



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2012

Mr. Michael M. Kelly
Assistant Criminal District Attorney
Victoria County
205 North Bridge Street, Suite 301
Victoria, Texas 77901

OR2012-04343

Dear Mr. Kelly:

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# 448745.

The Victoria County Sheriff’s Office (the “sheriff’s office”) received a request for a copy of a named individual’s medical records and any documents evidencing two specified agreements between the sheriff’s office and third party providers. You indicate that the sheriff’s office does not possess some of the requested information.¹ You inform us that the sheriff’s office will release the information evidencing the two specified agreements. We understand you to claim the submitted information is excepted from disclosure under section 552.108 of the Government Code.² We have considered the exception you claim and reviewed the submitted information. We have also received comments submitted by the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you generally raise sections 552.101 through 552.147 of the Government Code as exceptions to disclosure, you have not provided any arguments under any of the remaining exceptions; therefore, we assume you no longer assert the remaining exceptions. *See* Gov’t Code §§ 552.301, .302.

Initially, we note that in comments to this office, the requestor informs us that she does not seek the information submitted as Appendix D. Accordingly, we have marked this information as not responsive to the present request for information. Furthermore, we note some of the information submitted as Appendix E, which we have marked, is not responsive to the request because it does not consist of medical records. This decision does not address the public availability of the non-responsive information and that information need not be released in response to the present request.

Although you assert the responsive submitted information is excepted under section 552.108 of the Government Code, we note the requestor is a representative of Disability Rights Texas (“DRTX”), formerly known as Advocacy, Inc., 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 (the “PAIMI”), 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 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) . . . 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 [P&A] system to have such access[.]

Id. § 10805(a)(4)(A). The term “records” as used in the above-quoted provision

includes reports prepared by any staff of a facility rendering care and treatment 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). Additionally, the federal regulations promulgated under the PAIMI address the P&A system's right of access and provide that the term "records" includes "[i]nformation and individual records, obtained in the course of providing intake, assessment, evaluation, supportive and other services, including medical records, . . . and reports prepared or received by a member of the staff of a facility . . . rendering care or treatment." 42 C.F.R. § 51.41(c)(1). Further, the PAIMI defines the term "facilities" and states the term "may include . . . hospitals, . . . 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 [P&A] system or if there is probable cause to believe that the incidents occurred;

...

(I) have access to all records of—

(i) any individual with a developmental disability 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 [P&A] system to have such access[.]

...

(J)(i) have access to the records of individuals described in subparagraphs (B) and (I), and other records that are relevant to conducting an investigation, under the circumstances described in those subparagraphs, not later than 3 business days after the [P&A] system makes a written request for the records involved[.]

Id. § 15043(a)(2)(B), (I), (J)(i). 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 . . . as are set forth in [the DDA ACT].” 29 U.S.C. § 794e(f)(2).

In this instance, the information at issue reflects the named individual has a mental illness and that DRTX has learned of possible incidents of abuse and neglect of this individual while incarcerated by the sheriff’s office. The requestor explains that DRTX intends to investigate the provision of medical and mental health services to this individual for possible incidents of abuse or neglect of an individual with a mental illness as governed by the PAIMI. Additionally, the requestor explains that the legal guardian of the named individual has provided DRTX with consent to obtain the information at issue. 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 the 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).

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 DRTX access to “records,” and, to the extent state law provides for the confidentiality of “records” requested by DRTX, 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 information at issue 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.³ 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. Prot. & 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 system] ‘shall have access’ under § 10805[.]”).

We note the information at issue consists of records related to medical treatment provided to the named individual in a facility as defined by the PAIMI. Thus, in this instance, even though the sheriff's office claims this information is excepted from disclosure under section 552.108 of the Government Code, this claim is preempted by the PAIMI and the DDA. Accordingly, based on the requestor's representations, we determine that DRTX has a right of access to the information at issue pursuant to subsections (a)(1)(A) and (a)(4)(A) of section 10805 of title 42 the United States Code and subsections (a)(2)(B), (I), and (J)(i) of section 15043 of title 42 the United States Code. Thus, the sheriff's office must release the submitted responsive information to this requestor.⁴

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.

³Use 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.

⁴As our ruling is dispositive, we need not address the requestor's remaining comments. Furthermore, because the requestor has a right of access under subsections (a)(1)(A) and (a)(4)(A) of section 10805 of title 42 the United States Code and subsections (a)(2)(B), (I), and (J)(i) of section 15043 of title 42 the United States Code to the information being released, if the sheriff's office receives another request for this information from a different requestor, then the sheriff's office should again seek a decision from this office.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 448745

Enc. Submitted documents

c: Requestor
(w/o enclosures)