7, and 8 to Advocacy is a question of fact and this office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Thus, we assume the district released information responsive to items 1, 4, 6, 7, and 8. If not, the district must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). You state Exhibit D contains corrective action reports, a medication incident report, and supporting documentation maintained in an employee's personnel file. You further state these documents contain information relating to the identity, diagnosis, evaluation, and treatment of patients who are not the subject of the requestor's request. Based on your representations and our review, we agree the information we have marked in Exhibit D is subject to the MPA. However, we find you have failed to demonstrate a physician or someone under the supervision of a physician created the remaining information in Exhibit D, and we note some of the remaining information in Exhibit D does not pertain to the identity, diagnosis, evaluation, or treatment of a patient. Thus, we conclude you have failed to demonstrate the remaining information in Exhibit D is subject to the confidentiality provisions of the MPA.

Section 552.101 of the Government Code also encompasses section 241.152 of the Health and Safety Code, which states in relevant part:

> (a) Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative.

Health & Safety Code § 241.152(a). Section 241.151(2) defines "health care information" as "information . . . recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." *Id.* § 241.151(2). Although you also assert Exhibit D is excepted from disclosure under section 552.101 in conjunction with section 241.152(a), we note the remaining information in Exhibit D does not identify a patient. Accordingly, the remaining information in Exhibit D does not constitute "health care information." *See id.* Thus, no portion of the remaining information in Exhibit D is confidential pursuant to section 241.152. Consequently, the district may not withhold the remaining information in Exhibit D under section 552.101.

Section 552.101 of the Government Code also encompasses section 160.007 of the Occupations Code, which provides in part:

> (a) Except as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged.

Occ. Code § 160.007(a). Medical peer review is defined by the MPA to mean "the evaluation of medical and health care services, including evaluation of the qualifications and professional conduct of professional health care practitioners and of patient care provided by those practitioners." *Id.* § 151.002(a)(7). A medical peer review committee is "a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]" *Id.* § 151.002(a)(8).

Section 161.032 of the Health and Safety Code provides in part:

> (a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.
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> . . .
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> (c) Records, information, or reports of a medical committee, medical peer review committee, or compliance officer and records, information, or reports provided by a medical committee, medical peer review committee, or compliance officer to the governing body of a public hospital, hospital district, or hospital authority are not subject to disclosure under [the Act].
>
> . . .
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> (f) This section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility.

Health & Safety Code § 161.032(a), (c), (f). For purposes of this confidentiality provision, a "'medical committee' includes any committee, including a joint committee, of . . . a hospital [or] a medical organization [or] hospital district[.]" *Id.* § 161.031(a). Section 161.0315 provides in relevant part that "[t]he governing body of a hospital, medical organization [or] hospital district . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services[.]" *Id.* § 161.0315(a).

The precise scope of the "medical committee" provision has been the subject of a number of judicial decisions. *See, e.g., Memorial Hosp.—The Woodlands v. McCown*, 927 S.W.2d 1 (Tex. 1996); *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988); *Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1986). These cases establish that "documents generated by the committee in order to conduct open and thorough review" are confidential. This protection extends "to documents that have been prepared by or at the direction of the committee for committee purposes." *Jordan*, 701 S.W.2d at 647-48. Protection does not extend to documents "gratuitously submitted to a committee" or "created without committee impetus and purpose." *Id.* at 648; *see also* Open Records Decision No. 591 (1991) (construing, among other statutes, statutory predecessor to section 161.032).

The district's board of managers (the "board") is appointed by the Dallas County Commissioners Court with the responsibility of managing, controlling, and administering the district. You state the board provides authority to the medical advisory council to maintain, through the medical staff bylaws, a "procedure for making recommendations . . . concerning staff appointments and reappointments, as well as granting, reduction, suspension, and revocation of clinical privileges based on qualifications, experience, and current professional competence." You further state the documents in Exhibit B were obtained by district staff solely in support of and to verify information provided on a physician's application for appointment or reappointment to the district's medical staff. You state these documents were used by the district's credentials committee, medical advisory council, and the board in evaluating the qualifications of professional health care practitioners. You further state the information obtained in these documents was utilized in carrying out the deliberative, peer review, and medical committee activities of these committees. Based on your representations and our review, we agree Exhibit B consists of confidential records of a medical peer review committee under section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code.

Additionally, you assert Exhibit C is confidential pursuant to section 161.032(c) of the Health and Safety Code. You state one of the board's responsibilities is "[t]o establish, support, and oversee a system-wide performance improvement program." You inform us that, in furtherance of this duty, the board entrusts medical staff to establish and support committees and procedures to improve performance throughout the district. You state Exhibit C consists of "Patient Safety Net" reports ("PSNs") and supporting information. You further state PSNs are generated by nurses and other health care providers "whenever an untoward occurrence is observed by or reported to [district] staff." You explain the Quality Improvement Committee of the board reviews the PSNs and staff recommendations in order to prevent adverse events from recurring. Additionally, you state PSNs are not prepared in the regular course of business and are part of a "deliberative process of identifying incidents involving patient care, evaluating their causes and severity, and making recommendations on how to remedy the situation and reduce the likelihood of recurrence." *Cf. Texarkana Mem'l Hosp., Inc. v. Jones*, 551 S.W.2d 33, 35 (Tex. 1977) (defining records made or maintained in regular course of business). Based on your representations and our

review of Exhibit C, we find it consists of confidential records of a medical committee under section 161.032 of the Health and Safety Code.

