Confidentiality and Where to Find it

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Confidentiality Questions From 2024

Question:

We've recently started getting discovery demands from our PD in Article 10 cases for relevant caseworker emails. Apparently they attended a training where they were advised to start doing so. I don't find anything that protects such emails from being discoverable as relevant records under FCA 1038 (except those protected by the attorney-client privilege). Has anyone else been dealing with similar requests and how have they been handling them?

One major problem we have regards how to actually process the demands. Emails are not placed into Connections with the Progress Notes, and searches for relevant emails are complicated by the fact that our County's standing practice has been for caseworkers not to include full names – at least not in the Subject line – out of confidentiality concerns, along with a mistaken prior belief that emails were not part of the case record and *wouldn't* be discoverable.

Answer:

As a general proposition, for any type of DSS case, information received related to a case, no matter what form it is received, is part of the record, and may or may not be discoverable according to the particular law that relates to the particular type of record. Emails are no exception. A factor to consider here is that when a caseworker receives information on a case, they have a general requirement to make a progress note about that information. For example in a CPS case, 18 NYCRR 428.5 (Progress notes) requires that among other things, the progress notes must include:

- descriptions of contacts with children and parent(s) receiving services
- descriptions of collateral contacts and other activities relating to the collecting of information needed to formulate an assessment and/or assist with making a determination regarding the report of abuse or maltreatment
- descriptions of family and collateral contacts and other activities relating to the provision of a family assessment response; provided, however, the name or other information identifying the reporter and/or the source of a report of suspected child abuse or maltreatment, as well as the agency, institution, organization, and/or program with which such person(s) is associated, must be recorded in the manner specified by OCFS;

- referrals and communications with other service providers involved in the case
- referrals and communications with the local probation department regarding a child in the case;
- description of contacts with educational/vocational personnel on behalf of the child

This is just a partial list. The Child Protective Services Manual (Chapter 6—Section I—Page | I-2))CPS investigation progress notes) says that, among other things, progress notes describe all communications and interactions with the subject, children, other persons named in the report, source, and collateral contacts, and describe any other activities undertaken to collect information needed to formulate an assessment or make a determination regarding the report of abuse or maltreatment.

Assuming that the progress notes describe all of the information in emails received by the caseworker, the issues are then about whether or not the information in the progress notes is not discoverable (for example if it describes referral source identity), and then whether or not the progress note renders the email that the progress note documents as being redundant and perhaps not disclosable. A case, D.M. v. J.E.M. 23 Misc3d 584 (Family Court, Orange County, 2009) noted that other case law has upheld compelling parties to disclose records, including e-mails, in connection with litigation if that may result in producing relevant and material evidence for use at trial in the absence of a demonstration that prejudice or violation of some other right such as the attorney/client privilege will result.

Question:

I have a FOIL request from the attorney for a child and her parents requesting CPS records from our CPS investigation of a daycare worker where the child was allegedly injured. The investigation is still open. I know if it's unfounded, I do not have to turn the records over (this same attorney sued us last year of the same issue and we won).

However, with the case still open (likely to be unfounded) and the response deadline upcoming, I am unsure if the records need to be turned over as the parents and the child are "persons named in the report."

Answer:

First, a FOIL request is never the proper way to obtain CPS records.

Second, is it safe to assume that the “attorney for a child and her parents” is a personal injury or other type of attorney who is not an “attorney for the child” such as we would find appointed to represent the child under the Family court Act? If that assumption is correct, there is no exception for this attorney to obtain these records directly- they may only be obtained consistent with SSL 422.

Pursuant to SSL 422, there are only a couple of ways that they attorney could eventually obtain records. The first would be under the exception in SSL 422(4)(A)(d), which permits disclosure to an "other person named in the report." That would include any child named in the report. 18 NYCRR 432.1(e) has this definition:

> (e) *Other person named in the report* shall mean and be limited to the following persons who are named in a report of child abuse or maltreatment other than the subject of the report: any child and/or children who are named in a report made to the State Central Register of Child Abuse and Maltreatment and the parent, guardian or other person legally responsible for such child(ren) which parent, guardian or other person legally responsible for such child(ren) have not been named in the report as the person allegedly responsible for causing injury, abuse or maltreatment to such child(ren) or as allegedly allowing such injury, abuse or maltreatment to be inflicted on such child(ren).

