ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 8, 2011

Sgt. Rocky Bright
Records & Sex Offender Compliance
Ector County Sheriff's Office
P.O. Box 2066
Odessa, Texas 79760

OR2011-18115

Dear Sgt. Bright:

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# 438324.

The Ector County Sheriff's Office (the "sheriff") received a request for (1) the entire clinical or medical record file pertaining to the medical and mental health evaluation, care, and treatment of a named inmate; (2) the entire jail record for the named inmate; (3) any and all polices, procedures, processes, directives, protocols, and guidelines in place during a specified time period pertaining to the use of force, mental health training, the provision of emergency medical and mental health services, and suicide; and (4) the names, credential and employment information, and training logs of the officers who responded to a service call on a specified date regarding the named inmate. You state the sheriff has released information responsive to item two. You claim the submitted information is 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, a portion of which is a representative sample.[1] We have also received and considered comments

[1]We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we must address the sheriff's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the 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. *See id.* § 552.301(e). As of the date of this letter, you have not submitted to this office a copy or representative sample of the information requested in item four. Consequently, we find the sheriff failed to comply with the requirements of section 552.301 for this portion of the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information at issue is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because you have not submitted any information responsive to item four to this office for our review, we have no basis for finding it confidential under section 552.101 of the Government Code. Thus, we have no choice but to order the sheriff to release the information responsive to item four in accordance with section 552.302 of the Government Code. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

Although you assert that the submitted information is excepted under sections 552.101 and 552.108 of the Government Code, we note that the requestor is a representative of Disability Rights Texas ("DRT"), formerly know as Advocacy, Inc. DRT 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 (the "PAIMI Act"), 42 U.S.C. §§ 10801-10851, the Developmental Disabilities Assistance and Bill of Rights Act (the "DDA Act"), 42 U.S.C. §§ 15041-15045, and the Protection and Advocacy of Individual Rights Act (the "PAIR Act"), 29 U.S.C. § 794e. *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), .22 (requiring P&A agency to have a governing authority responsible for control).

The PAIMI Act provides, in relevant part, that DRT, 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 Act provides DRT 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 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); *see also* 42 C.F.R. § 51.41(c) (addressing P&A system's access to records under PAIMI). Further, the PAIMI Act defines the term "facilities" and states 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). 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[.]

Id. § 15043(a)(2)(B), (I)(ii). The DDA Act states 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). The PAIR Act provides, in relevant part, that a P&A system will "have the same . . . access to records and program income, as are set forth in [the DDA Act]." 29 U.S.C. § 794e(f)(2).

In this case, the requestor is investigating the death of an individual while in custody of the sheriff. DRT explains it intends to investigate this death for possible incidents of abuse or neglect of an individual with a developmental disability as defined by federal law. *See* 42 U.S.C. § 15002(8) (defining term "developmental disability"); *see id.* § 10805(a)(4). DRT asserts this individual 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, DRT 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 the PAIMI Act 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, the PAIMI Act and the DDA Act grant DRT access to "records," and to the extent state law provides for the confidentiality of "records" requested by DRT, its federal rights of access under the PAIMI Act and the DDA Act preempt 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 address whether the submitted information constitutes "records" of an individual with a mental illness as defined by the PAIMI Act or a disability as defined by the DDA Act.

Although the definition of "records" is not limited to the information specifically described in sections 10806(b)(3)(A) and 15043(c) of title 42 of the United States Code, we do not believe Congress intended for the definitions to be so expansive as to grant a P&A system

access to any information it deems necessary.[2] Such a reading of the statute 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 (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 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[.]").

We note some of the submitted information consists of medical records of the named individual that were received by the sheriff's staff. Thus, in this instance, even though the sheriff claims these documents are excepted from disclosure under section 552.101 of the Government Code, these claims are preempted by the PAIMI and the DDA. Accordingly, based on DRT's representations, we determine that DRT has a right of access to the medical records pursuant to subsections (a)(1)(A) and (a)(4)(B) of section 10805 of title 42 the United States Code and section 15043 of title 42 the United States Code. Thus, the sheriff must release this information to the requestor.

The remaining information consists of the internal polices and procedures of the sheriff. We have no indication the remaining information pertains to an individual diagnosed with a mental illness or a developmental disability. Accordingly, we find DRT does not have a right of access to the remaining information under the PAIMI Act or the DDA Act, and we will address the sheriff's claimed exceptions for this information.

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." Gov't Code § 552.101. This exception encompasses information protected by other statutes, such as section 143.089 of the Local Government Code. Section 143.089 provides for the existence of two different types of personnel files relating to a police officer: one that must be maintained as part of the officer's civil service file and another the police department may

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[2]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.

maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g). You claim some of the remaining information is excepted from disclosure under section 143.089(g). However, we note the provisions of chapter 143 of the Local Government Code only apply to civil service cities. In this instance, the information at issue is held by the county sheriff and not by a civil service city. Accordingly, section 143.089 is inapplicable to the remaining information.

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state that, when an inmate has a disciplinary problem, release of the submitted policies would result in an inmate knowing the manner in which an officer must respond. As such, you assert revealing these policies would interfere with the operation and security of the officers in the detention facility. Upon our review, we determine the sheriff may withhold portions of the submitted policies, which we have marked, under section 552.108(b)(1) of the Government Code. However, we find the sheriff has failed to demonstrate how the remaining information would interfere with law enforcement or crime prevention; therefore, the sheriff may not withhold the remaining information on this basis.

In summary, the sheriff may withhold the information we have marked under section 552.108(b)(1) of the Government Code. The sheriff must release the remaining information to the requestor.[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,

Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 438324

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[3]We note the information being released contains confidential information to which the requestor has a right of access. Thus, if the sheriff receives another request for this particular information from a different requestor, then the sheriff should again seek a decision from this office.