



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 26, 2016

Ms. Andrea D. Russell
Counsel for the City of Burkburnett
Taylor Olson Adkins Sralla Elam, L.L.P.
6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2016-16809

Dear Ms. Russell:

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# 618026.

The City of Burkburnett (the "city"), which you represent, received two requests for information pertaining to the death of a named individual. The second requestor also seeks the city's police department's protocols pertaining to mental health screenings, suicide prevention, and medication administration for new inmates.¹ You state you have released some information to the requestors. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the first requestor's contention the city did not comply with the procedural requirements of the Act. The first requestor asserts he was not timely notified of the city's request for a ruling from this office as required by section 552.301(d) of the Government Code. Pursuant to section 552.301(d), a governmental body must provide the

¹We note the city received clarification from one of the requestors regarding her request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. *Id.* § 552.301(d). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public. *Id.* § 552.302. The city states, and the first requestor confirms, the city received the instant request for information on April 14, 2016. The city does not inform us it was closed for business on any of the days at issue. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the ten-business-day deadline to provide information to the requestor pursuant to section 552.301(d) was April 28, 2016. We note the city's request for a ruling to this office was postmarked April 28, 2016. The request for a ruling indicates the first requestor was copied on the correspondence. *See id.* § 552.308(a) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the city complied with the procedural requirements mandated by subsection 552.301(d) of the Government Code.

Although you assert a portion of the submitted information is excepted under sections 552.101 and 552.130 of the Government Code, we note the first 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 ("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—

(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 [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, 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—

(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)(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, 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 first requestor states the deceased individual suffered from a disability and DRTX received information this individual died while he was an inmate in the custody of the city. 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 U.S.C. § 15002(8) (defining term “developmental disability”); *see id.* § 10805(a)(4). DRTX indicates 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, 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 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.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. 67, 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 Congress meant more than it said in enacting the PAIMI Act and the DDA Act. *See Kofa v. INS*, 60 F.3d 084 (4th Cir. 1995) (stating 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.3d 9 (D.D.C. 1998) (stating 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 some of the submitted information pertains to an administrative investigation of the named individual’s death. We find this information consists of a report prepared by the city that describes an incident of possible abuse, neglect, or injury. Thus, in this instance, even though the city claims these documents are excepted from disclosure under sections 552.101 and 552.130 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 we have marked 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 city must release this information to the first requestor.

The remaining information is related to criminal law enforcement and is 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 city’s claimed exceptions for this information.

²Use 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.

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 the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Furthermore, in considering whether a public citizen’s date of birth is private, the Third Court of Appeals looked to the supreme court’s rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees’ dates of birth are private under section 552.102 of the Government Code because the employees’ privacy interest substantially outweighed the negligible public interest in disclosure.³ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens’ dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Further, because “the right of privacy is purely personal[,]” that right “terminates upon the death of the person whose privacy is invaded[.]” *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); see also *Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d); see Attorney General Opinions JM-229 (1984) (“the right of privacy lapses upon death”), H-917 (1976) (“We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death.”); Open Records Decision No. 272 (1981) (the right of privacy is personal and lapses upon death). Thus, information pertaining solely to a deceased individual may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, except for the information we have marked for release, the city must withhold the information you have marked, and the additional information we have marked to withhold, under section 552.101 of the Government Code in conjunction with common-law privacy. Additionally, we agree some of the information in the submitted audio and video recordings satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. We note the audio

³Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a).

portions of the video recordings are intertwined with the video portions of the recordings. You state the city does not have the technological capability to redact the information at issue contained on the submitted video recordings. Therefore, we conclude the city must withhold the video recordings we have indicated in their entireties under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Open Records Decision No. 364 (1983). However, because the city had the ability to copy the submitted audio recordings in order to submit the requested information for our review, we believe the city has the capacity to produce a copy of only the non-confidential portions of the audio recordings. Therefore, the city must withhold the information in the audio recordings we have indicated under section 552.101 of the Government Code in conjunction with common-law privacy. *See* ORD 364. However, we find the remaining information at issue either relates to a deceased individual or is not highly intimate or embarrassing and of no legitimate public concern. Therefore, the city may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492).

This office has applied privacy to protect certain information about incarcerated individuals. *See* Open Records Decision Nos. 430 (1985), 428 (1985), 185 (1978). Citing *State v. Ellefson*, 224 S.E.2d 666 (S.C. 1976) as authority, this office held that those individuals who correspond with inmates possess a “first amendment right . . . to maintain communication with [the inmate] free of the threat of public exposure;” and that this right would be violated by the release of information that identifies those correspondents, because such a release would discourage correspondence. ORD 185. The information at issue in Open Records Decision No. 185 was the identities of individuals who had corresponded with inmates, and our office found that “the public’s right to obtain an inmate’s correspondence list is not sufficient to overcome the first amendment right of the inmate’s correspondents to maintain communication with him free of the threat of public exposure.” ORD 185. Implicit in this holding is the fact that an individual’s association with an inmate may be intimate or embarrassing. In Open Records Decision Nos. 428 and 430, our office determined that inmate visitor and mail logs which identify inmates and those who choose to visit or correspond with inmates are protected by constitutional privacy because people who