So, the child and their parents can obtain the records, and provide them to their attorney. What is always galling to the attorney is that they can't get the records directly, since you can't release CPS records pursuant to a release, authorization, etc., from someone who can get them to a third party.

The second way would be if the case was in litigation and the attorney made a motion, on notice to among others, your DSS for the production of the records. Then it would be question of whether the court would find the records are necessary to determine an issue before the court, and make whatever order that might permit attorney to utilize them.

It is always a problematic issue when you have a CPS case that has not been determined yet and it looks like it is going to be unfounded, but hasn't been yet. Those records are still disclosable- Chapter 13, Section A, at page A-2 of the Child Protective Services Manual says:

> While the general rule is that CPS records are confidential, Section 422(4)(A) of the SSL sets forth specific exceptions to the confidentiality standard. **These exceptions cover individuals and/or agencies who may be entitled to confidential information related to indicated reports or reports currently under investigation**, and the statute describes the circumstances under which different persons and agencies are entitled to confidential information. There are separate confidentiality exceptions for unfounded reports (Section 422(5) of the SSL) and FAR reports (Section 427-a(5)(d) of the SSL).

You might consider just denying the FOIL request due to the records being subject to a separate confidentiality statute, and this beyond the scope of FOIL. That might give you some more time for a determination to be made on the referral, which if it is unfounded, would make the records a lot less disclosable.

Question:

Is it your experience that LDSS share its records with the county MDTs? SSL 422-b(4) provides for sharing, other than records protected by statutory privilege, but some local teams are named MDT and not Fatality Review Teams.

Answer:

In the CPS realm, multi-disciplinary teams are conceptually different from child fatality review teams (CFRT), even if in any given county they might have some of the same members.

The confidentiality exceptions are also different.

You correctly identify SSL 422-b(4) as one of the confidentiality exceptions that applies to a CFRT- the exception is also found in SSL 422(4)(A)(w).

On the other hand, multi-disciplinary teams (MDT) are established pursuant to SSL 423(6). A portion of SSL 423(6) sets forth this about information sharing within the MDT:

> Notwithstanding any other provision of law to the contrary, members of a multidisciplinary investigative team or a child advocacy center may share with other team members client-identifiable information concerning the child or the child's family to facilitate the investigation of suspected child abuse or maltreatment.

There is also a confidentiality exception for an MDT to be found in SSL §422(4)(A)(x).

In addition to information related to indicated CPS cases, and cases under investigation, When a criminal justice agency is acting in its capacity as a member of an MDT and is involved in the MDT investigation of a subsequent report of suspected abuse or maltreatment involving a subject of the unfounded report, a child named in the unfounded report, or a child’s sibling named in an unfounded report SSL that information may be provided pursuant to §422(5)(a)(iii).

If your MDT is part of a child advocacy center established pursuant to SSL 423-a, there are also some confidentiality provisions in that statute.

Question:

To what extent, if any, can information received from Support Collection Unit (such as support delinquencies) or from the Medicaid Unit (such as health insurance enrollment), be disclosed in a Permanency Hearing Report which goes to the Court, parties and their attorneys?

Answer:

I think that there would be some limitations on how much could be disclosed. The primary child support confidentiality regulation, 18 NYCRR 347.19 (Use and disclosure of confidential information and credit reporting), says:

> (a) Use and Disclosure.
>
> (1) The Office and the Child Support Enforcement Unit (CSEU) shall maintain all information and data, including information and data in the State automated child support management system (automated system), in a confidential manner designed to protect the privacy rights of the parties and shall not use or disclose information or data except for the purpose of, and to the extent necessary to establish parentage, to establish, modify, or enforce an order of support, or to administer the child support program, unless otherwise authorized by law.
>
> (i) The information to be safeguarded includes all information or data obtained in connection with performance of child support functions, including records or information received in electronic form.
>
> (ii) The requirements of this section apply to the Office and CSEU, any other state or local agency or official to whom the Office or CSEU delegates any of the functions of the child support program, and any official, person or entity performing child support functions pursuant to a cooperative agreement or purchase of services agreement.

