



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2011

Mr. George E. Hyde
Mr. Ryan S. Henry
Ms. Erin A. Higginbotham
For the Parkland Health and Hospital System
Denton, Navarro, Rocha & Bernal
2517 North Main Avenue
San Antonio, Texas 78212

OR2011-16274

Dear Mr. Hyde, Mr. Henry, and Ms. Higginbotham:

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# 435343.

The Dallas County Hospital District d/b/a Parkland Health and Hospital System (the "district") received a request from Disability Rights Texas ("DRTX"), formerly Advocacy, Inc., for three categories of information pertaining to the mental health treatment and death of a named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim 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).

Initially, we note pages 288 through 291 of the submitted documents, which you have labeled Exhibit D, are not responsive to the request as they do not pertain to the three categories of requested information. We do not address information that is not responsive to the instant request and the district need not release such information.

Next, we note the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). In this instance, you state, and the submitted information reflects, the information at issue was collected, assembled, created, and maintained in the course of the district's investigation into the events relating to the named individual's death. Section 552.022(a)(1) makes this information expressly public unless it is confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you seek to withhold the information subject to section 552.022(a)(1) under sections 552.103 and 552.107 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 52.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information subject to section 552.022 under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of attorney-client privilege under rule 503 for the information subject to section 552.022. In addition, you claim some of this information is excepted from disclosure under section 552.101 of the Government Code. Because section 552.101 constitutes other law for purposes of section 552.022, we will address the applicability of this exception to the information at issue. Because information subject to section 552.022(a)(1) may be withheld under section 552.108, we will also consider your argument under this exception.

Although you assert the submitted investigation documents are excepted from disclosure under sections 552.101 and 552.108 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence, we note the requestor is a representative of DRTX, which may have a right of access to the requested information under federal law. DRTX 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 DRTX, 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 [P&A 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 DRTX shall

(4) in accordance with section 10806 of this title, have access to all records of—

(A) any individual who is a client of the [P&A 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; and

(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 [P&A 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—

- (i) such representative has been contacted by such system upon receipt of the name and address of such representative;
- (ii) such system has offered assistance to such representative to resolve the situation; and
- (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) “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); *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 DRTX received information that the named individual died while he was under district care. DRTX 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. 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, DRTX asserts pursuant to federal law, any state confidentiality laws shall not restrict DRTX’s right of access to the requested records. Additionally, DRTX 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 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); *Iowa Prot. & Advocacy Servs., Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D.

Iowa 2001); *cf.* 42 U.S.C. § 10806(b)(2)(C). 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, PAIMI grants DRTX access to “records” and to the extent state law provides for the confidentiality of “records” requested by DRTX, 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.¹ 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 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[.]”).

We note pages 1 through 88, 92 through 105, 107, 120, 125 through 132, 135 through 148, 162 through 165, 167 through 175, 191 through 193, 206 through 208, 212 through 216, 219 through 237, and 239 through 287 consist of information prepared by the district that describes an incident of possible abuse, neglect, or injury. Thus, in this instance, even though the district claims these documents are excepted from disclosure under sections 552.101 and 552.108 of the Government Code, and privileged under Texas Rule of Evidence 503 these claims are preempted by the PAIMI. Accordingly, based on DRTX’s representations, we determine DRTX has a right of access to the administrative investigation documents pursuant to subsections (a)(1)(A) and (a)(4)(B) of section 10805 of title 42 the United States Code, and the district must release this information to the requestor.

¹Use 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.

The remaining information consists of general policies and guidelines of the district, meeting minutes, general assessments of district procedures, and information pertaining to investigations into incidents of possible abuse, neglect, or injury of other individuals. We note section 10805(a)(4)(B) of title 42 of the United States Code only authorizes DRTX access to records of an individual who is the subject of DRTX'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). Accordingly, we find DRTX does not have a right of access to the remaining information, and we will address the district's arguments under sections 552.101 and 552.108 of the Government Code and Texas Rule of Evidence 503 for this information.

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, such as 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 Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code 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.

...

(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].

...

(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 is required to “‘establish, support, and oversee a system-wide performance improvement program’” according to the district’s bylaws. You further state “[i]n furtherance of this duty, the [b]oard maintains overall responsibility for the implementation and maintenance of Quality Assurance Committees.” You assert the information at issue constitutes documents that were “internally prepared in the course of the Quality Assurance Committee and [b]oard’s investigation and fact-gathering function in furtherance of its overall quality assurance duties.” Based on your representations and our review, we find the meeting minutes, general assessments of district procedures, and information pertaining to investigations into incidents of possible abuse, neglect, or injury of other individuals found on pages 89 through 91, 133 through 134, 166, 176 through 190, 194 through 211, and 238 consist 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.² However, we find the remaining information, which consists of general policies and guidelines of the district, was created or maintained in the regular course of the district’s business. Therefore, the remaining information may not be withheld under

²As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code or section 161.032 of the Health and Safety Code.

Section 552.101 of the Government Code also encompasses information protected by the MPA. Section 159.002 of the MPA provides in part the following:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

(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(a)-(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). We note none of the general policies and guidelines of the district constitute medical records or information obtained from medical records; thus, the district may not withhold any of the remaining information pursuant to the MPA.

You next argue the remaining information is excepted from public disclosure under section 576.005 of the Health and Safety Code. Section 552.101 of the Government Code also encompasses section 576.005, which provides that “[r]ecords of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential unless disclosure is permitted by other state law.” Health & Safety Code § 576.005. Upon review, we find you have failed to demonstrate how any of the general policies and guidelines constitute records of a mental health facility subject to section 576.005. Therefore, none of the remaining information may be withheld under section 552.101 on this basis.

You also contend the remaining information is confidential under section 611.002 of the Health and Safety Code. Section 552.101 of the Government Code also encompasses section 611.002, which is applicable to mental health records and provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Id. § 611.002(a)-(b); *see also id.* § 611.001 (defining “patient” and “professional”). Upon review, we find none of the general policies and guidelines consist of mental health records. Accordingly, the district may not withhold any of the remaining information under section 552.101 on the basis of section 611.002(a).

Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find the general policies and guidelines do not contain any information that is highly intimate or embarrassing. Thus, the district may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why 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). Section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. In this instance, you state, and provide documentation from the chief medical examiner of the Southwestern Institute of Forensic Sciences (the “institute”) stating, the information pertains to an ongoing death investigation being conducted by the institute. However, we note the institute is not a law enforcement agency. Accordingly, you have failed to show section 552.108(a)(1) applies to the remaining information. Therefore, the district may not withhold any of the remaining information under section 552.108(a)(1).

In summary, the district must withhold pages 89 through 91, 133 through 134, 166, 176 through 190, 194 through 211, and 238 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 remaining information must be released.³

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/agn

Ref: ID# 435343

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because DRTX 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.