We must now address the requestor's argument that, as a representative of Advocacy, 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. *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. §§ 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
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> > (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) in accordance with section 10806 of this title, have access to all records of
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> > (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;
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> > (B) any individual (including an individual who has died or whose whereabouts are unknown)
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> > > (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; and
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> (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
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> (i) such representative has been contacted by such system upon receipt of the name and address of such representative;
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> (ii) such system has offered assistance to such representative to resolve the situation; and
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> (iii) such representative has failed or refused to act on behalf of the individual[.]

Id. § 10805(a)(4)(B). 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 . . . 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 the term "may include, but need not be limited to, hospitals . . . jails and prisons." 42 U.S.C. § 10802(3).

In this case, the information reflects the named individual suffered from mental illness and that Advocacy received information that the named individual died while he was an inmate incarcerated in the county. 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 the individual at issue does not have a legal guardian, conservator, or other legal representative acting on his behalf with regard to the investigation of possible abuse and neglect and his death. Additionally, Advocacy states it has probable cause to believe the individual's death may have been the result of abuse and neglect. *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).

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 that state law must not diminish the required authority of a P&A system. *See* 45 C.F.R. § 1386.21(f); *see also Iowa Protection and Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D. Iowa 2001); *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 the 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); *cf.* 42 U.S.C. § 10806(b)(2)(C). Similarly, Texas law states, "[n]otwhithstanding other state law, [a P&A system] . . . is entitled to access to records relating to persons with mental illness to the extent authroized by federal law." Health & Safety Code § 615.002(a). Thus, PAIMI grants Advocacy access to "records" and to the extent state law provides for the confidentiality of "records" requested by Advocacy, its federal right of access under PAIMI preempts state law. *See* 42 C.F.R. § 51.41(c); *see also Equal Employment Opportunity Comm'n*, 905 F. Supp. at 382. Accordingly, we must first address whether the submitted information constitutes "records" of individuals with mental illness as defined by PAIMI.

Although the definition of "records" is not limited to the information specifically described in section 10806(b)(3)(A) of title 42 of the United States Code, we do not believe Congress intended for the definition to be so expansive as to grant a P&A system access to any information it deems necessary.[3] Such a reading of the statute would render it 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 PAIMI. *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 this analysis, we believe the information specifically described in section 10806(b)(3)(A) 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

[3]Use of the term "includes" in section 10806(b)(3)(A) of title 42 of the United States Code indicates the definition of "records" is not limited to the information specifically listed in that section. *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.

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 discussed, Exhibit B pertains to credentials of district physicians and Exhibit D pertains to employees of the district and the medical treatment of inmates of the county. We note a portion of Exhibit D appears to pertain to an individual diagnosed with a mental illness and constitutes a report prepared by district staff that describes an incident of possible abuse, neglect, or injury. Although the portion of Exhibit D pertaining to an individual diagnosed with mental illness constitutes a record under section 10806(b)(3)(A) of title 42 of the United States Code, section 10805(a)(4)(B) of title 42 of the United States Code only authorizes Advocacy access to records of an individual who is the subject of Advocacy's investigation of possible abuse or neglect. *See* 42 U.S.C. §§ 10805(a)(4)(B), 10806(b)(3)(A); *see also Gerard*, 274 F. Supp. 2d at 1079 (section 10805 of title 42 of the United State Code authorizes access to records of an individual with a mental illness if the individual is a client of the P&A system, not access to records of any patient with a mental illness). Further, we have no indication Exhibit B and the remaining portions of Exhibit D pertain to individuals diagnosed with mental illness. Accordingly, we find Advocacy does not have a right of access to Exhibits B and D under PAIMI. We therefore conclude the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code and the information we have marked in Exhibit D pursuant to the MPA.[4]

However, Exhibit C consists of information prepared by district staff that pertains to the individual who is the subject of Advocacy's request. Thus, in this instance, even though the district claims confidentiality under section 161.032 of the Health and Safety Code for this information, this claim is preempted by PAIMI. Accordingly, based on Advocacy's representations, we determine Advocacy has a right of access to Exhibit C pursuant to subsection (a)(1)(A) of section 10805 of title 42 the United States Code, and the district must release Exhibit C to the requestor.

In summary, the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 161.032 of the Health and Safety Code and section 160.007 of the Occupations Code. The district must withhold the information we have marked in Exhibit D pursuant to the MPA. The remaining information must be released to this requestor.[5]

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[4]As our ruling for Exhibit B is dispositive, we do not address the district's remaining arguments against disclosure of portions of Exhibit B.

[5]Because Advocacy has a federal statutory right of access to some of the information being released in this instance, the district must again seek a decision from this office if it receives a request for this same information from a different requestor.

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,

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 376979

Enc. Submitted documents

c: Requestor
(w/o enclosures)