With regard to disclosure to other government agencies, that regulation goes on to say:

> (4) Authorized disclosures to government agencies or programs.
>
> (i) The Office or CSEU may, subject to such requirements as the Office may prescribe, disclose information to state agencies as necessary to carry out state agency functions under plans or programs under titles IV (including tribal programs under title IV), XIX, or XXI of the federal Social Security Act, and the Supplemental Nutrition Assistance Program, including:
>
> (*a*) Any investigation, prosecution or criminal or civil proceeding conducted in connection with the administration of any such plan or program.
>
> (*b*) Information on known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child under circumstances which indicate that the child's health or welfare is threatened may be provided to the Statewide Central Register of Child Abuse and Maltreatment or a social services official charged with protection of children or a law enforcement officer; provided, however, that information obtained from financial institution data matches, the National or State Directory of New Hires or Federal or State Case Registry may not be disclosed absent independent verification.

(*c*) The Office or CSEU shall require agencies authorized to receive information to enter into agreements setting out the frequency, scope, and manner of information exchanges, and the limitations on use and re-disclosure of child support information. Agreements shall require that information disclosed to the agency or public official shall not be re-disclosed unless authorized by law and shall only be used for the purpose for which it is provided.

I don't know that the above would necessarily cover information that would go into a permanency report. The regulation also goes on to place limitations on the re-disclosure of certain records that the CSEU has obtained, so you might want to check that out.

The regulation also permits a parent to give written authorization to a third party to obtain information from the CSEU- I don't know if that would something that a court would be requiring someone who was subject to a permanency order to do.

As far as Medicaid goes, the law is generally that Medicaid client information may only be disclosed to further the purposes of the Medicaid program. GIS 00 MA/22, dated 10/16/2000, states that program administration includes four activities: 1) establishing eligibility; 2) determining the amount of MA; 3) providing services for recipients; and 4) fraud and abuse activities. Pretty limited circumstances, so there would be some limits on whether foster care could get much, although perhaps as relates to eligibility they could verify whether or not a parent was a recipient. If a respondent was required by court order to obtain MA that might also be something that you might be more able to find out about and report to the court.

Question:

Our office is in receipt of a request by a third party to access a recipient's SNAP records. Based on the particulars of that request and the controlling authority, there are multiple grounds for denial. However, in retrieving the authority to cite to within this specific denial, we became a bit stumped on what to our office is currently only academic, that being the potential right of access of a recipient to their own SNAP records.

We started with pp. 84-87 of your most recent work (thank you for providing such an invaluable resource). It seems 7 CFR 272.1(c)(3) is most on point, stating *"[i]f there is a written request by a responsible member of the household, its currently authorized representative, or a person acting on its behalf to review material and information contained in its casefile, the material and information contained in the casefile shall be made available for inspection during normal business hours. However, the State agency may withhold confidential information, such as the names of individuals who have disclosed information about the household without the household's knowledge, or the nature or status of pending criminal prosecutions."*

Unless we're missing something, it seems that physical, in-office review might be the only way that a recipient, former recipient, or their authorized representative may access their own SNAP records, and even then, that access may not be absolute. Any insight that you might be able to provide would be most appreciated. Thank you.

Answer:

It looks like the section that you refer to is controlling. A review of the SNAP Sourcebook (available on the OTDA website), says the following about the right of the individual or their representative to review the documents to be used at a disqualification hearing:

FSSB SECTION 6: Continuing Eligibility - Page 162 Notification Of Administrative Disqualification Hearing

4. A written notice of administrative disqualification hearing must be provided by the Department to an individual alleged to have committed an IPV in accordance with the definitions described in FSSB Section 6. This notice must be provided to the individual at least 30 days prior to the date of the administrative disqualification hearing. The notice must include:

a. The date, time, and place of the hearing;

b. The charge(s) against the individual;

c. A summary of the evidence and how and where the evidence may be examined;

d. A statement warning that the decision will be based solely on information provided by the local district if the individual fails to appear at the hearing;

e. A notification that the individual or the individual's representative may have an opportunity to examine all documents and records to be used at the hearing by calling an identified telephone number and making arrangements to examine the documents and records at a specified place, provided that confidential information, such as names of individuals who have disclosed information about the FS unit or the nature or status of pending criminal prosecutions, cannot be released

