



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

February 4, 2013

Mr. Grant D. Blaies  
For the Grayson County Sheriff's Office  
Blaies & Hightower, L.L.P.  
777 Main Street, Suite 1900  
Fort Worth, Texas 76102

OR2013-01989

Dear Mr. Blaies:

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# 477954.

The Grayson County Sheriff's Office (the "sheriff's office"), which you represent, received a request for six categories of information pertaining to the death of a named individual, including medical records, detention or incarceration records, specified investigative reports, specified policies and procedures in effect during a specified period of time, and information pertaining to the officer involved in transporting the named individual. You state you do not have information responsive to a portion of the request.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments received from the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note Exhibit G consists of a completed investigation subject to section 552.022(a)(1) of the Government Code, and Exhibit J includes court-filed documents

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

subject to section 552.022(a)(17). Section 552.022(a)(1) provides for required disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is made confidential under the Act or “other law” or is excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record,” unless the information is made confidential under the Act or other law. *Id.* § 552.022(a)(17). Although you seek to withhold the marked court-filed documents under sections 552.103 and 552.108 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See 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 § 552.103); 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.108 do not make information confidential for the purposes of section 552.022(a)(17). Therefore, the sheriff’s office may not withhold the marked court-filed documents under section 552.103 or section 552.108. You also raise sections 552.103 and 552.108 for the completed investigation. As noted above, section 552.103 does not make information confidential under the Act. Therefore, the sheriff’s office may not withhold the completed investigation under section 552.103. However, section 552.022(a)(1) states information subject to that section may be withheld under section 552.108. Therefore, we will address whether the completed investigation may be withheld under section 552.108. Additionally, you raise section 552.101 of the Government Code for the information subject to section 552.022. Further, we note the court-filed documents contain information subject to section 552.130 of the Government Code. Because sections 552.101 and 552.130 make information confidential under the Act, we will address the applicability of sections 552.101 and 552.130 to the information subject to section 552.022. We will also address your claims for the information not subject to section 552.022.

Although you assert the submitted information is excepted under sections 552.101, 552.103, and 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 (“PAIMI Act”), 42 U.S.C. §§ 10801-10851, the Developmental Disabilities Assistance and Bill of Rights Act (“DDA Act”), 42 U.S.C. §§ 15041-15045, and the Protection and Advocacy of Individual Rights Act (“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, 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—

...

(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, PAIMI 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, 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).

The requestor states the deceased individual suffered from a disability and DRTX received information this individual died while he was under the care and the custody of the sheriff’s office. DRTX explains it intends to investigate this death for possible incidents of abuse or neglect of an individual with developmental disability as defined by federal law. *See* 42 USC § 15002(8) (defining term “developmental disability”); *see id.* § 10805(a)(4). DRTX 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. 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). 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 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]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 and the DDA grant 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 and the DDA 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 address whether the submitted information constitutes “records” of an individual with a disability as defined by the DDA and mental illness as defined by PAIMI.

Although the definition of “records” is not limited to 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 and all information it deems necessary to conduct an investigation.<sup>2</sup> Such a reading of the statutes 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).

As you acknowledge, the information in Exhibit G pertains to an administrative investigation of the named individual's death. We find this information consists of a report prepared by the sheriff's office that describes an incident of possible abuse, neglect, or injury. Thus, in this instance, even though the sheriff's office claims these documents are excepted from disclosure under sections 552.101 and 552.108 these claims are preempted by the PAIMI and the DDA. Accordingly, based on DRTX's representations, we determine DRTX has a right of access to the administrative investigation documents in Exhibit G 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's office must release Exhibit G to the requestor.

The remaining information in Exhibits H through J consists of internal policies and procedures of the sheriff's office, information pertaining to the certification and training of a police officer, or information being used for law enforcement purposes. Upon review, we conclude DRTX has failed to demonstrate the applicability of section 10806 of title 42 of the United States Code or section 15043 of title 42 of the United States Code to this information. Accordingly, DRTX does not have a right of access to this information, and we will address the sheriff's office's claimed exceptions for this information.

