February 25, 2015

Ms. Michele Freeland
Legal Assistant
Office of General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2015-03728

Dear Ms. Freeland:

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# 554859 (DPS PIR No. 14-5141).

The Texas Department of Public Safety (the "department") received a request for information related to a specified incident. You state the department has released the basic information pertaining to the submitted report. *See* Gov't Code § 552.108(c) (basic information about an arrest, arrested person, or crime cannot be withheld under section 552.108). You claim the remaining requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.[1]

Section 552.108(a)(1) 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 . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" *Id.* § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A);

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

see also Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). You state the information you have marked relates to an ongoing criminal investigation. Based on this representation, we find the release of the information at issue would interfere with the detection, investigation, and prosecution of a crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, the department may generally withhold the submitted information under section 552.108(a)(1) of the Government Code.

However, we note the requestor is a representative of Disability Rights Texas ("DRTX"), 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), 51.22 (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–
>
> > (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).

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 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 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 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 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

[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.

clear that the definition of 'records' in § 10806 controls the types of records to which [the P&A system] 'shall have access' under § 10805[.]").

The submitted information consists of a criminal law enforcement investigation that is being utilized for law enforcement purposes. We note this type of information is not among the information specifically listed as a "record" in sections 10806(b)(3)(A) and 15043(c). Furthermore, we find the submitted information is not the type of information to which Congress intended to grant a P&A system access. Consequently, we find DRTX does not have a right of access to the submitted information under either the PAIMI or the DDA Act. Accordingly, the department may withhold the submitted information under section 552.108(a)(1) of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 554859

Enc. Submitted documents

c: Requestor
(w/o enclosures)