There is similar OTDA policy to be found for public assistance records to be found in the TA Source Book (also on the OTDA website):

TASB CHAPTER 4 - RECIPIENT APPLICANT RIGHTS Section S - Confidentiality & Disclosure of Information

3. BASIS FOR DISCLOSURE OF INFORMATION

c. Disclosure to Applicant, Recipient, or Person Acting on His/Her Behalf

(1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:

(a) Those materials to which access is governed by separate statutes, such as child welfare, foster care, adoption of child abuse or neglect or any records maintained for the purposes of the Child Care Review Service.

(b) Those materials being maintained separate from TA files for purposes of criminal prosecution and referral to the district attorney's office.

(c) The county attorney or welfare attorney's files.

Question:

Can a POA provide written permission to release an APS referral, for which the POA was the source alleging financial exploitation of his father, to Medicaid for the purpose of explaining the transactions and proof of a scam? SSL 473-e?

Answer:

It depends upon whether the principal is still alive, and if so, what authority the agent has under the POA.

The most relevant part of SSL 473-e says:

1. Definitions. When used in this section unless otherwise expressly stated or unless the context or subject matter requires a different interpretation:

(a) “Subject of a report” means a person who is the subject of a referral or an application for protective services for adults, or who is receiving or has received protective services for adults from a social services district.

(b) **“Authorized representative of a subject of a report” means (i) a person named in writing by a subject to be a subject's representative for purposes of requesting and receiving records under this article; provided, however, that the subject has contract capacity at the time of the writing or had executed a durable power of attorney at a time when the subject had such capacity, naming the authorized representative as attorney-in-fact, and such document has not been revoked in accordance with applicable law**; (ii) a person appointed by a court, or otherwise authorized in accordance with law to represent or act in the interests of the subject; or (iii) legal counsel for the subject.

2. **Reports made pursuant to this article, as well as any other information obtained, including but not limited to, the names of referral sources, written reports or photographs taken concerning such reports in the possession of the department or a social services district, shall be confidential and, except to**

persons, officers and agencies enumerated in paragraphs (a) through (g) of this subdivision, shall only be released with the written permission of the person who is the subject of the report, or the subject's authorized representative, except to the extent that there is a basis for non-disclosure of such information pursuant to subdivision three of this section. Such reports and information may be made available to:

(a) **any person who is the subject of the report or such person's authorized representative;**

The first consideration is whether or not the principal in the POA is still alive? If the principal is dead the POA is terminated and the agent has no authority to consent to the release of the principal's APS or other DSS records. Agents retain no authority under a POA once the principal dies. Vellozzi v. Brady, 267 AD2d 695 (3rd Dept., 1999).

If the principal is still alive, the agent can authorize disclosure of APS records to Medicaid, especially so if the agent has authority to deal with:

(H) claims and litigation;

(J) benefits from governmental programs or civil or military service;
(K) health care billing and payment matters; records, reports, and statements;

Before APS provides any records, they should be provided with a copy of the POA.

Question:

I have a request from an attorney looking for our complete APS file on a deceased former client of our that we served as guardian. The attorney represents the estate of the deceased individual and is suing the nursing home where he passed. Is the executor would be entitled to the file and, if so, whether a subpoena would be necessary?

Answer:

I would say that a subpoena is required.

There is no explicit inclusion of an estate representative included in the APS records confidentiality exceptions found in SSL 473-e. The closest exception that I can think of that might be available under SSL 743-e would be sub. (b) , which says:

(b) “Authorized representative of a subject of a report” means (i) a person named in writing by a subject to be a subject's representative for purposes of requesting and receiving records under this article; provided, however, that the subject has contract capacity at the time of the writing or had executed a durable power of attorney at a time when the subject had such capacity, naming the authorized representative as attorney-

in-fact, and such document has not been revoked in accordance with applicable law**; (ii) a person appointed by a court, or otherwise authorized in accordance with law to represent or act in the interests of the subject**; or (iii) legal counsel for the subject.