correspond with inmates have a First Amendment right to do so that would be threatened if their names were released. ORDs 428, 430. We have determined the same principles apply to an inmate's recorded conversations from a telephone at a jail. Further, we recognized that inmates had a constitutional right to visit with outsiders and could also be threatened if their names were released. *See also* ORD 185. The rights of those individuals to anonymity was found to outweigh the public's interest in this information. *Id.*; *see* ORD 430 (list of inmate visitors protected by constitutional privacy of both inmate and visitors). As noted above, the right to privacy is a personal right that lapses at death and therefore may not be asserted solely on behalf of a deceased individual. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. However, the United States Supreme Court has determined that surviving family members can have a privacy interest in information relating to their deceased relatives. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). In this instance, the remaining information contains an audio recording and video recordings of an inmate's telephone conversations. Although the inmate at issue is deceased and his privacy rights lapsed at death, the separate privacy interests of the individuals who associate with him are protected by constitutional privacy. We note the audio portions of the video recordings are intertwined with the video portions of the recordings. As previously noted, you state the city lacks the technological capability to redact the confidential information from the video recordings at issue. Upon review, we find this information is confidential under constitutional privacy. Accordingly, the city must withhold the audio and video recordings we have indicated in their entireties under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. You also seek to withhold some of the submitted photographs to protect the deceased's family members' rights to privacy. However, upon review, we find the information at issue either does not fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy, or the public interest in the information at issue outweighs any remaining privacy interests.

Section 552.1175 of the Government Code protects the home address, home telephone number, emergency contact information, date of birth, social security number, and family member information of certain individuals, when that information is held by a governmental body in a non-employment capacity and the individual elects to keep the information confidential.⁴ Gov't Code § 552.1175. Section 552.1175 applies, in part, to "peace officers as defined by Article 2.12, Code of Criminal Procedure[.]" *Id.* § 552.1175(a)(1). Upon review, we find some of the submitted recordings contains information subject to section 552.1175. We note the audio portions of the video recordings are intertwined with the video portions of the recordings. As previously noted, you state the city lacks the technological capability to redact the confidential information from the submitted video recordings. Accordingly, to the extent the information we have indicated relates to an individual who is currently licensed as a peace officer, who elects to restrict access to the

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information in accordance with section 552.1175(b), the city must withhold the video recordings we have indicated in their entireties under section 552.1175 of the Government Code. *See* ORD 364.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130. 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 deceased individuals may not be withheld under section 552.130. *See Moore*, 589 S.W.2d at 491; *see also* Attorney General Opinions JM-229, H-917; ORD 272 at 1. Upon review, we find some of the information you have marked, which we have marked for release, pertains solely to an individual who is deceased. Accordingly, except for the information we have marked for release, the city must withhold under section 552.130 of the Government Code the motor vehicle record information you marked, and the additional information we have marked to withhold. Additionally, we agree some of the submitted audio and video recordings contain information subject to section 552.130. We note the audio portions of the video recordings are intertwined with the video portions of the recordings. As previously noted, you state the city does not have the technological capability to redact the motor vehicle record information contained on the submitted video recordings. Therefore, we conclude the city must withhold the video recordings we have indicated in their entireties under section 552.130 of the Government Code. *See* ORD 364. However, because the city had the ability to copy the submitted audio recordings in order to submit the requested information for our review, we believe the city has the capacity to produce a copy of only the non-confidential portions of the recording. Therefore, the city must withhold the audible motor vehicle record information in the audio recordings you have indicated, and the additional information in the audio recordings we have indicated, under section 552.130 of the Government Code. *See id.*

In summary, the city must release to the first requestor the information we have marked 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. Except for the information we have marked for release, the city must withhold the information you have marked, and the additional information we have marked to withhold, under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the video recordings we have indicated in their entireties under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the audio and video recordings we have indicated in their entireties under section 552.101 of the Government Code in conjunction with the constitutional right to privacy. To the extent the information we have indicated relates to an individual who is currently licensed as a peace officer, who elects to restrict access to the information in accordance with section 552.1175(b), the city must withhold the video recordings we have indicated in their entireties under section 552.1175 of the Government Code. Except for the information we have marked for release, the city must withhold under section 552.130 of the Government Code the motor vehicle record information you marked and indicated, and the additional information we have marked and indicated to withhold. The city must withhold the video

recordings we have indicated in their entirety under section 552.130 of the Government Code. The city must release the remaining information.

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,

A handwritten signature in black ink, appearing to read 'Cristian Rosas-Grillet', with a stylized flourish at the end.

Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/bw

Ref: ID# 618026

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)