Next, we will address your claims for the remaining information in Exhibits H through J not subject to section 552.022. Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

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<sup>2</sup>Use of the term "includes" in sections 10806(b)(3)(A) and 15043(c) of title 42 of the United States Code indicates that the definitions of "records" are not limited to the information specifically listed in those sections. *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.

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." See Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See *id.* In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing litigation is reasonably anticipated by representing the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. See ORD 638 at 4.

You inform us, and provide documentation showing, prior to the sheriff's office's receipt of this request for information, the sheriff's office received a letter from the an attorney representing the family of the named individual regarding any and all claims arising out of the death of the named individual. You represent the letter meets the requirements under the TTCA. You contend the remaining information in Exhibits H, I, and J are related to the subject matter of the reasonably anticipated litigation. Based on your representations and our review, we find the information at issue is related to litigation the sheriff's office anticipated on the date of its receipt of the request for information. Therefore, we conclude, with the

exception of the court-filed documents we have marked in Exhibit J, the sheriff's office may withhold the remaining information in Exhibits H, I, and J under section 552.103 of the Government Code.<sup>3</sup>

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next, we will address your arguments for the court-filed documents in Exhibit J. 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 laws that make criminal history record information ("CHRI") confidential. CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for criminal justice purposes. *See id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we find you have failed to demonstrate how the marked court-filed documents constitute CHRI for the purposes of chapter 411, and thus, none of the court-filed documents may be withheld under section 552.101 in conjunction with chapter 411 of the Government Code.

We note the court-filed documents in Exhibit J contain information subject to section 552.130 of the Government Code. Section 552.130 of the Government Code

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

provides information relating to a motor vehicle operator's license, driver's license, and motor vehicle title or registration issued by a Texas agency, or an agency of another state or country, is excepted from public release. See Gov't Code § 552.130(a)(1)-(2). We note the purpose of section 552.130 is to protect the privacy interests of individuals. Because the right of privacy lapses at death, motor vehicle record information that pertains solely to a deceased individual may not be withheld under section 552.130. See *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); see also *Justice v. Belo Broad. Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979); Attorney General Opinions JM-229 (1984), H-917 (1976); Open Records Decision No. 272 at 1 (1981). The marked court-filed documents contain information subject to section 552.130. However, we note some of the motor vehicle record information we have marked relates to a vehicle owned by the named individual, who is deceased. Accordingly, information pertaining to this vehicle may only be withheld under section 552.130 if a living person owns an interest in the vehicle at issue. If no living person owns an interest in the vehicle, then the information relating to that vehicle is not excepted from disclosure and must be released. In either case, the sheriff's office must withhold the remaining marked information pertaining to living individuals under section 552.130.

In summary, with the exception of the information subject to section 552.022(a)(17), which we have marked, the sheriff's office may withhold the information in Exhibits H, I, and J under section 552.103. To the extent a living person owns an interest in the motor vehicle record information we have marked in the court-filed documents, the sheriff's office must withhold the marked information under section 552.130. The sheriff's office must withhold the remaining marked information pertaining to living individuals under section 552.130. The remaining information must be released to the requestor.<sup>4</sup>

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.

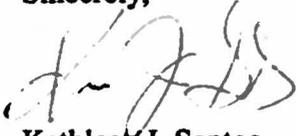
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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

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<sup>4</sup>We note the requestor has a right of access in this instance to information the sheriff's office would be required to withhold from the general public. Should the sheriff's office receive another request for this same information from a different requestor, the sheriff's office should resubmit this information and request another ruling. See Gov't Code §§ 552.301(a), .302. We note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision under the Act. See *id.* § 552.147(b).

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,



**Kathleen J. Santos**  
**Assistant Attorney General**  
**Open Records Division**

KJS/dls

Ref: ID# 477954

Enc. Submitted documents

c: Requestor  
(w/o enclosures)