I don't think that the bolded part would include an estate representative. The case of Vellozzi v Brady, 267 AD2d 695, (3rd Dept., 1999) would seem to me to indicate that it is not. In that case, a daughter, who had been appointed guardian of her father's person and property, and who had previously executed a general power of attorney, commenced an Art. 78 proceeding to compel production of her father's APS file after the DSS denied request based on confidentiality. The 3rd Dept. held that: (1) the daughter's general power of attorney and appointment as guardian were extinguished by operation of law upon father's death, and (2) father's death mooted proceeding to compel disclosure of file in absence of any other basis on which to assert standing. It seems to me that since as the daughter would be a beneficiary of the father, and the 3rd Dept. was reviewing SSL 473-e, that if they felt her status as a beneficiary of her father's estate fell within one of the exceptions that they would have reversed the Supreme court decision.

Another case that suggests that a subpoena application is required is In re Estate of Stiehler,
In re Estate of Stiehler, 59 Misc.3d 1114(A) (Surrogate's Court, Richmond County, 2005). In that case an estate representative applied for a subpoena for APS records. One twist here is that the decision is not clear about whose APS records were being subpoenaed- a husband had murdered his wife and then he died shortly thereafter, and the respective estates were wrangling over the joint estate proceeds.

One other case to check out would be Mosey v County of Erie, 148 AD3d 1572 (4th Dept., 2017). In that case, the 4th Dept. did find error in Supreme Court's denial of the estate's motion for discovery of APS records. That case involved a lawsuit against Erie County alleging APS's failure to adequately investigate referrals involving the abuse of an adult by her family members, who later killed her.

Question:

Can CPS directly obtain a copy of an autopsy from a Medical Examiner? The position of our Medical Examiner is that CPS must go through law enforcement for a copy of an autopsy, even when CPS has a duly executed release for the records of the Medical Examiner. Also, is there any authority for APS to receive such records?

Answer:

Like many situations, the disclosure to/from the ME to/from an LDSS is not equal or available in every situation, it depends upon the individual circumstances of the case.

As between the ME disclosing to CPS and APS, it looks like County Law §677(8) applies here:

> 8. The coroner, coroner's physician or medical examiner shall promptly, but in no event later than sixty days from the date of death, absent extraordinary circumstances, provide the office of children and family services with copies of any autopsy report, toxicological report or any report of any examination or inquiry prepared with respect to any death occurring to a child whose care and custody or custody and guardianship has been transferred to an authorized agency, a child for whom child protective services has an open case, a child for whom the local department of social services has an open preventive services case, or a child reported to the statewide central register of child abuse and maltreatment. If the toxicological report is prepared pursuant to any agreement or contract with any person, partnership, corporation or governmental agency with the coroner or medical examiner, such report shall be promptly, but in no event later than sixty days from the date of death, absent extraordinary circumstances, provided to the office of children and family services by such person, partnership, corporation or governmental agency. **Where the death involves a child reported to the statewide central register of child abuse and maltreatment, the reports referred to in this subdivision shall also be promptly, but in no event later than sixty days from the date of death, absent extraordinary circumstances, provided to the local child protective service investigating the report pursuant to section four hundred twenty-four of the social services law.**

Notice that the first part of the section also requires that the ME provided these records to OCFS, but the last section is specific to providing the reports to CPS.

However, I don't see a similar section that applies to APS, or that provides that a relative may consent to or authorize a third party to receive the reports- kind of like how SSL 422 permits a subject of a CPS report to receive records, but the statute does not permit the subject to authorize 3rd party to receive the records.

As far as access by a personal representative, spouse or next of kin:

> 3. (a) The coroner or coroners of each county, or the medical examiner, shall keep full and complete records, properly indexed, stating the name, if known, of every person whose death is investigated, the place where the body was found, the date of death, if known, and if not known, the date or approximate date as determined by the investigation, to which there shall be attached the original report of the coroner, or coroner and coroner's physician or physician employed, or medical examiner, and the detailed findings of the autopsy, if any. Such records shall be kept in the office of the county clerk except in those counties having a full-time coroner or medical examiner, in which case such records shall be kept in the office of the coroner or medical examiner.

(b) Such records shall be open to inspection by the district attorney of the county. **Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant.** Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both.

But see the next sentence after the bolded one that requires court application for other entities.

So, absent anything else, it looks like that CPS may obtain the reports via statute, while APS can't, except via court application. I don't think that it prevents the DA or a personal rep., spouse, or next of kin from obtaining the report and providing it to APS.

On the flip side of this issue, there isn't any confidentiality exceptions in the Social Services Law to provided DSS client records to the Coroner or Medical Examiner. Although a coroner or medical examiner is granted subpoena power pursuant to County Law §674(4), it appears that this authority is related to obtaining information that is related to cause of death. At least one court has held that the subpoena power extends to the production of hospital records as well as witnesses. See Matter of Brunner, 119 Misc2d 952, (Supreme Court, Niagara County, 1983). Another court has held that the coroner/ME may only subpoena records related to cause of death. Widziewicz v. Golding, 52 Misc2d 837 (1966).

Question:

So I've run across this twice in the last few weeks. The parent who adopted a kid either 1) never got a copy of the adoption order or 2) lost it. They have now reached out to the agency to get a copy which the agency keeps in the program support folder which is the folder DSS uses for the ongoing subsidy. So, it looks like by everything I've checked, the records gets sealed. But it seems CRAZY to me that a person would have to make a motion to unseal a record that they were entitled to a copy of in the first place. Thoughts on a work around or maybe it doesn't apply?

Answer:

Have the adoptive parents reached out to the attorney that represented them in the adoption proceeding? They should have a copy.

As far as accessing the adoption subsidy file, did the adoptive parent provide the adoption order to MCDSS for that? I always took the position that if the document that

came into the DSS came from a source, then the source could have a copy- I primarily ran across that in landlord cases where the landlord submitted something to DSS, like the landlord-tenant agreement that was used to set up direct payment to the landlord. Since the landlord generated the form, and but for the fact that they sent it to DSS it wouldn't have been in the record, then it was okay to give them a copy. I think that the same logic would apply to providing something that the adoptive parent gave to MCDSS that went into the adoption subsidy file.

Apparently, the adoption subsidy file is different from the adoption file. It's not sealed like the adoption file, although it is confidential. Here's what OCFS says about that in the Adoption Services Guide at page 13-12:

F. Creating a subsidy eligibility case file

A separate eligibility case file must be maintained for each child and must include the completed, signed and dated applicable checklist, the signed and approved adoption subsidy agreement, and copies of all appropriate documents that support the eligibility decision by the LDSS. The eligibility file must be made available when requested for state monitoring or federal case reviews.

The OCFS Eligibility Manual for Child Welfare Programs specifies which checklists are required for each program and the necessary documents to support the eligibility decision made by the LDSS. The eligibility case file and all supporting documents are confidential and must be protected to prevent disclosure.

The “Adoption Subsidy Eligibility Documentation File” (OCFS-4401) provides the checklist for acceptable documentation for eligibility claiming in the child’s individual adoption subsidy eligibility folder. It also supports accurate eligibility determinations [19-OCFS-LCM-20].

Caseworkers can access the adoption subsidy database using their NYS Directory Services account. The online process allows caseworkers to complete the adoption subsidy agreement, upload the page with the parent’s signature, submit an electronic subsidy application to supervisors, and, upon supervisory approval, forward it to OCFS/BPS.

All records must be maintained confidentially. In the case of an adopted child, the adoption subsidy eligibility documents of that child must be copied from the adoption file and maintained in a separate, confidential eligibility file that is accessible if requested for review. All documents identified on the OCFS-4401 to substantiate eligibility must be included in the child’s eligibility file.

The “Adoption Subsidy Eligibility Documentation File” (OCFS-4401) referred to above does require that the file include a copy of the decree or adoption order.

So, I would say that the first thing to do is find out if the adoptive parent has asked their attorney for a copy (especially if they never received a copy in the first place), and if that fails, and if there is an adoption subsidy file, they could have a copy from that.